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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11 STATE OF CALIFORNIA, et al.,

12 Plaintiffs,

13 vs.

14 WILBUR L. ROSS, JR.,

15 Defendants.

No.: 3:18-CV-01865-RS

Action Filed: March 26, 2018

**[PROPOSED] BRIEF AMICUS CURIAE
OF THE LEGISLATURE OF THE STATE
OF CALIFORNIA IN SUPPORT OF
PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT**

Summary Judgment Motion Hearing:

Date: December 7, 2018
Time: 10:00 a.m.
Dept.: 3

(The Honorable Richard Seeborg)

Trial Date: January 7, 2019

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21

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INTRODUCTION

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2 The issue in this case is whether defendants’ decision to add a question about
3 citizenship to the 2020 census instrument violates the Enumeration Clause of the Constitution and the
4 federal Administrative Procedure Act. Because the answer to both questions is yes, defendants prefer
5 to attack plaintiffs’ standing to raise the issue at all. As one of three coequal branches of California’s
6 government, the Legislature of the State of California offers this brief amicus curiae in support of the
7 State’s opposition to defendants’ motion for summary judgment.

8 Like all other state legislatures, the California Legislature is a representative body. And
9 like all other state legislatures, the California Legislature is divided into districts that, every ten years,
10 are redrawn to be as nearly equal in population as is practicable. The population count on which
11 redistricting is based, in California and the other 49 states, is the decennial census required by article I,
12 section 2 and the Fourteenth Amendment of the federal Constitution. Those census data in turn form
13 the core of the statewide population database, which the California Legislature is tasked with
14 maintaining and which is used for a myriad of other purposes at the state and local level. The accuracy
15 of that database will have profound effects on the representative quality not only of the state
16 Legislature, but of every district-based city council and board of supervisors throughout the State.

17 The California Legislature is also tasked with passing a balanced state budget every
18 year. The 2018-19 state budget calls for \$138.6 billion in state General Fund expenditures, but it also
19 depends upon more than \$107.4 billion in federal funds, much of which is determined by formulas
20 based on the census count. As demonstrated below and by the plaintiffs’ briefs, to the degree that
21 California’s population is undercounted, the California Legislature will either be required to substitute
22 state funds for the federal revenue to which it would otherwise be entitled or do without the services
23 that would otherwise be funded by that revenue.

24 Finally, the California Legislature depends upon and works closely with California’s
25 Congressional delegation to represent the interests of the State and its inhabitants. If the size of that
26 delegation is decreased due to an undercount, the State’s voice in Congress is diminished and its
27 representational interests are harmed in violation of the Fourteenth Amendment.

1 Thus, for California, the validity of the census enumeration in this state is critically
2 important both to its representative form of government and to its fiscal health. The federal
3 Constitution *requires* a census that “count[s] the whole number of persons in each state, excluding
4 Indians not taxed” U.S. CONST. amend. XIV, § 2.

5 That command cannot be met if the Census Bureau is allowed to include a question that
6 well-respected experts, many of them former or current Census Bureau officials, say will decrease
7 response rates. This is particularly the case in the current political climate with its anti-immigrant
8 rhetoric and actions, as many of the experts have pointed out.

9 Despite these strong interests, defendants argue that the State of California and the other
10 plaintiffs in these actions lack standing, because they cannot show that the inclusion of a census
11 question will cause lower response rates to the census questionnaire. That argument conflates standing
12 with ultimate success on the merits. As demonstrated below, the State has a more than reasonable
13 belief that a citizenship question will lower response rates in California, and defendants’ actions have
14 forced it to act upon that belief by devoting millions of dollars to outreach efforts to counter the effect
15 of that question. That in itself is more than sufficient to establish standing in this case.

16 The increased expenditure of funds on outreach is not the only basis for state standing
17 in this case, however. The degree to which minorities and immigrants are undercounted has an
18 immediate and detrimental effect on the representative nature of the Legislature and on the State’s
19 Congressional delegation. The right to equal representation belongs to *every* person in California,
20 whether or not they are eligible to vote. People who live in districts with a high number of uncounted
21 residents have less access to their representatives than those who do not, and areas with a high
22 undercount have a lower share of representatives in the Legislature and in Congress than they would
23 otherwise be entitled to. Finally, even according to defendants’ view of the evidence, the State stands
24 to lose millions, if not billions, of dollars in federal funding for programs that allocate funds based on
25 census data. At this stage of the proceedings, the evidence is more than sufficient to foreclose
26 summary judgment in favor of defendants.

