IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NEW YORK, *et al.*, Plaintiffs, vs. U.S. DEP'T OF COMMERCE, *et al.*, Defendants	Case No. 1:18-cv-2921 (JMF)

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

PLEASE TAKE NOTICE that, upon the accompanying declaration of Mithun Mansinghani, and all prior pleadings and proceeding in this action, *amici curiae* the States of Oklahoma, Louisiana, Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, by and through Governor Matthew G. Bevin, Maine, by and through Governor Paul R. LePage, Michigan, Missouri, Montana, Nebraska, South Carolina, Tennessee, and Texas, and the People of the State of Colorado *ex rel.* Cynthia H. Coffman, in her official capacity as Colorado Attorney General, move this Court, before the Honorable Jesse M. Furman, for leave to file a brief as *amici curiae* in support of Defendants' Motion to Dismiss, Doc. 155 (May 25, 2018).

Attached hereto as Exhibit 1 is the States' proposed brief in support of Defendants' Motion to Dismiss.

Dated: June 1, 2018

By: */s/ Mithun Mansinghani*

Mithun Mansinghani (*pro hac vice*)*
Solicitor General
OKLAHOMA OFFICE OF THE
ATTORNEY GENERAL
313 NE 21st Street
Oklahoma City, OK 73105
P: (405) 522-4392

*Counsel of Record for the States of Oklahoma, Louisiana, Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, by and through Governor Matthew G. Bevin, Maine, by and through Governor Paul R. LePage, Michigan, Missouri, Montana, Nebraska, South Carolina, Tennessee, and Texas, and the People of the State of Colorado *ex rel.* Cynthia H. Coffman, in her official capacity as Colorado Attorney General.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NEW YORK, *et al.*, Plaintiffs, vs. U.S. DEP'T OF COMMERCE, *et al.*, Defendants	Case No. 1:18-cv-2921 (JMF)

BRIEF OF THE STATES OF OKLAHOMA, LOUISIANA, ALABAMA, ARKANSAS, FLORIDA, GEORGIA, INDIANA, KANSAS, KENTUCKY, BY AND THROUGH GOVERNOR MATTHEW G. BEVIN, MAINE, BY AND THROUGH GOVERNOR PAUL R. LEPAGE, MICHIGAN, MISSOURI, MONTANA, NEBRASKA, SOUTH CAROLINA, TENNESSEE, AND TEXAS, AND THE PEOPLE OF THE STATE OF COLORADO *EX REL.* CYNTHIA H. COFFMAN, IN HER OFFICIAL CAPACITY AS COLORADO ATTORNEY GENERAL, AS AMICI CURIAE IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Cynthia H. Coffman
Attorney General of Colorado
Frederick R. Yarger
Solicitor General
Glenn E. Roper
Deputy Solicitor General

Jeff Landry
Attorney General of Louisiana
Elizabeth Murrill
Solicitor General

Steve Marshall
Attorney General of Alabama

Leslie Rutledge
Attorney General of Arkansas

Pamela Jo Bondi
Attorney General of Florida

Christopher M. Carr
Attorney General of Georgia

Mike Hunter
Attorney General of Oklahoma
Mithun Mansinghani (*pro hac vice*)*
Solicitor General
Michael K. Velchik
Assistant Solicitor General
OKLAHOMA OFFICE OF THE
ATTORNEY GENERAL
313 NE 21st Street
Oklahoma City, OK 73105
P: (405) 522-4392

*Counsel of Record for the States of Oklahoma, Louisiana, Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, by and through Governor Matthew G. Bevin, Maine, by and through Governor Paul R. LePage, Michigan, Missouri, Montana, Nebraska, South Carolina, Tennessee, and Texas, and the People of the State of Colorado *ex rel.* Cynthia H. Coffman, in her official capacity as Colorado Attorney General.

Curtis T. Hill, Jr.
Attorney General of Indiana

Derek Schmidt
Attorney General of Kansas

Matthew G. Bevin
Governor of Kentucky

Paul R. LePage
Governor of Maine

Bill Schuette
Attorney General of Michigan

Josh Hawley
Attorney General of Missouri

Tim Fox
Attorney General of Montana

Doug Peterson
Attorney General of Nebraska

Alan Wilson
Attorney General of South Carolina

Herbert H. Slatery III
Attorney General and Reporter, State of Tennessee

Ken Paxton
Attorney General of Texas

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CONSTITUTION

OTHER

INTERESTS OF AMICI

Amici curiae the States of States of Oklahoma, Louisiana, Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, by and through Governor Matthew G. Bevin, Maine, by and through Governor Paul R. LePage, Michigan, Missouri, Montana, Nebraska, South Carolina, Tennessee, and Texas, and the People of the State of Colorado *ex rel.* Cynthia H. Coffman, in her official capacity as Colorado Attorney General, have a direct interest in this case. *Amici* States rely upon demographic information specifically provided by the Department of Commerce when redistricting. 13 U.S.C. § 141(c). The Bureau's decision to include a citizenship question in the 2020 Census will affect *amici* States' ability to comply with the Voting Rights Act of 1965 ("VRA"), codified at 52 U.S.C. § 10301, by affording States superior data of the citizen voting age population.

