No. 18-966

In The
Supreme Court Of The United States

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Petitioners,

v.

STATE OF NEW YORK, ET AL.,

Respondents.

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

BRIEF OF AMICI CURIAE PLAINTIFFS IN *KRAVITZ ET AL. V. UNITED STATES DEPARTMENT OF COMMERCE ET AL.*, NO. 18-1041 (D. MD.) IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are seventeen individuals residing in five states[2] who are plaintiffs in *Kravitz et al. v. United States Department of Commerce et al.*, No. 18-cv-1041 (D. Md.), an action challenging the March 2018 decision by Secretary of Commerce Wilbur Ross to add a citizenship question to the 2020 Decennial Census. *Amici* challenged the Secretary's action under the Enumeration Clause, U.S. Const. art. I, § 2, cl. 3, as well as the Administrative Procedure Act, 5 U.S.C. §§ 704, 706, and the Equal Protection Clause of the Fifth Amendment, U.S. Const. amend. V, XIV. The district court denied defendants' motion to dismiss these claims as a matter of law. The *Kravitz* action was consolidated with *La Union del Pueblo Entero et al. v. Ross et al.*, No. 18-cv-1570 (D. Md.) for trial, which was held before the Maryland district court (Hazel, J.) in January 2019. As of the filing of this brief, the district court has not issued a decision.

The issues presented in this case directly affect *amici* and many other individuals in their communities. The addition of a citizenship question to the 2020 Census questionnaire will result in a substantial differential undercount of Hispanic and noncitizen populations. *Amici* reside in states, districts, and localities with substantial Hispanic and noncitizen populations that will be among the worst affected by this differential undercount. Plaintiffs will suffer a loss of political

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[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to fund the brief's preparation or submission. The parties consent to the filing of this brief.

[2] *Amici* are Diana Alexander, Lauren Rachel Berman, Elizabeth Buchanan, Alejandro Chavez, Jacob Cunningham, Virginia Garcia, Michael Kagan, Michael Kravitz, Robyn Kravitz, Richard McCune, Jose Moreno, Catherine Nwosu, Nnabugwu Nwosu, Maegan Ortiz, T. Carter Ross, Martha Sanchez, and Sonia Casarez Shafer. *Amici* reside in Arizona, California, Maryland, Nevada, and Texas.

representation either because their states will lose congressional seats, or because plaintiffs will be drawn into overpopulated voting districts, or both. Many *amici* also rely on federal funding programs calculated based on census data, and will suffer a loss of funds as a result of an undercount.

Unlike Respondents in this case and the plaintiffs in the other lawsuits challenging the Secretary's action, *amici* are individual United States citizens whose personal voting rights will be compromised by the demonstrated impact of the differential undercount caused by the addition of a citizenship question. Further, *amici* have demonstrated injury to their voting rights arising not just from the loss of congressional representation, but also from the dilution of their votes due to the impact of a disproportionate undercount on intrastate redistricting. *See Dep't of Commerce v. U.S. House of Reps.*, 525 U.S. 316, 332-33 (1999) (involving plaintiffs suffering similar injury to voting rights based on intrastate redistricting as a result of challenged census conduct).

Amici therefore have a strong and distinct interest in preserving the injunction against the addition of a citizenship question to avoid the harms that the citizenship question will inflict on them. Moreover, the Court's ruling in this case will likely impact the outcome of *amici's* pending action challenging the addition of a citizenship question.

INTRODUCTION

Amici submit this brief to address the challenge to the Secretary's action brought under the Enumeration Clause, which the Court has directed the parties to address in their merits briefs, notwithstanding the New York district court's dismissal of Respondents' Enumeration Clause claim at the pleading stage and Respondents' decision not to cross-petition for review of that decision. Whereas the Enumeration Clause claim was the subject of limited briefing in the New York district court, *amici* successfully briefed and defeated both a motion to dismiss and a motion for summary judgment on the Enumeration Clause claim in the Maryland district court. *Amici* are thus well-positioned to address the legal issues related to the Enumeration Clause claim, and submit this brief to demonstrate that the constitutional text and history and this subsequent Court's jurisprudence under the Enumeration Clause provide a firmly rooted, judicially manageable standard for evaluating the constitutionality of the Secretary's action. Under that standard, the unchallenged factual findings of the New York district court clearly establish that the Secretary's decision to add a citizenship question to the 2020 Census violated the Enumeration Clause and should be vacated.