FACTUAL BACKGROUND

A. California Has a Large Share of the Nation’s Hard-to-Count Population

History has shown time and again that the decennial census undercounts certain categories of people, including low-income individuals, minorities, renters, foreign-born individuals, and individuals living in crowded households. Because half of California’s residents are nonwhite, over a quarter are foreign born, close to half live in rental housing, and 14% have incomes at or below the poverty line, many of California’s residents fall into at least one of these categories. Request for Judicial Notice in Support of [Proposed] Brief Amicus Curiae of the Legislature of the State of California (“RJN”), Ex. A at 42. This not only places California at great risk of being undercounted during the Census, but, because California has disproportionately more people that fall into some of these categories than other states,¹ California is at a substantially greater risk of being undercounted than any other state in the union.

Indeed, the most significant national undercount in recent decades took place during the 1990 Census, when the Census Bureau estimated that it undercounted the national population by 1.6%, or approximately 4 million people. *See Population Measures Are Important for Federal Funding Allocations*, GAO, <https://www.gao.gov/assets/120/118299.pdf> at 4-5. Yet the undercount in California was significantly worse: the Census Bureau missed approximately 2.7% of the State’s population, or 835,000 people. RJN, Ex. B at 6. In 1999, California’s Legislative Analyst reported “that the 1990 census undercount has likely cost California an estimated \$2.2 billion during the 1990s” and an additional seat in the U.S. House of Representatives. *Id.* at 9-10.

In the wake of the damage to California from the 1990 undercount, the State launched extensive outreach efforts to encourage full participation by every Californian in the 2000 Census. The

¹ For example, California has nearly 5.3 million non-citizen residents, which is more than any other state in the union. The next closest state is Texas, with 2.9 million. Similarly, California has the highest number of foreign-born residents. It has 10.4 million, whereas the next closest state of Texas has nearly 4.5 million. *See Selected Characteristics of the Native and Foreign-Born Populations, 2012-2016 American Community Survey 5-Year Estimates, All States Within United States and Puerto Rico*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited Nov. 19, 2018).

1 State committed \$24.7 million to execute an outreach strategy among its residents. *Id.*, Ex. C at 23.
 2 Although these efforts increased the rate at which Californians responded to the Census so that the
 3 State performed better in that regard than the national average,² California still suffered the largest
 4 undercount of any state in the union. The total national undercount in 2000 was estimated to be more
 5 than 1.18%, or approximately 3.4 million people. *Id.*, Ex. E at 124. In California, however, the rate
 6 was 1.52%, leaving approximately 522,796 Californians uncounted. *Id.* at 124-25.

7 During the Great Recession, California was only able to dedicate \$2 million in state
 8 funding to outreach efforts for the 2010 Census. Although the private sector supplemented that outlay
 9 with an infusion of \$10 million, the mail participation rate in California still declined from 76% in
 10 2000 to 73% in 2010. *Id.*, Ex. C at 23.

11 **B. The California Legislature Was Compelled to Increase the State’s Outreach Efforts**
 12 **After Learning of Defendants’ Decision to Include the Citizenship Question**

13 In 2017, the State decided to commit substantial resources to obtaining a complete
 14 count of California residents during the 2020 Census. These efforts began last year when the State
 15 budgeted \$10 million for early preparation and planning activities. *Id.*, Ex. D at 4. On January 10,
 16 2018, Governor Edmund G. Brown Jr. proposed as part of his 2018-19 Budget that the State dedicate
 17 an additional \$40.3 million for efforts to improve the State’s response rate. *Id.*, Ex. F at 126.

18 At that point in time, the public did not know that the Census Bureau intended to
 19 include a citizenship question on the 2020 Census. Although the Department of Justice submitted a
 20 public request that the Census Bureau include a citizenship question on the 2020 Census on
 21 December 12, 2017, the Census Bureau would not announce its decision to add the question until
 22 March 26, 2018. *Id.*, Ex. G.