In light of these benefits, sixteen States wrote letters to the Secretary of Commerce formally requesting that he include a citizenship question on the 2020 census.[1] Based in part upon these requests, the Bureau plans to include a citizenship question on the 2020 Census, as it is constitutionally and statutorily permitted to do. Memorandum to Karen Dunn Kelley, Under Secretary for Economic Affairs, from Wilbur Ross, Secretary of Commerce, on Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire at 1 (Mar. 26, 2018) ("Ross Memo") ("[M]y staff and I reviewed over 50 incoming letters from stakeholders, interest groups, Members of Congress, and state and local officials regarding reinstatement of a citizenship question on the 2020 decennial census.").

[1] Letter from Steve Marshall, Attorney General of Alabama to Wilbur Ross, U.S. Secretary of Commerce (Feb. 23, 2018); Letter from Jeff Landry, Attorney General of Louisiana, to Wilbur Ross, U.S. Secretary of Commerce (Feb. 8, 2018); Letter from Ken Paxton, Attorney General of Texas, to Dr. Jamin, U.S. Census Bureau (Feb. 23, 2018); Letter from Mike Hunter, Attorney General of Oklahoma, to Wilbur Ross, U.S. Secretary of Commerce (March 13, 2018). The Oklahoma Attorney General letter was co-signed by the Attorneys General of Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, Michigan, Mississippi, Nebraska, South Carolina, Tennessee, and West Virginia.

ARGUMENT

Citizenship still matters. It has always been and continues to be the hallmark of civic participation. It is nothing short of sovereignty as it exists at the atomic level. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995). "Citizenship … was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship." *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950).

The lack of reliable data on citizenship degrades each citizen's right to participate in free and fair elections. When legislators determine districts based on population without access to accurate statistics on citizenship, the result is that legally eligible voters may have their voices diluted or distorted. Matters of such constitutional importance should not be unnecessarily imperiled when the solution is as simple as a question on a census form.

In recognition of this commonsense principle, the Bureau has decided to include a question about citizenship on the 2020 Census. This decision adds a citizenship question just like questions on age, name, race, sex, relationship status, Hispanic origin, and housing status—the other questions to be asked on the 2020 Census. And it stands to provide substantial, known benefits to States complying with the VRA.

Yet "[a]s one season follows another, the decennial census has again generated a number of reapportionment controversies." *Franklin v. Massachusetts*, 505 U.S. 788, 790 (1992); *see also Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996) (noting "the plethora of lawsuits that inevitably accompany each decennial census"). This time, Plaintiffs argue that the federal government lacks the constitutional authority to ask its residents whether or not they are citizens of this country. This argument has been twice rejected, once at the dawn of the 20th century and then again at the turn of the 21st. *United States v. Moriarity*, 106 F. 886 (C.C.S.D.N.Y. 1901); *Morales v. Daley*, 116 F. Supp.2d 801, 809 (S.D. Tex. 2000), *aff'd sub nom. Morales v. Evans* 275 F.3d 45 (5th Cir. 2001). It is also inconsistent with centuries of

executive branch practice. Because precedent controls the outcome of this case, this Court should grant Defendants' Motion to Dismiss.

I. History of citizenship questions.

A. There is a long tradition of using the census to collect additional information beyond a mere enumeration.

"Census taking is an age-old practice," *Utah v. Evans*, 536 U.S. 452, 496 (2002) (Thomas, J., concurring in part and dissenting in part), and has long been a tool to collect more information than a mere headcount. The Pharaohs of Ancient Egypt further asked every inhabitant to declare how he earned his living. Herodotus, Histories 2.177. The Bible records several censuses, which were not exclusively limited to headcounts. Exodus 30:11-16 (collecting atonement monies); Numbers 1-4 (separately counting men above the age of 20 capable of military service); 1 Chron. 21 (same). And Ancient Athens was known to have separately counted citizens, metics (i.e. resident aliens), and slaves. Hayman Alterman, Counting People: The Census in History 30 (1969).

Most notably, the Roman "census" (from which the English word derives) was established in the 6th century B.C. by King Servius Tullius to count the number of arms-bearing citizens. During the Roman Republic, the head of each family was required to appear in the Campus Martius to give under oath an account of himself, his family, and all his property, including: his full name, whether he was a freedman, his age, whether he was married, the number and names of children, a list of all his property, and his citizenship status. Officials made a list of citizens that was then published.