SUMMARY OF ARGUMENT

The Enumeration Clause, as modified by the Fourteenth Amendment, requires that congressional seats "shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State," and that an "actual Enumeration" of the population for such purpose be conducted every ten years. U.S. Const. art. I, § 2, cl. 3; U.S. Const. amend. XIV, § 1. The Framers enshrined this requirement in the Constitution to ensure that representation in Congress would accurately reflect the actual population of each state, and that the process

for determining each state's population would be free from the distorting effects of political influence or manipulation. As the Court's jurisprudence recognizes, the constitutional history and text of the Enumeration Clause therefore place a hard limit on the discretion that Congress can exercise—directly or by delegation to the Secretary—in census-related matters. Specifically, the Clause prohibits action in conducting the census that so compromises the accuracy of the population count such that at least one state and its residents will be denied the congressional representation to which they are entitled based on that state's actual population.

The factual findings of the New York district court, which were well grounded in extensive record evidence, clearly establish that the addition of the citizenship question to the 2020 Census will cause a disproportionate undercount of certain demographic groups to such an extent that several states will lose a congressional seat to which they would otherwise be entitled. Thus, the Court need not decide the circumstances under which an action that has a more marginal impact on the accuracy of the census count is constitutional. Where, as here, the Secretary takes an action that will so materially undermine the accuracy of the population count as to cause a malapportionment of congressional seats, such action contravenes the very purpose of the census and exceeds the constitutional bounds imposed by the fundamental requirement of an "actual Enumeration." Furthermore, given that the Secretary's paramount constitutional obligation in conducting the census is to ensure an accurate numerical "count of the whole number of persons in each state," such that congressional representation is properly apportioned based on the total population of each state, an action by the Secretary that demonstrably fails to fulfill this obligation cannot be justified on the grounds that it advances some ancillary interest such as a purported desire to support enforcement of the Voting Rights Act of 1965.

This limit on the conduct of the decennial census is entirely compatible with the level of discretion that Congress has afforded the Secretary to use the census form to collect additional information needed to support other government functions. Through the statutory framework it has enacted, Congress has made clear that the Secretary should proceed cautiously before adding questions to the census form that are incidental to obtaining an accurate population count. Here, the Secretary failed entirely to heed this caution in adding a question that will undermine the constitutional purpose of the census. Unlike the citizenship question at issue here, none of the few demographic questions that have historically been included on the census form provided to all U.S. households has been shown to cause a malapportionment of congressional seats. The presence of such questions in the past does not license the Secretary to pursue unrelated objectives at the expense of the decennial census's fundamental constitutional purpose.

Nor does the pre-1950 practice of asking about citizenship in decennial censuses, or the sampling of citizenship data through the "long form" questionnaire prior to 2010, provide an imprimatur justifying the addition a citizenship question in 2020 regardless of its impact on census accuracy. The record contains no evidence that citizenship questions in these prior censuses significantly undermined the accuracy of those counts or that they were subjected to legal challenge at all. They may well have been unobjectionable under the Enumeration Clause when they were asked. However, the findings of the New York district court clearly establish that the citizenship question *in 2020* will severely undermine the accuracy of the population count, preventing the census from properly fulfilling its constitutional purpose. While that purpose has remained constant since the Constitution was adopted, historical circumstances have

changed, and a seventy-year-old practice cannot justify a constitutionally impermissible result today.

ARGUMENT

I. The Secretary's Addition of a Citizenship Question to the 2020 Census Questionnaire Violates the Enumeration Clause.

Article I, § 2, cl. 3 of the Constitution requires that Representatives in the United States House of Representatives "shall be apportioned among the several States . . . according to their respective Numbers . . . ." As modified by the Fourteenth Amendment, the Enumeration Clause requires that the "respective Numbers" must be determined by "counting the whole number of persons in each State." U.S. Const. amend. XIV, § 1. This "actual Enumeration" must be conducted every ten years. On its face, the Constitution obligates the Secretary to conduct the census in a manner that ensures that the "whole number of persons in each State" are counted. *Id*. At a minimum, as the constitutional history and the Court's jurisprudence confirm, this bars the Secretary from taking actions that compromise the accuracy of the population count so badly that the census fails to fulfill its constitutional purpose of ensuring equal representation. The district court's findings establish that this is precisely what the Secretary has done here.

A. The Enumeration Clause Embodies the Framers' Intention to Guarantee Congressional Apportionment Based on an Accurate, Unbiased Count of Each State's Total Population.