23 On April 24, 2018, the California Assembly Budget Committee held hearings on the
 24 Governor’s proposal to dedicate \$40.3 million to increase the response rate for the 2020 Census. In the
 25 agenda for that hearing, Committee staff advocated for providing “additional resources” over and
 26

27 ² *Id.*, Ex. D at 4.

1 language requiring reporting on the progress of the outreach plan.³ When the State enacted its final
 2 2018-19 State Budget on June 27, 2018, it included \$90.3 million for the State Census, a \$50 million
 3 increase over the amount originally proposed by the Governor before the Bureau announced its
 4 decision to add the citizenship question. RJN, Ex. J at 26.

5 ARGUMENT

6 To have Article III standing, “a plaintiff must show (1) it has suffered an ‘injury in fact’
 7 that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;
 8 (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as
 9 opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of*
 10 *the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Standing can be
 11 based on a threat of future injury “if the threatened injury is ‘certainly impending,’ or there is a
 12 ‘substantial risk that the harm will occur.’” *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341,
 13 (2014) (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409, & n.5 (2013)) (internal quotation
 14 marks omitted).

15 Defendants are wrong that plaintiffs cannot establish standing. California has and will
 16 suffer three categories of harm that readily satisfy these requirements.

17 I.

18 **CALIFORNIA WILL SPEND MILLIONS ON OUTREACH BECAUSE** 19 **OF DEFENDANTS’ DECISION TO INCLUDE A CITIZENSHIP QUESTION**

20 **A. The Addition of the Citizenship Question Has Already Harmed California**

21 Before the Census Bureau announced its decision to include the citizenship question on
 22 the 2020 Census, California’s proposed 2018-19 Budget included \$40.3 million for census outreach
 23 efforts in the State. RJN, Ex. F at 126. After the Bureau announced its decision, and after the
 24 Assembly and Senate budget committees studied the effect of the question on the undercount in the
 25 State, the Legislature and Governor agreed to provide an additional \$50 million, as well as requiring
 26

27 ³ RJN, Ex. I at 173.

1 the California Complete Count Committee to report its “needs assessment” to the Legislature, in case
2 additional funding would be necessary in future fiscal years. *Id.*, Ex. J at 26; Sen. Bill 866 (2017-2018
3 Reg. Sess.), § 45.

4 In this way, California has already been injured in a concrete and particularized manner
5 sufficient to confer standing on the State: it has felt compelled to divert \$50 million in state revenues
6 from other priorities to additional census outreach efforts over a three-year period in an effort to avoid
7 future representational and economic injuries of a far greater magnitude. If not for the Census
8 Bureau’s announcement that it will include the citizenship question on the 2020 Census, the State
9 could have spent those funds in 2018-19 on initiatives that would have moved the State forward, like
10 health care programs, investments in higher education, or the construction of new housing.

11 Alternatively, the State could have directed some or all of those funds to additional outreach efforts to
12 reduce the State’s historic undercount, rather than having to fight to prevent the citizenship question
13 from making that undercount far worse than it otherwise would have been. This kind of economic
14 injury fully qualifies as an “injury in fact.” *See, e.g., Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163,
15 1172 (9th Cir. 2002) (the loss of money “easily meet[s]” the standing test); *see also City of Oakland v.*
16 *Lynch*, 798 F.3d 1159, 1163 (9th Cir. 2015) (loss of “substantial portion” of expected \$1.4 million in
17 tax revenues for City of Oakland was sufficient to confer standing); *Mont. Shooting Sports Ass’n v.*
18 *Holder*, 727 F.3d 975, 980 (9th Cir. 2013) (economic costs of complying with challenged regulation
19 sufficient to confer standing).

20 Thus, even if plaintiffs could not establish that the State will in the future lose a
21 congressional seat or federal funding as a result of the citizenship question (plaintiffs can and have),
22 the decision to add the citizenship question has already irrevocably harmed California. Millions of
23 dollars that could have been spent on affirmatively improving the lives of Californians have been
24 diverted to efforts to prevent California from losing even more ground in the next Census than it has in
25 the past.