The first English census was taken by William I and published in the Domesday Book in 1086. Inhabitants were asked: what the local manor was called; who held it in 1066; who held it now; the area of land the manor encompassed; how many ploughs there were; how many freemen, sokemen,

villans, cottages, and slaves there were; a description of the land's natural resources; a valuation of the property; and a description of how much property each freeman and sokeman had.[2]

B. There is a long history of including a citizenship question on the census.

"[F]rom the first census, taken in 1790, the Congress has never performed a mere headcount. It has always included additional data points, such as race, sex, and age of the persons counted." *Morales*, 116 F. Supp.2d at 809. Between 1820 and 1950, almost every decennial census asked a question about citizenship in some form. *See* Dfs. Motion to Dismiss, Doc. 155, at 3-6 (May 25, 2018) ("MTD") (reviewing history of census questions).[3] It was not until 1960—following more than 30 years of very low immigration levels—that the census omitted a question about citizenship, although even that census asked about each respondent's "[p]lace of birth" and "[i]f foreign born … the person's mother tongue" (as well as the birth country of each person's mother and father).[4] In 1970, the census included on its long-form questionnaire: "Where was this person born?" and "For persons born in a foreign country—Is the person naturalized?"[5] Again in 1980, the census asked a sample of respondents "In

[2] Before the first decennial census in 1790, no modern nation had conducted a census (although several colonial States did so). The Twenty-Second Decennial Census, 18 U.S. Op. Off. Legal Counsel 184, 188 (1994) (citing Alterman, *supra*, at 164). The absence of a national census between the Domesday Book and Enumeration Clause appears to be explained by a fear that the biblical plague that beset the Jews after David's census would reprise itself. Indeed, the British seem to have only instituted their modern census after receiving assurances from the American example that nothing bad would happen if their people were counted. Alterman, *supra*, at 205-07.

[3] *See also* Act of March 14, 1820, 3 Stat. 548, 550; Act of March 23, 1830, 4 Stat. 383, 389; Act of May 23, 1850, 9 Stat. 430, 433; Act of March 3, 1879, 20 Stat. 475, 477; Act of March 3, 1899, 30 Stat. 1014, 1015; Act of July 2, 1909, 36 Stat. 1, 3; Act of March 3, 1919, 40 Stat. 1291, 1294; Act of June 18, 1929, 46 Stat. 21, 22.

[4] U.S. Census Bureau, *History: 1960 (Population)*, www.census.gov/history/www/through_the_decades/index_of_questions/1960_population.html. A citizenship question *was* included on the 1960 Census questionnaire for all residents of New York state. *See* Frederick G. Bohme, *Twenty Censuses: Population and Housing Questions 1790-1980*, Bureau of the Census, at 71 (Oct. 1979), *available at* https://www.census.gov/history/pdf/20censuses.pdf.

[5] U.S. Census Bureau, *History: 1970 (Population)*, www.census.gov/history/www/through_the_decades/index_of_questions/1970_population.html.

what state or foreign country was the person born?" and "If this person was born in a foreign country … Is this person a naturalized citizen of the United States?"[6] Then in 1990, the long-form, sent to about one in six households, directly asked respondents "Is this person a citizen of the United States?"[7] And it repeated this question in 2000.[8]

Following the 2000 census, the Bureau decided to retire the long-form questionnaire and initiate the American Community Survey ("ACS"), beginning in 2005. The ACS features a question on citizenship, and this has been asked every year from 2005 until the present.[9] In total, the federal government has asked a resident whether he is a citizen of this country more than a billion times since 1820.[10] Given this nearly unbroken history of asking about citizenship—repeatedly in the decennial census, and yearly in the ACS—Plaintiffs' assertion that it violates the U.S. Constitution to include a citizenship question in the 2020 census is remarkable.

Contrary to Plaintiffs' assertion that "no citizenship question has been included on the decennial census since 1950," Pls. First Amend. Compl., Doc. 85, at ¶ 97 & n.43 (Apr. 30, 2018) ("FAC"), the long-form questionnaire *was* the decennial census questionnaire for selected households from 1970 to 2000. BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION AND HOUSING: PROCEDURAL HISTORY, § 15, 1 (1976); BUREAU OF THE CENSUS, PROCEDURAL HISTORY: 1980 CENSUS OF POPULATION AND HOUSING, § 12, 3; BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION AND HOUSING, § 14, 3; BUREAU OF THE CENSUS, 2000 CENSUS OF POPULATION AND HOUSING, V.1, chapter 1, 3 (2009).

[6] U.S. Census Bureau, *History: 1980 (Population)*, www.census.gov/history/www/through_the_decades/index_of_questions/1980_population.html.

[7] U.S. Census Bureau, *History: 1990 (Population)*, www.census.gov/history/www/through_the_decades/index_of_questions/1990_population.html.

[8] U.S. Census Bureau, *History: 2000*, www.census.gov/history/www/through_the_decades/index_of_questions/2000_1.html.

[9] U.S. Census Bureau, *American Community Survey: Questionnaire Archive*, www.census.gov/programs-surveys/acs/methodology/questionnaire-archive.html.

[10] This figure includes all residents enumerated from 1820 to 1830 and from 1850 to 1950, plus those who responded to the long form questionnaire from 1980 to 2000, as well as all those surveyed in the ACS from 2005 to 2016.

II. Legal basis for including a question about citizenship status.

"The authority to gather reliable statistical data reasonably related to governmental purposes and functions is a necessity if modern government is to legislate intelligently and effectively." *United States v. Rickenbacker*, 309 F.2d 462, 463-64 (2d Cir. 1962) (Thurgood Marshall, J.); *accord Wyman v. James*, 400 U.S. 309, 321 (1971). For this reason, the Constitution empowers the federal government with wide discretion in conducting a decennial census, and Congress has statutorily authorized the Secretary to gather information beyond a mere headcount. 13 U.S.C. § 141(a). Thus, the census not only functions as a predicate mechanism for apportionment but "also provides important data for Congress and ultimately for the private sector." *Baldrige v. Shapiro*, 455 U.S. 345, 353 (1982).