The Enumeration Clause inscribed into the Constitution the Framers' determination to ensure that "comparative state political power in the House would reflect comparative population, not comparative wealth . . . ." *Utah v. Evans*, 536 U.S. 452, 477 (2002). As the Court stated in

Wesberry v. Sanders, 376 U.S. 1 (1964), the debates over Article I, § 2 at the Constitutional Convention made clear that "the House should represent 'people'" and that "in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants." *Id.* at 13; *see also id.* at 9-14 (reviewing Convention debates); 1 M. Farrand, *The Records of the Federal Convention of 1787* at 35–36, 196–201, 540–542, 559–60, 571, 578–88, 591–97, 603 (1911) (hereinafter "Farrand").

Moreover, the Framers also knew from bad experience that calculations of states' populations "could be and often were skewed for political or financial purposes." *Evans*, 536 U.S. at 500 (Thomas, J., concurring in part and dissenting in part). Debate at the Constitutional Convention revealed the Framers' "keen awareness that absent some fixed standard, the numbers were bound to be subject to political manipulation." *Id.* at 501. To combat the risk of "political chicanery," several Framers "expressed the desire to bind or 'shackle' the legislature so that neither future Congresses nor the States would be able to let their biases influence the manner of apportionment." *Id.* at 500–01; *see, e.g.*, 1 Farrand at 571 (statement of Gouverneur Morris that if the mode for allocating representation were "unfixt the Legislature may use such a mode as will defeat the object: and perpetuate the inequality"); *id.* at 578 (George Mason observed that without a "precise standard" for allocating representation, "those who have power in their hands will not give it up while they can retain it"); *see generally Evans*, 536 U.S. at 496–503 (Thomas, J., concurring in part and dissenting in part).

To ensure that the House of Representatives accurately reflected States' relative populations, and to protect this goal from the corrupting influence of political manipulation, the Framers wrote into the Enumeration Clause an express requirement that the "respective numbers" of the states be determined by a count of the whole number of persons in each

state—*i.e.*, an "actual Enumeration"—to be conducted every ten years. *See U.S. House of Reps.*, 525 U.S. at 348–49 (Scalia, J., concurring) (noting that the Constitution's requirement of an "actual Enumeration" was intended to demand "the *most accurate* way of determining population with *minimal* possibility of partisan manipulation") (emphases added). Edmund Randolph proposed the inclusion of a census in the Constitution specifically "for the purpose of redressing inequalities in the Representation," 1 Farrand at 578. As Randolph noted, the ratio of representation for the first Congress "placed the power in the hands of that part of America, which could not always be entitled to it, that this power would not be voluntarily renounced; and that it was consequently the duty of the Convention to secure its renunciation when justice might so require" through the constitutional requirement of a periodic census. *Id.* George Mason likewise observed that a census would provide a "permanent & precise standard . . . essential to ye. fair representation," as opposed to the "conjectural" estimates that prevailed at the time. *Id.* at 578. James Madison similarly made clear that the "unequivocal objects" of a census count would be to periodically "readjust" and "augment" the apportionment of representatives between the states to accurately reflect population. The Federalist No. 58 at 301 (Madison) (George W. Carrey and James McClellan eds., 2001).

This history demonstrates that the requirement of an "actual Enumeration" was no idle command, but a recognized linchpin of democracy. The Enumeration Clause ensconces in the Constitution the core principles that the decennial census must, above all, provide an accurate measure of the population of the states, and that the goal of accuracy requires vigilance against distortion and misuse.

B. The Court's Precedents Recognize That The Secretary May Not Compromise the Accuracy of the Census Count to Such a Degree That It Undermines the Constitutional Goal of Equal Representation.

Consistent with the constitutional history set forth above, the Court has recognized that the Secretary's conduct of the census is limited by the "constitutional goal of equal representation," *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992), and the "strong constitutional interest in [the] accuracy" of the population count that are embedded in the Enumeration Clause, *Evans*, 536 U.S. at 478.