1 **B. California’s Harm Is Traceable To The Bureau’s Decision To Include the Citizenship**
 2 **Question**

3 An injury is fairly traceable so long as the “government’s unlawful conduct is at least a
 4 substantial factor motivating the third parties’ actions.” *Mendina v. Garcia*, 768 F.3d 1009, 1012
 5 (9th Cir. 2014). Here, the legislative history of the census outreach budget item establishes that the
 6 Legislature provided \$50 million in additional funding for outreach expressly because the Census
 7 Bureau added the new citizenship question.

8 **C. The Remedy Plaintiffs Seek Would Redress California’s Harm**

9 A plaintiff satisfies the redressability requirement where “it is likely, as opposed to
 10 merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth*,
 11 528 U.S. at 180-81. Redressability is satisfied here, where the ruling plaintiffs seek would save
 12 California from having to spend millions just to combat the harm that would have been caused by the
 13 inclusion of the citizenship question on the 2020 Census.

14 A court ruling blocking the citizenship question would enable the State to use those
 15 funds to improve the lives of Californians. Instead of dedicating precious revenues to minimizing the
 16 extent to which the State would fall even further behind in its undercount due to the new citizenship
 17 question, the State could use its funds to improve the Census response rate among populations that
 18 have contributed to California’s historic undercount problem, such as its large populations of low-
 19 income individuals, minorities, and renters. *See Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983, 993
 20 (9th Cir. 2012) (redressability prong satisfied if remedy would reduce injury).

21 If California is able to use this funding to try to mitigate its historic undercount, it is
 22 likely that the State will succeed in reducing that undercount. Defendants’ own expert testifies that
 23 outreach efforts are generally effective in increasing census response rates. Dr. Abowd declares that
 24 the Census Bureau’s nonresponse follow up operations (“NRFU”) have been successful in previous
 25 censuses. Dkt. No. 89-1, ¶ 24.

26 The evidence reveals that California’s past outreach efforts have also been successful in
 27 mitigating the State’s undercount. As explained above, when the State committed \$24.7 million to
 28 outreach efforts for the 2000 Census, it was able to increase the mail participation rate among its

1 residents to 76%. RJN, Ex. C at 23. By contrast, when the State and its private sector allies were only
 2 able to spend \$12 million for outreach efforts for the 2010 Census, the mail participation rate among
 3 California residents declined to 73%. *Id.*

4 The decrease in response rates between the 2000 and 2010 enumerations took place
 5 without a citizenship question on the census instrument. Plaintiffs' experts and census officials
 6 themselves are of the opinion that the citizenship question alone will reduce response rates. Given the
 7 size of California's immigrant population, it is more than reasonable for the State to conclude that it
 8 must concentrate more effort on that population in order to counteract the effect of the question on
 9 response rates. That means, therefore, that there will be less money available to conduct outreach with
 10 the State's other hard-to-count populations, such as those who are homeless, low-income individuals,
 11 and those who live in crowded households.

12 Conversely, without the citizenship question, the State will be able to use its resources
 13 to address its historic undercount rate, and California will likely achieve higher participation rates than
 14 it has in the last two censuses. This will redress the injury it now faces from having to spend millions
 15 of dollars just to defend rather than improve its position.

16 II.

17 **CALIFORNIANS WILL SUFFER REPRESENTATIONAL HARMS BECAUSE** 18 **OF DEFENDANTS' DECISION TO INCLUDE A CITIZENSHIP QUESTION**

19 As is true in every other state, every California resident, regardless of citizenship or
 20 ability to vote, is entitled to, and is counted for, representation in the state Legislature and in Congress.
 21 *Evenwel v. Abbott*, 136 S. Ct. 1120, 1123 (2016); CAL. CONST. art. XXI, §§ 1, 2(d)(1). Since at least
 22 1879, the population count on which legislative and Congressional districts are based has been the
 23 federal census. *Legislature v. Deukmejian*, 34 Cal. 3d 658, 668 (1983).⁴ Indeed, in *Legislature v.*
 24 *Deukmejian*, the California Supreme Court reaffirmed existing case law that legislative and
 25

26 ⁴ The California Supreme Court quoted article IV, section 6 of the State Constitution: “[the] census
 27 taken under the direction of the Congress of the United States . . . shall be the basis of fixing and
 28 adjusting the legislative districts . . .” *Id.*

1 Congressional redistricting may *only* occur once a decade, after the federal decennial census. *Id.*
 2 at 680.⁵ Thus, for the people of California, equality of representation turns on the validity of the
 3 federal census.