A. The text of the Constitution explicitly recognizes the ability of Congress to use the Census for further inquiries.

The U.S. Constitution provides that: "The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, **in such Manner as they shall by Law direct.**" Art. I, § 2, cl. 3 (emphasis added). Thus, "[t]he text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration.'" *Wisconsin*, 517 U.S. at 19. Contra Plaintiffs' argument that the Constitution requires the Bureau to employ a specific method—only asking questions that maximize response for headcount, nothing more—"[t]he Constitution's text does not specify any such limitation. Rather, the text uses a general word, 'enumeration,' that refers to a counting process without describing the count's methodological details." *Evans*, 536 U.S. at 464. Indeed, "[t]he final part of the [Enumeration Clause] says that the 'actual Enumeration' shall take place 'in such Manner as' Congress itself 'shall by Law direct,' thereby suggesting the breadth of congressional methodological authority, rather than its limitation." *Id.* (citation omitted). What is more, the text of the Enumeration Clause would seem to explicitly authorize enumerators to inquire about a respondent's political status, insofar

as the Clause directs enumerators to ascertain whether a resident is a "free Person[ ] … Indian[ ] not taxed" or "other Person[ ]." U.S. Const. art. I, § 2, cl. 3.

This is consistent with "the basic purpose of the Census Clause," which "reflects several important constitutional determinations: that comparative state political power in the House would reflect comparative population, not comparative wealth; that comparative power would shift every 10 years to reflect population changes; that federal tax authority would rest upon the same base; **and that Congress**, not the States, **would determine the manner of conducting the census**." *Evans*, 536 U.S. at 477 (emphasis added and citations omitted).

It is also consistent with the original understanding of this Clause. For example, "[d]uring congressional debates James Madison emphasized the importance of census information beyond the constitutionally designated purposes and encouraged the new Congress to 'embrace some other subjects besides the bare enumeration of the inhabitants.'" *Baldrige*, 455 U.S. at 354 n.9 (citation omitted). And as for "[c]ontemporaneous general usage of the word 'enumeration' … [l]ate-18th-century dictionaries define the word simply as an 'act of numbering or counting over,' without reference to counting methodology." *Evans*, 536 U.S. at 476 (citations omitted).

In this context, judicial deference has a long pedigree. In 1870 the Supreme Court wrote:

> The Constitution orders an enumeration of free persons in the different states every ten years. The direction extends no further. Yet Congress has repeatedly directed an enumeration not only of free persons in the States but of free persons in the Territories, and not only an enumeration of persons but the collection of statistics respecting age, sex, and production. Who questions the power to do this?

The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 536 (1870), *abrogated on other grounds, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

Against this backdrop, both the Supreme Court and federal Courts of Appeals have consistently rejected claims that the Bureau's methodology resulted in less than an actual enumeration of a State's residents. *Evans*, 536 U.S.at 474 (upholding Bureau's discretion to adjust for statistical

errors); *Wisconsin*, 517 U.S. 1 (alleging undercount); *City of Los Angeles v. U.S. Dep't of Commerce*, 307 F.3d 859 (9th Cir. 2002) (upholding Bureau's discretion not to adjust data); *Nat'l Law Center on Homelessness & Poverty v. Kantor*, 91 F.3d 178 (D.C. Cir. 1996) (alleging homeless persons undercounted); *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993) (alleging number of uncounted was not appropriately adjusted); *Tucker v. U.S. Dep't of Commerce*, 958 F.2d 1411 (7th Cir. 1992) (alleging minorities undercounted and their number not appropriately adjusted); *Borough of Bethel Park v. Stans*, 449 F.2d 575 (3d Cir. 1971) (upholding Bureau's discretion to count people away from their families, e.g. college students, armed forces, etc.); *see also District of Columbia v. U.S. Dep't of Commerce*, 789 F. Supp. 1179 (D.D.C. 1992) (upholding Bureau's decision to count inmates in prison); 41 Op. Att'y Gen. 31 (1949) (concluding that Bureau had discretion to decide to count inhabitants abroad on date of enumeration in light of long practice); *cf. Dep't of Commerce v. U.S House of Representatives*, 525 U.S. 316, 343 (1999) (requiring an actual enumeration, rather than mere sampling). This case is no different.

B. This Court's precedent holds that the Bureau may constitutionally include a citizenship question on the census.

Courts have already addressed and rejected Plaintiffs' specific claims. The Circuit Court for S.D.N.Y. held in *United States v. Moriarity* that the Enumeration Clause

> does not prohibit the gathering of other statistics, if 'necessary and proper,' for the intelligent exercise of other powers enumerated in the constitution, and in such case there could be no objection to acquiring this information through the same machinery by which the population is enumerated, especially as such course would favor economy as well as the convenience of the government and the citizens.

