

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

ROBYN KRAVITZ, *et al.*,

*

Plaintiffs,

*

v.

*

No. 18-cv-01041-GJH

UNITED STATES DEPARTMENT OF
COMMERCE, *et al.*,

*

*

Defendants.

*

* * * * *

**BRIEF OF THE STATE OF MARYLAND
AS *AMICUS CURIAE* IN SUPPORT OF
PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

BRIAN E. FROSH
Attorney General of Maryland

JOHN R. GRIMM (Bar No. 19223)
Assistant Attorney General
Maryland Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6339 (tel.)
(410) 576-6955 (fax)
jgrimm@oag.state.md.us

Attorneys for *Amicus Curiae* State of
Maryland

June 25, 2018

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST OF AMICUS CURIAE.....	1
ARGUMENT.....	1
I. A Citizenship Question on the 2020 Census Will Harm Maryland By Interfering With an Accurate Population Count.....	2
A. A Citizenship Question Will Interfere with Maryland’s Ability to Draw Legislative District Lines.	3
B. A Census Undercount Will Cause Maryland to Receive Less Federal Aid.	4
II. A Loss of Population-Based Transportation Funds Will Harm Maryland and Plaintiffs.	6
A. Transportation Programs, Including Population-Based Grants, Are an Important Source of Federal Benefits in Maryland.....	7
B. Plaintiffs Are Harmed When Maryland Does Not Receive All the Federal Funds to Which it is Entitled.....	9
CONCLUSION	11

TABLE OF AUTHORITIES

Page

Cases

City of Detroit v. Franklin, 4 F.3d 1367 (6th Cir. 1993)..... 10

Evenwell v. Abbott, 136 S. Ct. 1120 (2016) 3

In re Legislative Districting of State, 299 Md. 658 (1984)..... 3

Legislative Redistricting Cases, 331 Md. 574 (1993) 3

New York v. United States Dep’t of Commerce, No. 18-cv-2921 (JMF) (S.D.N.Y.)..... 2, 5

Constitutional Provisions

U.S. Const. art. I, § 2, cl. 3 1

Md. Const. art. III, § 4 3

Statutes

2018 Md. Laws, ch. 18 5, 6

Md. Code Ann., Transp. § 3-216..... 7

Rules

Fed. R. Evid. 201(b)(1)..... 9

Miscellaneous

Md. Dep’t of Legislative Servs., Federal Funds History (Jan. 2016)..... 5

Md. FY2018 to FY2020 Consolidated Transportation Program, 2018 State Report
on Transportation 9

Md. Proposed Operating Budget, FY 2019, vol. I 8

United States Census Bureau, Use of Census Bureau Data in Federal Funds
Distribution (Sept. 2017) 7

STATEMENT OF INTEREST OF AMICUS CURIAE

The State of Maryland is the home of many of the Plaintiffs in this action and it shares many of their concerns. Maryland has an interest in an accurate 2020 census, which will allow it to receive all the federal aid to which it is entitled, and allow Maryland to discharge its constitutional duty to draw legislative districts with equal populations. Because Maryland, like Plaintiffs, will be directly injured by a census undercount, it has also joined a lawsuit in New York raising substantially the same arguments as those Plaintiffs raise here. No party's counsel has authored this brief in whole or in part, and no party's counsel or other person contributed money that was intended to fund the preparation or submission of this brief.

ARGUMENT

The United States Census Bureau's recent—and hasty—decision to add a citizenship question to the 2020 decennial census threatens the integrity of an important governmental function that is mandated by the United States Constitution, and which is essential to our democratic system. Ignoring its own decades-long conclusion that a citizenship question would depress response rates, the Census Bureau has taken a step that will jeopardize the accuracy of the 2020 census by discouraging participation in the census count. In addition to violating the Constitution's directive that the Census Bureau conduct an "actual Enumeration" of the population, U.S. Const. art. I, § 2, cl. 3, a citizenship question will cause extensive harm to Maryland and Plaintiffs.

Because of the paramount importance of an accurate 2020 census count and the real harm that a citizenship question will inflict, Maryland joined dozens of other states and

municipalities in challenging the Census Bureau's proposed citizenship question in the Southern District of New York earlier this year. *See* First Am. Compl., *New York v. United States Dep't of Commerce*, No. 18-cv-2921 (JMF) (S.D.N.Y.), ECF No. 85 ("N.Y. Complaint"). This case raises issues that are substantially similar to those raised in New York, and Maryland fully supports Plaintiffs' efforts to ensure an accurate 2020 census. Plaintiffs have stated a meritorious claim, and the Court should deny Defendants' motion to dismiss.