4 **A. Representation in California Is Based on Total Population**

5 Long before the United States Supreme Court addressed whether districting should be
 6 based on total population or the number of those eligible to vote in *Evenwel v. Abbott*, the California
 7 Supreme Court held that representation in California’s legislative bodies must be based on total
 8 population, not registered voters. The case was *Calderon v. Los Angeles*, 4 Cal. 3d 251 (1971), in
 9 which the court held that the federal equal protection clause prohibited the City of Los Angeles from
 10 drawing its City Councils districts based on registered voters. In doing so, the court said:

11 Adherence to a population standard, rather than one based on registered
 12 voters, is more likely to guarantee that those who cannot or do not cast a
 13 ballot may still have some voice in government.

14 Thus a 17-year-old, who by state law is prohibited from voting, may still
 15 have strong views on the Vietnam War which he wishes to communicate
 16 to the elected representative from his area.

17 *Id.* at 258-59.

18 The court went on to note that “much of a legislator’s time is devoted to providing
 19 services and information to his constituents” and that a district with a large population but few
 20 registered voters “would, under a voter-based apportionment, have fewer representatives to provide
 21 such assistance and to listen to concerned citizens.” *Id.*

22 In *Garza v. Cnty. of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), the Ninth Circuit
 23 reached much the same conclusion, noting that supervisorial districts drawn using registered voters
 24 rather than total population “result[] in serious population inequalities across districts” and that
 25 “[r]esidents of the more populous districts thus have less access to their elected representative.” *Id.*
 26 at 774. Such districts, the Ninth Circuit concluded, would “constitute a denial of equal protection to
 27 these Hispanic plaintiffs and rejection of a valued heritage.” *Id.* at 776.

28 ⁵ The court cited cases from other states in which courts had held the same thing. *Id.* at 669-70.

1 Californians who live in areas where there is a large undercount experience the same
 2 kind of harm to their representational rights as did those in *Calderon* and *Garza*, where districts were
 3 drawn on the basis of registered voters. As noted earlier, the undercount in California is already
 4 greater than in most other states, because of California’s greater share of hard-to-count populations. In
 5 a district with significantly more people than are recorded on the census, a constituent’s voice will
 6 have less impact than in a district that more nearly reflects the actual number of inhabitants. Thus, the
 7 constituent who wants to communicate with his or her legislator or to organize fellow constituents to
 8 do so must work harder in order to be heard. *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969)
 9 (representation based on equal numbers of people is designed to prevent both “debasement of voter
 10 power *and* diminution of access to elected representatives”) (emphasis added). As the *Garza* court
 11 observed, “[i]nterference with individuals’ free access to elected representatives impermissibly
 12 burdens their right to petition the government.” 918 F.2d at 775. The court went on:

13 Non-citizens are entitled to various federal and local benefits, such as
 14 emergency medical care and pregnancy-related care provided by
 15 Los Angeles County. As such, they have a right to petition their
 government for services and to influence how their tax dollars are spent.

16 *Id.*

17 It is a sad fact today that even non-citizens who are here legally are not only afraid to
 18 petition their government but to participate in the census itself for fear of reprisal against them and
 19 their families. Defendants’ own research confirms this. In a 2017 study, the Bureau reported “an
 20 unprecedented ground swell in confidentiality and data sharing concerns, particularly among
 21 immigrants or those who live with immigrants,” leading the Bureau to conclude that these concerns
 22 “may present a barrier to participation in the 2020 Census.” The study noted that respondents
 23 “express[ed] new concerns about topics like the ‘Muslim ban,’ discomfort ‘registering’ other
 24 household members by reporting their demographic characteristics, the dissolution of the ‘DACA’
 25 (Deferred Action for Childhood Arrival) program, repeated references to Immigration and Customs
 26 Enforcement (ICE), etc.”⁶

27 ⁶ *Memorandum from Center for Survey Measurement on Respondent Confidentiality Concerns to*
 28

(continued . . .)