106 F. 886, 891 (C.C.S.D.N.Y. 1901). Indeed, "[i]t would be curious governmental debility that should incapacitate the nation from directing its census enumerator to ask an inhabitant concerning his business because for certain purposes he was only to be counted, and perhaps his gender ascertained." *Id.* After all, "the intelligent action of the general government," *id.*, depends upon access to such information. Thus, this Court has already addressed and rejected Plaintiffs' claim 100 years ago.

Likewise, the U.S. Court for the Southern District of Texas rejected a challenge to, *inter alia*, the Bureau's inclusion of a citizenship question on the 2000 Census. 116 F. Supp.2d 801, 815 (S.D. Tex. 2000), *aff'd sub nom. Morales v. Evans* 275 F.3d 45 (5th Cir. 2001). In doing so, the court noted that "Congress has never performed a mere headcount. It has always included additional points, such as race, sex, and age of the persons counted." *Id.* at 809. And it upheld the inclusion not only of a citizenship question but also those questions regarding race and ethnicity. *Id.* at 815. Furthermore, the court acknowledged the federal government's argument that, in fact, "the collection of data such as that asked for on the Census 2000 forms is vital to guard against discrimination based on race or ethnicity" and pointed to several cases that "rel[ied] upon census data to review equal protection challenges to redistricting plans." *Id.* at 813 (citing *Hunt v. Cromartie*, 526 U.S. 541, 544 (1999); *Miller v. Johnson*, 515 U.S. 900, 906 (1995); *Shaw v. Reno*, 509 U.S. 630, 634 (1993)).

In a similar vein, the U.S. Court for the District of Delaware in *United States v. Little* rejected a constitutional challenge to the census's demographic questions as "wholly without merit." 321 F. Supp. 388, 391 (D. Del. 1971). The court explained, "The fact that there is a zone for the exercise of discretion by the Secretary in framing the questions which will elicit the necessary statistical information within the scope of the census to be undertaken does not render the delegation invalid." *Id.* at 391. Nor did demographic questions unduly interfere with a resident's right to privacy, because "[t]he questions, which defendant allegedly refused to answer, all relate and bear upon important federal concerns, such as population, housing, labor and health." *Id.* at 392.

Finally, in *United States v. Rickenbacker* then-Judge Thurgood Marshall held that the government could constitutionally penalize residents who refused to respond to demographic questions contained in the census questionnaire. 309 F.2d 462, 463 (2d Cir. 1962). In so doing, he emphasized that "[t]he authority to gather reliable statistical data reasonably related to governmental purposes and functions is a necessity if modern government is to legislate intelligently and effectively." *Id.* (citations omitted).

C. There is no empirical evidence showing that asking about citizenship will result in data suppression.

Citizenship questions are not untested. Rather, they have consistently been included on the census and the ACS for many iterations. Plaintiffs do not claim that asking about citizenship in these surveys has had a detrimental effect on response rates. In fact, there is evidence suggesting the inclusion of the citizenship question in the ACS has had no effect on the response rate in minority communities. *Rodriguez v. Harris Cty.*, 964 F. Supp.2d 686, 730-31 (S.D. Tex. 2013) (finding that ACS approximated the census tallies for ethnic and minority populations); *Fabela v. City of Farmers Branch*, No. 3:10-CV-1425-D, 2012 WL 3135545, at *6 (N.D. Tex. Aug. 2, 2012) (noting that the ACS significantly over-represents the number of Hispanics in Dallas County). Further, when the citizenship question was introduced in the ACS in 2005, the response rate actually increased for the following four years.[11] Plaintiffs' claims of data suppression are therefore exaggerated and unsupported.[12]

Further evidence from the Bureau itself suggests that the inclusion of a citizenship question would not significantly deter participation in census surveys. In 2006, the Bureau studied proposed modifications to ACS questions, including the citizenship question. Philip Harris, et al., *Evaluation Report Covering Place of Birth, U.S. Citizenship Status, and Year of Arrival* (Jan. 12, 2007).[13] The study concluded that revising that question to ask for more detailed information—namely, year of naturalization—did not impact either the overall response rate, which was greater than 95 percent, or the nonresponse rate to the citizenship question, which was about 3 percent. *Id.* at 15, 19. This high response rate—and the fact that even respondents who decline to answer the citizenship question (the

[11] U.S. Census Bureau, *American Community Survey: Response Rates*, www.census.gov/acs/www/methodology/sample-size-and-data-quality/response-rates/.

[12] In addition, the Department of Commerce illustrates the comprehensive efforts it is scheduled to take in order to ensure responses from as many residents as possible. MTD, at 10-11.

[13] *Available at* www.census.gov/library/working-papers/2007/acs/2007_Harris_01.html.

3 percent) are still counted in the broader survey—undermine Plaintiffs' assertion that reintroducing a citizenship question in the census will cause an undercount. *Id.* at 19.