The Court has repeatedly held that the Secretary's conduct of the census may not undermine the constitutional goal of equal representation. In *Franklin*, plaintiffs argued that the Secretary's decision to allocate overseas military personnel to their home states for purposes of determining the total population of each state violated the Enumeration Clause. *See* 505 U.S. at 804. "[R]eview[ing] the dispute to the extent of determining whether the Secretary's interpretation is consistent with the constitutional language and the constitutional goal of equal representation," the Court rejected the challenge because, it concluded, the Secretary's decision "does not hamper the underlying constitutional goal of equal representation, but . . . actually promotes equality." *Id.* at 806. Likewise, in *Wisconsin v. City of New York*, 517 U.S. 1 (1996), the Court held that the "Secretary's conduct of the Census" is "within the limits of the Constitution" if it is "consistent with the constitutional language and the constitutional goal of equal representation" and bears a "reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census." *Id.* at 19-20; *see also Evans*, 536 U.S. at 477-78 (assessing constitutionality of imputation by reference to the

"constitutional determination[] . . . that comparative state political power in the House would reflect comparative population").

Furthermore, where the challenged conduct relates to a potential undercount of the population, the Court has focused on whether the Secretary's action promotes the accuracy of the census count in service of the overriding constitutional goal of equal representation. In *Wisconsin*, the Court held that the Secretary's decision not to undertake a statistical adjustment of the census count to correct for potential undercounts was constitutional precisely because it was based on a preference for "distributive accuracy"—*i.e.*, a count that accurately reflects each state's share of the nationwide population—that "follow[ed] from the constitutional purpose of the census, viz., to determine the apportionment of the Representatives among the States." 517 U.S. at 20. Recognizing the "strong constitutional interest in accuracy" that followed from the Framers' decision to apportion representation based on population, the Court in *Evans* upheld the Census Bureau's use of an imputation method that inferred the presence of individuals in households that could not be directly counted, on the grounds that "the alternative is to make a far less accurate assessment of the population." 536 U.S. at 478–79.

C. The Secretary's Addition of a Citizenship Question Violates the Enumeration Clause Because It Will Compromise the Accuracy of the Census Count to Such a Degree That It Will Result in the Malapportionment of Congressional Seats.

As both the constitutional history and the Court's jurisprudence make clear, the wording of the Enumeration Clause places at least one clear limit on Congress', and thus the Secretary's, conduct of the census: the Secretary may not take an action that compromises the accuracy of the population

count to such a degree that a state and its residents would be denied the congressional representation to which they are entitled based on their actual population count. Not only would such an action be inconsistent with the constitutional text, which calls for a "count of the whole number of persons" in each state, but it would directly contravene the Framers' intent and "the constitutional goal of equal representation" by failing to apportion congressional seats on the basis of total population.

Not every inaccuracy in the census count causes a shift in the apportionment of congressional seats. Rather, to cause malapportionment, the Secretary's action must have an especially substantial effect on the distributive accuracy of the census. *See* Findings of Fact & Conclusions of Law ¶¶ 242–45, Dkt. No. 574, *State of N.Y. v. U.S. Dep't of Commerce*, No. 18-cv-2921 (S.D.N.Y. Jan. 15, 2019) (hereinafter "N.Y. Opinion") (discussing the differential undercount necessary to lead to malapportionment). While an action by the Secretary that undermines the accuracy of the census but falls short of causing a shift in congressional representation may violate the Enumeration Clause, particularly where it fails to advance a compelling government interest, the Court need not decide that issue in this case.

Here, although the district court erroneously dismissed Respondents' Enumeration Clause claim, it nonetheless concluded, in the context of its standing analysis, that the citizenship question would lead to a disproportionate undercount among certain populations of such a magnitude that "several states . . . will lose at least one seat in the congressional reapportionment based on the 2020 census data." N.Y. Opinion ¶ 243. This conclusion was based on detailed factual findings that a citizenship question on the 2020 Census would produce a substantial net differential undercount among Hispanic and noncitizen populations that are disproportionately concentrated in certain states. Before

the Court, Petitioners challenge Respondents' standing only on other, more limited grounds, and they have not contested the validity of these findings.

Thus, the effect of the Secretary's action on the accuracy of the census count will be so severe that it will undermine the constitutional purpose the decennial census itself: to obtain a "count of the whole number of persons" in each state such that congressional seats are "apportioned among the several states . . . according to their respective numbers." Although the Court has recognized that the Enumeration Clause affords Congress broad discretion in most census-related matters, it has also made clear that this discretion is not unbounded. *See Wisconsin*, 517 U.S. at 19-20 (noting that the Enumeration Clause vests Congress with "virtually unlimited discretion" in conducting the decennial census, but holding that the Secretary's conduct of the census, pursuant to Congress' delegation of authority, must still be "consistent with the constitutional language and the constitutional goal of equal representation" in order to fall "within the limits of the Constitution"); *see also Evans*, 536 U.S. at 495 (Thomas, J., concurring in part and dissenting in part) ("[W]hile Congress may dictate the manner in which the census is conducted, it does not have unbridled discretion . . . it must follow the Constitution's command of an actual Enumeration."). If an action that undermines the very purpose of the Enumeration Clause does not breach constitutional limits, then the Enumeration Clause establishes no constitutional limit at all. Such an interpretation would permit the Secretary to take any number of actions that undermine the distributive accuracy of the count, thereby depriving states and individuals of their fair share of political representation. For example, if the Secretary decided to assign hundreds of thousands of in-person enumerators to California and New York and none at all to Texas, Alabama and West Virginia, such a misallocation would predictably cause a