I. A CITIZENSHIP QUESTION ON THE 2020 CENSUS WILL HARM MARYLAND BY INTERFERING WITH AN ACCURATE POPULATION COUNT.

There is little realistic doubt that a question about respondents' citizenship status will depress participation in the upcoming census, leading to an undercount of many states' actual populations. The Census Bureau itself took this position for decades. *See* N.Y. Complaint ¶¶ 38-46. In 2005, for example, the Director of the Census Bureau testified to the House Subcommittee on Federalism and the Census that "[a]sking all respondents for additional information relating to citizenship might raise additional fears about responding to the census," and that "[t]he mere act of asking about the residency status of an individual may confuse or discourage respondents, even legal residents and citizens, and could affect the overall accuracy of the census." Statement of Charles Louis Kincannon (Dec. 6, 2005), Administrative Record, at 645 (ECF No. 25.) Even in announcing the current decision to include a citizenship question in the 2020 census, the Secretary of Commerce acknowledged "the argument that the reinstatement of the citizenship question . . . would depress response rate[s]," but concluded that "the need for accurate citizenship data . . .

outweigh[s] fears about a potentially lower response rate.” Secretary Wilbur Ross, Memorandum (March 26, 2018), Administrative Record at 1317.

This latter view is incorrect: a census undercount will cause substantial and unjustifiable harm to Maryland, including in its ability to draw legislative districts and fund important services, and those harms will ultimately affect Marylanders like Plaintiffs.

A. A Citizenship Question Will Interfere with Maryland’s Ability to Draw Legislative District Lines.

As Plaintiffs correctly point out, (*e.g.*, Am. Compl. ¶ 149), a census undercount will skew population figures, distorting congressional and legislative districts. Not only will this dilute the strength of Plaintiffs’ votes, it will prevent Maryland from delineating legislative districts with populations that are as close to perfectly equal as possible, as both the United States and Maryland Constitutions require. *See, e.g., Evenwell v. Abbott*, 136 S. Ct. 1120, 1123-24 (2016) (describing federal one-person, one-vote requirement); Md. Const. art. III, § 4 (“Each legislative district shall consist of . . . substantially equal population.”); *Legislative Redistricting Cases*, 331 Md. 574, 592-601 (1993) (discussing federal and state one-person, one-vote requirements). Maryland’s ability to fulfill its constitutional obligation of ensuring equal representation in legislative districts—which the Maryland Court of Appeals has described as the “*sine qua non* of fair representation,” *In re Legislative Districting of State*, 299 Md. 658, 672 (1984)—depends on the State having accurate population figures.

The Census Bureau attempts to wave this concern away, arguing that States may simply “choose to adjust census data before beginning redistricting[.]” (Defs.’ Mem. in

Supp. of Mot. to Dismiss at 18, ECF No. 24-1 (“Defs.’ Mem.”).) But even accepting this as a legal proposition, the Census Bureau’s argument ignores the fact that a State cannot adjust a district to compensate for an inaccurate census count unless it knows how much compensation is necessary—which requires knowledge of a district’s actual population. The Census Bureau does not explain how it thinks states can derive the accurate population data needed to correct a flawed census count, if the only source of population data is the flawed count itself. States simply cannot avoid the need to refer to census data when drawing legislative districts, and Maryland is unaware of any way to correct an inaccurate census count as the Census Bureau suggests. A citizenship question on the 2020 census will therefore jeopardize Maryland’s ability to carry out its constitutional one-person, one-vote obligations.

B. A Census Undercount Will Cause Maryland to Receive Less Federal Aid.

Maryland will also suffer real, pecuniary injury in the form of decreased population-based federal funds if its population is undercounted in 2020. Because many Plaintiffs are Maryland residents who are the ultimate beneficiaries of those federal funds, the injuries to Maryland will naturally flow to Plaintiffs and others like them.¹ (*See, e.g.*, Am. Compl.

¹ The Census Bureau claims that Plaintiffs’ theory of injury is too attenuated to confer standing on them, because “[t]he federal government could alter its funding formulas, the states or localities could make up the [funding] difference, the impact [of a shortfall] could be minimal in Plaintiffs’ areas, or the states or local authorities could determine ways to stretch the more limited funds.” (Defs.’ Mem. at 19.) In fact, it is the Census Bureau’s theory that is attenuated, as it relies on an improbable series of events to compensate Plaintiffs for the direct injuries a census undercount will cause them.

¶¶ 22, 27-28, 30, 33, ECF No. 17 (listing Plaintiffs' ties to Maryland and reliance on federal population-based funds).)