Rather than providing empirical support for their assertion, Plaintiffs claim that the Bureau has "acknowledged for decades" that asking about citizenship reduces response rates. FAC ¶ 38. But the Bureau has acknowledged no such thing. Most of the alleged "acknowledgements" were responses to the proposed exclusion of undocumented residents from the census entirely. For example, Plaintiffs cite *Federation for American Immigration Reform v. Klutznick*, *see* FAC ¶ 39, but the issue in that case was not whether to ask about citizenship, but whether the Bureau was required to "exclude [illegal aliens] from the apportionment base." 486 F. Supp. 564, 567 (D.D.C. 1980). Likewise, the 1988 and 1989 congressional testimony of Bureau officials, *see* FAC ¶¶ 40-41, related to a proposal to exclude undocumented residents from the census.[14] With respect to that proposal, Bureau officials were primarily concerned with the effect of asking, not about citizenship, but about legal residency.[15] And rightfully so, since asking whether someone is lawfully present raises very different concerns from asking whether he is a U.S. citizen, as many non-citizens are lawfully present. *Cf. Torao Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419-20 (1948) (noting that certain rights equally extend to citizens and lawfully present non-citizens); *Juarez v. Nw. Mut. Life Ins. Co.*, 69 F. Supp.3d 364, 369 (S.D.N.Y. 2014) (same). The 2009 letter from former Bureau directors supports that distinction, *see* FAC ¶ 43, since it contrasted a proposed "untested" question about both "citizenship and immigration status" with the well-tested ACS citizenship question, which "only asks if respondents are U.S. citizens, not

[14] *See* Census Equity Act, H.R. 2661, 101st Cong. § 2(2) (1989), *available at* www.congress.gov/bill/101st-congress/house-bill/2661/text.

[15] *See Census Equity Act: Hearings Before the Subcomm. on Census & Population of the H. Comm. on Post Office & Civ. Serv.*, 101st Cong. 43-44 (1989) (statement of C. Louis Kincannon); *see also Exclude Undocumented Residents from Census Counts Used for Apportionment: Hearing Before the Subcomm. on Census & Population of the H. Comm. on Post Office & Civil Serv.*, 100th Cong. 50 (1988) (testimony of John Keane).

if they are in the country lawfully." *Statement of Former Census Directors on Adding a New Question to the 2010 Census* 1 (Oct. 16, 2009).[16]

To the degree that Plaintiffs possess but have so far declined to share evidence that a citizenship question will materially depress the census response rate, they had an adequate opportunity to present this to the Bureau back when the agency was considering whether or not to include the question. *Amici* States and numerous other shareholders availed themselves of this opportunity to present their views. Ross Memo at 1-2. But "no one provided evidence that there are residents who would respond accurately to a decennial census that did not contain a citizenship question but would not respond if it did." *Id.* at 5.

D. Plaintiffs provide no limiting principle for their argument.

Plaintiffs' theory also lacks a limiting principle. The census has long included many other questions that in theory could depress voter turnout to a far greater degree than a citizenship question: May the Bureau ask about a person's race? (The Bureau has done so in every single census.)[17] May the Bureau ask whether a person is Spanish, Hispanic, or Latino? (The Bureau has done so in some form in every census since 1970.)[18] Does the answer to this question change from administration to administration because, in Plaintiffs' view, the administration's stance on immigration law enforcement may depress response rates to the Hispanic origin question? *See* FAC ¶ 76 (alleging that

[16] The remaining "acknowledgements" cited by Plaintiffs were not positions of the Bureau, but merely private opinions of former Bureau officials. *See* FAC ¶ 42 (citing congressional testimony of former Director Prewitt); *id.* ¶ 45 (citing the former Directors' brief filed in *Evenwel v. Abbott*, which relied heavily on Prewitt's testimony).

[17] U.S. Census Bureau, *History: Index of Questions*, www.census.gov/history/www/through_the_decades/index_of_questions/.

[18] U.S. Census Bureau, *History: 2010*, www.census.gov/history/www/through_the_decades/index_of_questions/2010.html; *see also* sources cited *supra* at 9-10 nn.5-8.

the citizenship question is unlawful because it "has not been tested in the contemporary environment of high immigrant anxiety"—which is true of other questions, like that of Hispanic origin). Any one of these questions could depress response turnouts, and yet Plaintiffs do not complain about these. *Cf. Morales*, 116 F. Supp.2d at 809 (upholding race and Hispanic origin questions). Indeed, under Plaintiffs' broad theory, even non-census related actions, like the President's decision to rescind DACA or campaign-trail statements, would violate the Enumerations Clause because, according to Plaintiffs, "the Census Bureau found that unprecedented anxiety in immigrant communities—even without the inclusion of a demand for citizenship status—could increase non-response rates and adversely affect data quality for the 2020 Census." FAC at ¶¶ 47-51, 77. If this Court should find that a simple question about citizenship status is unconstitutional or arbitrary and capricious, that would set a very low bar for invalidating virtually any census question. As Justice Scalia prophesied, "The prospect of th[e Supreme] Court's reviewing estimation techniques in the future, to determine which of them *so obviously* creates a distortion that it cannot be allowed, is not a happy one. (I foresee the new specialty of 'Census Law.')." *Dep't of Commerce*, 525 U.S. at 349 (Scalia, J., concurring in part).