1 The harm caused by the addition of a citizenship question to the federal census is not
 2 speculative; it is real. The Bureau has already documented “an unprecedented ground swell in
 3 confidentiality and data sharing concerns.” *Id.* That ground swell will be magnified exponentially if
 4 defendants are allowed to include a citizenship question on the 2020 census.

5
 6 **B. Substantial Evidence Demonstrates That California Will Lose Representation in
 Congress Due to Defendants’ Actions**

7 Plaintiffs’ experts have submitted substantial – and compelling – evidence that
 8 California would lose seats in Congress if a citizenship question appears on the 2020 census. Dkt.
 9 No. 91-8 at 26-28 (describing scenarios based on citizenship question and degree of follow up; “in
 10 only a very small number of scenarios (1.3%) California is apportioned the same number of seats
 11 in 2020 that it received in 2010.”). Indeed, Dr. Fraga states that the probability of losing three or more
 12 of California’s current 53 seats “is far higher (13.2%) and, again, for every potential apportionment
 13 outcome the percent of simulations where California receives fewer seats than it currently has is
 14 greater in Scenario A than for the 2020 baseline.” *Id.*

15 The potential loss of seats will cause real harm to the State. One need only look at the
 16 impact of the wildfires that have devastated parts of California over the last two years to understand
 17 the importance of congressional representation. In times of natural disaster, the Governor and the
 18 Legislature need to be able to count on a strong voice in Washington to help obtain federal funding and
 19 aid for disaster victims. To the degree that California’s congressional delegation is reduced, the State’s
 20 voice is not as strong and its representation is weakened in relation to the other states.

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 22
 23
 24 (. . . continued)

25 *Associate Directorate for Research and Methodology*, U.S. CENSUS BUREAU (Sept. 20, 2017),
 26 [https://www2.census.gov/cac/nac/meetings/2017-11/Memo-Regarding-Respondent-Confidentiality-
 27 Concerns.pdf](https://www2.census.gov/cac/nac/meetings/2017-11/Memo-Regarding-Respondent-Confidentiality-Concerns.pdf) (last visited August 6, 2018). *See also Respondent Confidentiality Concerns in
 28 Multilingual Pretesting Studies and Possible Effects on Response Rates and Data Quality for the 2020
 Census*, U.S. CENSUS BUREAU (May 2018), [https://www.census.gov/content/dam/Census/newsroom/
 press-kits/2018/aapor/aapor-presentation-confidentiality.pdf](https://www.census.gov/content/dam/Census/newsroom/press-kits/2018/aapor/aapor-presentation-confidentiality.pdf).

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III.

CALIFORNIANS WILL LOSE FEDERAL FUNDING BECAUSE OF DEFENDANTS' DECISION TO INCLUDE A CITIZENSHIP QUESTION

The amount of money the federal government returns to a particular state turns in significant part on how many people the U.S. Census Bureau counts as living in that state. Indeed, the Census Bureau recently determined that 132 federal programs used Census Bureau data to distribute more than \$675 billion in funds to states during fiscal year 2015. RJN, Ex. K at 3. These programs include everything from critical health care services like Medicaid, to food assistance like the National School Lunch Program, education programs like Title I and Head Start, housing assistance like Section 8 Vouchers, and transportation funding like the Highway Planning and Construction program. *Id.* at 3-7. The importance of California's share of these funds cannot be overstated. According to one study, sixteen of these programs delivered more than \$76 billion to California in a single year (2015). *Id.*, Ex. L.

As plaintiffs' evidence establishes, an undercount of any size would lead to a decline of federal revenue flowing to California during the decade that follows. Dkt. No. 91-7, 26-29. Defendants quibble with the magnitude of that decline, but they do not deny that a decline would occur. Far from it, defendants argue that if there is an undercount, it would be reduced by NRFU efforts that defendants assume will "have the same success rate as it had in the 2010 Census: 98.58 percent." *See* Dkt. No. 89-2, ¶¶ 54, 68-69. Under this optimistic scenario, Dr. Gurrea predicts that "the distribution of federal funds to the State of California is estimated to decline by 0.01 percent' for Title I LEA Grants, WIC Supplemental Foods Grants, and Social Services Block Grants." Dkt. No. 89 at 14 (quoting Dkt. No. 89-2, ¶ 11). Defendants insist that this amount – 0.01 percent – is "negligible" and not "material," thereby precluding plaintiffs from establishing an injury sufficient to confer standing. Dkt. No. 89 at 13-14.