Maryland and, in particular, the Washington, D.C. metropolitan region where Plaintiffs live, benefit substantially from federal funds. In Fiscal Year 2014, for instance, federal funds accounted for 25.3% of Maryland's operating budget. Md. Dep't of Legislative Servs., *Federal Funds History* (Jan. 2016) at 1, *available at* <http://mgaleg.maryland.gov/Pubs/BudgetFiscal/2016-Federal-Funds-History.pdf>. A substantial amount of the federal aid that Maryland receives is based on population, as derived from the decennial census. In Fiscal Year 2015 alone, Maryland received almost \$11 billion in federal population-based grants and direct payments from health care, education, transportation, nutrition, child care, housing, and energy assistance programs. 2018 Md. Laws, ch. 18 (noting Maryland's receipt of \$10,900,000 in federal population-based funds in Fiscal Year 2015). In recent years, federal aid to Maryland based at least in part on census data has included:

- Over \$154 million in Urbanized Area Formula grants in Fiscal Year 2015, N.Y. Complaint ¶ 138(g);
- Over \$230 million in Title I funds to Maryland school districts in Fiscal Year 2017, *id.* ¶ 141(h);
- Nearly \$206 million in Maryland Special Education Grants, *id.*; and
- Nearly \$54 million in Child Care and Development Fund grants in Fiscal Year 2015, *id.* ¶ 145(h).

Indeed, the need to ensure an accurate census count is so important that in the 2018 legislative session, the Maryland General Assembly appropriated \$5 million to establish a

2020 Census Grant Program devoted to “issuing matching grants to local governments and nonprofit organizations to support the accurate counting of the population of the State and its local jurisdictions[.]” 2018 Md. Laws, ch. 18 § 1(b). In creating this program, the Legislature was particularly concerned with ensuring that the census would generate accurate data for areas in the State with hard-to-count populations, including Prince George’s County, where a number of Plaintiffs reside. 2018 Md. Laws, ch. 18 Preamble. A citizenship question will only exacerbate the conditions that led Maryland to appropriate millions of dollars to protect the accuracy of the 2020 census.

Like other states, Maryland uses federal aid to provide a wide array of services to its residents. And given the significance of that aid and the important role it plays, it is simply wishful thinking for the Census Bureau to suggest that State and local governments could make up missing federal funds by finding a way to stretch their limited resources. (Defs.’ Mem. at 19.) In Maryland’s experience, there is no practical means of making up such substantial shortfalls, meaning that a reduction in population-based funds due to a census undercount will be borne by Marylanders in the form of fewer public works and services.

II. A LOSS OF POPULATION-BASED TRANSPORTATION FUNDS WILL HARM MARYLAND AND PLAINTIFFS.

Almost every facet of State government receives some federal benefits, but federal transportation funds illustrate the kinds of harm Maryland and Plaintiffs will suffer if a citizenship question leads to a census undercount.

A. Transportation Programs, Including Population-Based Grants, Are an Important Source of Federal Benefits in Maryland.

Plaintiffs have identified the United States Department of Transportation's Surface Transportation Block Grant as one kind of population-based federal aid that is in jeopardy as a result of the proposed census questionnaire. (*See* Am. Compl. ¶ 135.) This is an apt example: nationwide, the Department of Transportation administers many programs that distribute funds using Census Bureau data,² and a substantial portion of Maryland's federal aid comes from the Department of Transportation. In Fiscal Year 2016, for example, the Maryland Department of Transportation received over a billion dollars in overall federal funds—8.8% of Maryland's total federal funds that year. *See* Federal Funds History at 13. Population-based Surface Transportation grants, in turn, form an important portion of Maryland's overall federal transportation aid.

When the State receives federal transportation funds, it appropriates them to the Transportation Trust Fund, a fund that is maintained by the Maryland Department of Transportation and used to support all of its activities. Md. Code Ann., Transp. § 3-216. Federal grants, including population-based grants like Surface Transportation Block grants, comprise a substantial portion of the overall Transportation Trust Fund. In Fiscal

² These include including highway planning and construction funds, Federal Transit Formula grants, Federal Transit Capital Investment grants, Formula Grants for rural areas, Capital Assistance grants for elderly persons and persons with disabilities, National Motor Carrier Safety grants, State and Community Highway Safety grants, and Job Access Reverse Commute grants. *See* United States Census Bureau, Use of Census Bureau Data in Federal Funds Distribution (Sept. 2017) at 3-7, *available at* <https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf>.

Year 2017, the State appropriated more than \$877 million in federal funding to the Transportation Trust Fund—almost 18% of the Fund’s total budget that year. *See* Md, Proposed Operating Budget, FY 2019, vol. I at 21, *available at* <http://www.dbm.maryland.gov/budget/Documents/operbudget/2019/Proposed/Volume1.pdf>. The State Highway Administration—a part of the Department of Transportation—received hundreds of millions of dollars from the Transportation Trust Fund, including \$164 million in federal Surface Transportation Grants. *Id.* at 539. In fact, in Fiscal Year 2017, federal Surface Transportation grants alone made up 37% of the State Highway Administration’s total federal funding and accounted for 19% of the total federal transportation funds the State appropriated to the Transportation Trust Fund that year. *See id.* at 523, 539. Surface Transportation grants, thus, form a substantial portion of federal transportation aid, which in turn forms a substantial portion of the State’s transportation budget.