* * *

Every court to address this question—including this Court—has held that the Enumeration Clause does not preclude the government from asking residents additional demographic questions. This Court should follow the guidance of these decisions as well as the consistent practice of the executive branch over two centuries. *See N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) ("[I]n interpreting the Clause, we put significant weigh upon historical practice.") (emphasis deleted); *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) ("[A] practice of at least twenty years duration 'on the part of the executive department, acquiesced in by the legislative department … is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.'") (citation omitted); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401

(1819) ("[A] doubtful question … , if not put at rest by the practice of the government, ought to receive a considerable impression from that practice."). This respect for historical practice is at its acme in the context of the Enumeration Clause. *Wisconsin*, 517 U.S. at 21; *Franklin*, 505 U.S. at 803-06; *see also Dep't of Commerce v. Montana*, 503 U.S. 442, 465 (1992) ("To the extent that the potentially divisive and complex issues associated with apportionment can be narrowed by the adoption of both procedural and substantive rules that are consistently applied year after year, the public is well served."). It would therefore be an extraordinary jolt to constitutional administration for this Court to rule that nearly every past census was unconstitutional.

III. Including a citizenship question would yield significant benefits.

The Bureau's decision to include a citizenship question reflects good public policy. Doing so would provide substantial benefits by reducing litigation under Section 2 of the Voting Rights Act, allowing States to achieve greater certainty in redistricting, and promoting the equal suffrage of all citizens. Any costs associated with the decision are hypothetical and insubstantial.

A. States will better be able to execute their statutory and constitutional duties with more accurate citizenship data than the ACS can supply.

States must comply with Section 2 of the Voting Rights Act, which prohibits any practice that "results in a denial or abridgement of the right of any citizen … to vote on account of race or color." 52 U.S.C. § 10301. Claims under Section 2 most commonly involve allegations of vote dilution, *i.e.* "the dispersal of [a minority group] into districts in which they constitute an ineffective minority of voters or by the concentration of [the minority] into districts where they constitute an excessive majority." *Thornberg v. Gingles*, 478 U.S. 30, 46 n.11 (1986). To establish a vote dilution claim, a "minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district." *Id.* at 50 & n.16. But the Supreme Court has made clear that it is not enough to say that a minority group forms the majority of the total population in a

given area, or even forms "a bare majority of the voting-age population"; rather, "the relevant numbers must include citizenship" since "only eligible voters affect a group's opportunity to elect candidates." *LULAC v. Perry*, 548 U.S. 399, 429 (2006). Failure to take into account citizenship risks creating majority-minority districts "only in a hollow sense." *Id.* Thus, in order for States to achieve any certainty over whether their districts comply with Section 2, they must obtain information about the voting-eligible population.[19] Because "[t]he decennial census does not include a question on citizenship … the sole source of citizenship data published by the Census Bureau now comes from the [ACS]." *Patino v. City of Pasadena*, 230 F. Supp.3d 667, 687 (S.D. Tex. 2017) (citations omitted). But as New York and other Plaintiffs have acknowledged elsewhere,[20] ACS data is inferior for several reasons.

First, ACS data is less accurate.[21] The ACS surveys only one out of every thirty-eight households, whereas a census question would reach every resident. This smaller sample size translates to larger margins of error. And although courts presume the decennial data is accurate and reliable, *e.g., Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 853-54 (5th Cir. 1999); *United States v.*

[19] Because of demographic and socioeconomic differences between minority populations and the national population, States cannot assume that the percentage of minority voter-eligible residents in a given area matches the percentage of minority residents in the same area. Brief of U.S., *Evenwel v. Abbott*, No. 14-940, at 33 (Sept. 25, 2015). A higher proportion of the country's minority population consists of children under the age of 18; there are disparities in the rates of citizenship among ethnicities; and even among citizens of voting age, members of some minority groups are less likely to be eligible voters because of felon voting laws. *Id.*

[20] Brief of New York, Alaska, California, Delaware, Hawai'i, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, North Dakota, Oregon, Rhode Island, Vermont, Virginia, and Washington as *Amici Curiae* in Support of Appellees, *Evenwel v. Abbott*, No. 14-940, at 1-5 & 14-26 (U.S. Sept. 25, 2015) ("N.Y. Br., Evenwel").

[21] Statistical accuracy in Section 2 litigation is very important, as cases often come down to 1-2% differences in citizen voting age populations. *See, e.g.*, *LULAC*, 548 U.S. at 429; *Luna v. Cty. of Kern*, 291 F. Supp.3d 1088, 1114 (E.D. Cal. 2018); *Rios-Andino v. Orange Cty.*, 51 F. Supp.3d 1215, 1224-25 (M.D. Fla. 2014).