disproportionate undercount of those states and thereby deprive them of congressional representation. The Enumeration Clause does not countenance actions that do violence to its fundamental goal and purpose.

Nor can the Secretary's decision be justified by any purported interest in strengthening enforcement of the Voting Rights Act. Such balancing might be appropriate if the consequences of the distributive inaccuracy caused by the Secretary's action were limited to non-constitutional purposes such as the allocation of federal funding resources or the drawing of intrastate legislative districts. However, the Secretary cannot use the decennial census to advance ancillary governmental interests at the expense of the accuracy required to effectuate the sole constitutional purpose of the census.

D. The Historical Use of the Census to Ask Questions Unrelated to Enumeration Does Not Establish the Constitutionality of the Secretary's Decision.

That the census form provided to every U.S. household historically has included a small number of demographic questions unrelated to the task of enumeration does not imply that the Secretary has free reign over the substance of the form, without regard to any constitutional limits. This case presents the unique situation in which there is a clear showing that a proposed question is not simply *unrelated* to the goal of an "actual enumeration," but will directly *impair* that goal and severely skew the distributive accuracy of the population count.

Historically, careful consideration has been given to the impact of proposed census questions on the accuracy of the population count. As shown above, the Framers were acutely aware of the risk of political manipulation of a census, and required an "actual Enumeration" as a bulwark against that risk. Moreover, beginning with the first debates over the 1790

Census, Congress recognized the potentially adverse impact of demographic questions on participation and trust in the census, and rejected calls for a wide-ranging questionnaire. For example, Rep. Samuel Livermore of New Hampshire predicted that asking multiple probing questions:

> would excite the jealousy of the people; they would suspect the Government was so particular in order to learn their ability to bear the burthen [sic] of direct or other taxes, they may refuse to give the officer such a particular account as the law requires . . . .

Annals of Congress, House of Representatives, 1st Cong. 2d Session at 1146–47; *see also id.* (comments of Rep. John Page (VA) raising fear that a census question on respondents' occupations "would occasion an alarm among [the people]"). As a result, the 1790 Census Act authorized only a few demographic questions about age, sex, and status (free or enslaved), excluding more intrusive questions.

Prior to the second census in 1800, Congress faced renewed calls to add numerous additional questions to the census. *See* C. Wright, History and Growth of the United States Census (prepared for the Senate Committee on the Census), S. Doc. No. 194, 56th Cong., 1st Sess., 19 (1900). Again, however, Congress rejected this approach, altering the 1790 Census only by modifying the age range for the 1800 Census questionnaire. *Id.* at 20. The history of these early censuses shows that Congress tacked safely away from testing the constitutional limits of an "actual Enumeration" by respecting the paramount purpose of the decennial census to accurately count everyone once and in the right place. That history provides evidence of congressional restraint, but not constitutional impotence.

In delegating some of its constitutional authority over the census to the Secretary, Congress has enacted a statutory

framework designed to preserve the accuracy of the census population count and rank demographic questions as of secondary importance. For example, § 141 of the Census Act imposes strict deadlines on the Secretary to make "determinations" as to the subjects and questions proposed for the next decennial census, and to change those determinations only upon a finding that "new circumstances" have arisen that "necessitate" such a change. *See* 13 U.S.C. § 141(f)(1)–(3). Section 195 further narrows the Secretary's discretion by "directly prohibit[ing] the use of sampling in the determination of population for purposes of apportionment." *U.S. House of Reps.*, 525 U.S. at 338 (construing 13 U.S.C. § 195). And Section 6(c) requires the Secretary to rely upon available administrative records "to the maximum extent possible" before authorizing any "direct inquiries" of the public. *Id.* § 6(c). By its terms, § 6(c) imposes the most stringent burden of justification on direct inquiries of the broadest scope—*i.e.*, subjects and questions for the decennial census.