Given how much population-based federal aid Maryland receives for transportation projects alone, it is no exaggeration to say that, in the 2020 census, hundreds of millions of dollars could hang in the balance. And these substantial sums of money are not just lines on an appropriations bill; they are dollars that are spent on actual services that benefit Maryland’s residents. If the 2020 census undercounts Maryland’s population by depressing response rates, it is implausible that Maryland will avoid experiencing a shortfall in federal funds that will materially harm Marylanders like Plaintiffs.

B. Plaintiffs Are Harmed When Maryland Does Not Receive All the Federal Funds to Which it is Entitled.

Throughout the State, Maryland spends hundreds of millions of dollars of federal money to provide its citizens important services. Continuing the example of federal transportation grants, the State is currently engaged in hundreds of transportation projects that are being funded in substantial part by federal aid. *See generally* Md. FY2018 to FY2020 Consolidated Transportation Program, 2018 State Report on Transportation (“Transportation Report”), *available at* http://www.mdot.maryland.gov/newMDOT/Planning/CTP/CTP_18_23_Final/CTP_FY2018-2023.pdf. More than two dozen such projects are taking place in Plaintiffs’ home of Prince George’s County. *See* Transportation Report at 455-85. These include important improvements to access and safety, such as:³

- Improving access to existing roads and bridges;
- Replacing bridges;
- Making safety improvements to major roads;
- Building new interchanges with bicycle and pedestrian accommodations;
- Building raised curbs along roadways;

³ These projects are taking place in areas including the Interstate 95-Interstate 495 corridor, U.S. Route 50, East-West Highway/Adelphi Road, U.S. Route 1 in College Park, and the Greenbelt Metro Station. *E.g.*, Transportation Report at 455, 458, 466, 468, 469. The Court can take judicial notice that these are among the most important arteries in Prince George’s County. *See* Fed. R. Evid. 201(b)(1). Because Plaintiffs have alleged that they drive on highways and roads in areas of Prince George’s County including District Heights, Langley Park, Hyattsville, and Bowie (Am. Compl. ¶¶ 22, 28, 30, 33), the Census Bureau’s suggestion that Plaintiffs have not alleged that any “roads they actually use” will be affected by a census undercount defies plausibility. (Defs.’ Mem. at 18.)

- Constructing landscaped medians and improving sidewalks and crosswalks;
- Reconstructing portions of major arteries;
- Conducting studies to upgrade roads to address safety and capacity concerns;
- Upgrading existing roads to multilane freeways; and
- Research and construction projects to ease traffic congestion.

Of the funding needed to complete these projects, the State estimates that nearly \$445 million will come from federal funding. And the State will require hundreds of millions of dollars more to complete similar projects in other jurisdictions. Because significant portions of the federal money Maryland receives for transportation projects come from population-based grants from the federal Department of Transportation, a citizenship question on the 2020 census could have a meaningful detrimental effect on Maryland's ability to continue important public works.

A decrease in population-based federal funding, therefore, does not simply mean fewer dollars for Maryland to spend (although that alone would constitute a sufficient injury to state a claim for relief⁴); it means fewer new bridges, less pedestrian access, more congestion, and less-safe roads for Marylanders including Plaintiffs. And this is only a small corner of Maryland's federal-funding landscape. Federal transportation funds, though important, make up only a portion of Maryland's overall federal aid. In addition to

⁴ See, e.g., *City of Detroit v. Franklin*, 4 F.3d 1367, 1374 (6th Cir. 1993) (holding that City of Detroit had standing to challenge Census Bureau methodology that allegedly resulted in an undercount on the theory that "the census undercount will result in a loss of federal funds to the City").

the State Department of Transportation, the Department of Health and Mental Hygiene received 58.7% of the State's federal funding in Fiscal Year 2016, the Department of Labor, Licensing, and Regulation received 16%, and the Department of Public Education received 9.3%. Federal Funds History at 13. All of these State agencies provide critical services to Marylanders, and they will all suffer in their ability to serve Maryland residents, including Plaintiffs, if Maryland's population is inaccurately reported in the 2020 census.

CONCLUSION

The Court should deny Defendants' motion to dismiss.

Respectfully Submitted,

BRIAN E. FROSH
Attorney General of Maryland

/s/

JOHN R. GRIMM (Bar No. 19223)
Assistant Attorney General
Maryland Office of the Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6339 (tel.)
(410) 576-6955 (fax)
jgrimm@oag.state.md.us

Attorneys for *Amicus Curiae* State of
Maryland

June 25, 2018

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2018, the foregoing document was filed with the Clerk of the Court and served on all counsel of record electronically through the Court's CM/ECF system.

/s/ John R. Grimm
John R. Grimm