The problem for defendants with this line of argument is three-fold. As a matter of law, there is no requirement that an injury in fact be of a particular magnitude. The United States Supreme Court has flatly rejected the notion that an injury must be "substantial" to clear the standing hurdle. To the contrary, an "identifiable trifle" of economic harm may be enough. *United States v. Students*

1 *Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) (citing cases where a
2 \$5 fine plus costs or a \$1.50 poll tax were sufficient to establish standing); *see also Council of Ins.*
3 *Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 932 (9th Cir. 2008) (rejecting argument that
4 plaintiff did not have standing because her injury was only “minor”; plaintiff had standing when the
5 injury is “concrete” and “actual”); *Boating Indus. Ass’ns v. Marshall*, 601 F.2d 1376, 1380
6 (9th Cir. 1979) (declaring that a person may have standing when it has “a direct stake in the actual
7 outcome of the particular litigation, *however small . . .*”) (emphasis added).

8
9 Moreover, as a factual matter, California would suffer substantial harm even if the loss
10 of federal funds did not exceed 0.01 percent for Title I LEA Grants, WIC Supplemental Foods Grants,
11 and Social Services Block Grants. Although such a small percentage may suggest otherwise, the
12 dollars at stake are substantial. Dr. Gurrea estimates that in a single year California could lose
13 \$215,226 in Title 1 funding, \$90,263 in WIC grants, and \$23,709 in Social Service Block Grant funds.
14 Dkt. No. 89-2, ¶ 70, & 28-30. Considered together and multiplied by ten to account for the decade that
15 such an undercount would remain in place, California stands to lose \$3,292,980 from the three federal
16 programs analyzed by Drs. Reamer and Gurrea, even under defendants’ optimistic predictions about
17 how effective the Bureau’s NRFU operations will be in countering the effect of the citizenship
18 question.

19 Finally, plaintiffs’ predictions almost certainly fall far short of the mark. As described
20 in Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, California is likely to face a
21 far greater decline than 0.01 percent because the Bureau’s NRFU efforts are unlikely to be as effective
22 as defendants suggest. Dkt. No. 91 at 9-11. Taking into account the more realistic impact of the
23 Bureau’s NRFU, Dr. Reamer predicts that California would lose \$2 million in Title 1 funding,
24 \$850,759 in WIC grants, and \$223,450 in Social Service Block Grant funds in a single year. Dkt.
25 No. 91-7 at 26-28. Over the course of a decade, California can be expected to lose over *\$31 million*
26 from these three federal programs alone.

27 Yet these numbers are only the beginning of the story because they predict outcomes in
28 just three of the federal programs that rely on census data. As noted above, the Census Bureau has

1 identified 129 additional federal programs that use Census data to distribute billions in federal funding
 2 to the states. RJN, Ex. K at 3-7. With so much funding at stake, even an exceptionally small
 3 undercount could deprive California of many millions – or even billions – of dollars.

4 In short, defendants effectively concede that California stands to lose at least millions of
 5 dollars in federal funding if the 2020 Census includes a citizenship question. That is sufficient to
 6 establish standing. *See, e.g., Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (“[C]itizens who
 7 challenge a census undercount on the basis, inter alia, that improper enumeration will result in loss of
 8 funds to their city have established both an injury fairly traceable to the Census Bureau and a
 9 substantial probability that court intervention will remedy the plaintiffs' injury.”).

10 CONCLUSION

11 With its large immigrant population, California stands to lose more than any other state
 12 in the nation if a citizenship question appears on the 2020 census questionnaire. The California
 13 Legislature’s role and responsibilities in state government mean that it will suffer representationally,
 14 fiscally, and in its access to federal representation as a result of defendants’ actions. That alone
 15 establishes that the State has standing to bring this case.

16 Dated: November 20, 2018

Respectfully Submitted,

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