The Secretary's decision to add the citizenship question utterly failed even to consider, much less address, these limitations. Secretary Ross's March 26, 2018 decision memorandum (the "Ross Memorandum") entirely ignored the fact that the Secretary had already determined and reported to Congress the subjects for the 2020 Census—*not* including citizenship—in March 2017. AR 1313. There is no evidence in the district court record suggesting that the Secretary was even aware of § 6(c)'s *existence*, much less any acknowledgment or analysis in the Ross Memorandum of its requirements. Furthermore, the Secretary asserted a conclusion about the relative accuracy of the "citizenship data provided to DOJ" with or without a citizenship question, but failed to consider the potential harm that the addition of the citizenship question would cause to the accuracy of the ultimate enumeration. AR 1313 at 7.

As explained above, the record in the district court has established a prospective harm to the distributive accuracy of the census and resultant malapportionment that the Framers intended the Enumeration Clause to prevent. Contrary to Petitioners' argument, the requirement of concrete proof of harm to the distributive accuracy of the census securely anchors the constitutional standard within a judicially manageable framework and avoids unduly constraining the Secretary's authority over the content of the census questionnaire. While violations of the Enumeration Clause under this standard based on a particular census question may be rare, the Court should reject Petitioners' attempt to deprive the Clause of any meaningful effect in safeguarding the core animating principle of the decennial census.

For these reasons, the New York district court's dismissal of the Enumeration Clause claim based upon a general "longstanding practice of asking questions about the populace of the United States without a direct relationship to the constitutional goal of an 'actual Enumeration'" was erroneous. *See* Opinion and Order, Dkt. No. 215, *State of N.Y. v. U.S. Dep't of Commerce*, No. 18-cv-2921 (S.D.N.Y. July 26, 2018). Such a practice is beside the point. What matters is not whether the relationship between a question and the achievement of an actual Enumeration is direct or indirect, but whether that relationship is *reasonable*, "keeping in mind the constitutional purpose of the census" to ensure the fair apportionment of Representatives. *Wisconsin*, 517 U.S. at 19-20. Demographic questions that are unrelated to the population count, but do not impair or distort its results, are reasonable and therefore unobjectionable under the Enumeration Clause.

E. Historical Practice in Asking About Citizenship on the Census Does Not Immunize the Secretary's Decision Against Constitutional Challenge.

Petitioners contend that the Secretary's decision to add a citizenship question to the 2020 Census cannot violate the Enumeration Clause, because such a ruling would mean every decennial census that included a question on citizenship in the past was unconstitutional. This argument is without merit and should be rejected.

There is no dispute that some form of question concerning citizenship was asked on decennial censuses through 1950, and that the Census Bureau continued to collect sample citizenship data through the "long form" census questionnaire sent to a fraction of households through the 2000 Census. *See* N.Y. Opinion at 21–24. The record, however, contains no evidence concerning the impact of those earlier questions on the accuracy of the census head count, nor any suggestion that their use was ever challenged on the grounds raised by plaintiffs here. The evidence presented before the district court establishes that the belated inclusion of an inadequately tested citizenship question on the 2020 Census will cause material harm to the distributive accuracy of the census *in 2020*. There is no basis to accord the citizenship question—without regard to actual impact on the census—an overriding historical pedigree that somehow permanently inoculates it against constitutional review.

The past use of such a demographic question, however, should not be construed to grant a categorical blessing even when circumstances arise to render the question unconstitutional. In this regard, Petitioners' contention that the finding of an Enumeration Clause violation here would make the constitutional standard impermissibly variable over time is unpersuasive. The constitutional standard under the

Enumeration Clause does not change over time; historical circumstances do. As the California district court correctly observed, the constitutionality of a particular governmental action often depends on the larger social context in which that action occurs. *See*, *e.g.*, *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 551 (2013) (striking down Section 4 of the Voting Rights Act of 1965 because, *inter alia*, the provision was rooted in "decades-old data and eradicated practices"); *Grutter v. Bollinger*, 539 U.S. 306, 342–43 (2003) (stating that "race-conscious admissions policies must be limited in time" and could fail constitutional scrutiny in the future). The Secretary's obligation to avoid action that unreasonably impairs the numerical and distributive accuracy of the decennial census, under the circumstances present when the census is conducted, remains constant.

CONCLUSION

For the foregoing reasons, *amici* join Respondents and respectfully request that the Court affirm the judgment of the district court.

Date: April 1, 2019

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