Village of Port Chester, 704 F. Supp. 2d 411, 439 (S.D.N.Y. 2010), the reliability of ACS data is a significant and costly focus of section 2 litigation, particularly in cases involving small political units like town councils and school districts for which ACS data has large margins of error. *See, e.g.*, *Benavidez v. Irving Indep. Sch. Dist.*, 690 F. Supp. 2d 451, 459-60 (N.D. Tex. 2010) (rejecting plaintiff's reliance on ACS data); *see also Mo. State Conf. of NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp.3d 1006, 1033 & n.10 (E.D. Mo. 2016); *Pope v. Cty. of Albany*, No. 11-CV-0726, 2014 WL 316703, at *13 n.22 (N.D.N.Y. Jan. 28, 2014). Indeed, litigants often must expend significant resources to cull separate corroborative data to successfully overcome criticisms of ACS data. *See, e.g.*, *Fabela*, 2012 WL 3135545, at *4-8. And even where the parties agree that it is appropriate to use ACS data, there is litigation over obscure technical issues about *how* to use the data. *See, e.g.*, *Rios-Andino*, 51 F. Supp. 3d at 1224-25 (resolving dispute over whether ACS data indicated proposed district had 50.19% or 48.0% Latino citizen voting age population).

Second, ACS data is less granular than decennial census data. Census data is available at the level of census block groups (600 – 3,000 people) and census tracts (1,500 – 8,000 people).[22] But because of the ACS's limited sample size, its 1-year estimates are only statistically reliable for areas of 65,000 people or more. *Perez v. Perry*, No. SA-11-CV-360, 2017 WL 962686, at *3 (W.D. Tex. Mar. 10, 2017). In other words, such data is reliable only for 6.6% of school districts, 10.4% of urban areas, and 25% of counties in the country.[23] The ACS's 3-year estimates are available for areas containing more than 20,000 people, and only the 5-year estimates are available for smaller areas such as census tract and block groups—although even here "block group estimates may contain large margins of error." *Id.*

[22]U.S. Census Bureau, Participant Statistical Areas, *available at* www2.census.gov/geo/pdfs/partnerships/PSAP_info_sheet.pdf.

[23] U.S. Census Bureau, *A Compass for Understanding and Using American Community Survey Data: What State and Local Governments Need to Know*, at 2-3 (Feb. 2009), *available at* www.census.gov/content/dam/Census/library/publications/2009/acs/ACSstateLocal.pdf.

Plaintiffs themselves have argued that without a citizenship question on the census, "[Citizen Voting Age Population] figures simply do not exist at the level of granularity that the States require for purposes of drawing state legislative districts." N.Y. Br., Evenwel, at 19.

Third, the ACS dataset does not mesh with the decennial census dataset. ACS data is continually collected on a monthly basis and only later aggregated into one-, three-, and five-year estimates. The decennial census, by contrast, is a snapshot of the country taken once per decade. Further complicating matters, ACS geography (urban areas, census tracts, block groups, etc., including how those terms are defined) resets with the decennial census, which results in a data discontinuity at precisely the time officials who are engaged in redistricting need race and citizenship data to ensure VRA compliance. Thus, any attempt to merge population data from the census with citizenship data from the ACS requires significant adjustments to the datasets.

Finally, the ACS does not provide an authoritative dataset for States to rely upon. Rather, courts must wrestle with whether the relevant dataset should be the one-, three-, or five-year estimate. Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 CARDOZO L. REV. 755, 777 (2001) ("Each [range] … indicate[s] a different number of citizens, include[s] a different statistical range for each level of geography, and [is] amenable to different arguments as to their relative validity."). And litigants may further debate when the relevant time period should begin and end. *See, e.g.*, *Rodriguez*, 964 F. Supp.2d at 731-33 (resolving whether to use 2005-2009 or 2006-2010 ACS data). In contrast, the decennial census occurs only once every ten years. There is no room for manipulation in selecting the relevant time-band—a virtue Plaintiffs have acknowledged. *See* N.Y. Br., Evenwel, at 19-20; *cf. Dep't of Commerce*, 525 U.S. at 348-49 (Scalia, J., concurring in part) (arguing for the interpretation "with minimal possibility of partisan manipulation").

In the absence of reliable citizenship data from the federal census, States lack the resources to conduct their own statewide citizenship surveys. Some States—including Plaintiffs New York and

Massachusetts—used to do so in order to apportion state districts according to citizen populations. N.Y. Br., Evenwel, at 1-5. Yet because States lacked the expertise and resources of the Bureau, their data was intolerably inaccurate. Ruth C. Silva, *The Population Base for Apportionment of the New York Legislature*, 32 FORDHAM L. REV. 1 (1963). As a result, several States specifically amended their Constitutions to require only apportionment by population. *See* N.Y. Const. art. III, § 5-a; Mass Const. art. CXII; Tenn. Const. art. II, §§ 4-6.

* * *

Significant amounts of Section 2 litigation stem from the inaccuracies of ACS data, its incompatibility with decennial census data, and the lack of any authoritative dataset.[24] These uncertainties are compounded by the corresponding uncertainty as to how any particular court will view the same issues. The Bureau's simple step of adding a citizenship question to the census will reduce the likelihood of litigation and the expense of litigation that does occur by providing a unified dataset that is presumed to be authoritative, accurate, and reliable. Legislatures can therefore draw districts with greater certainty. And citizens, in turn, can rest more confident that their right to vote most fundamental right is being preserved.

B. Including a citizenship question on the census will not have any adverse effect on participating residents.

Census respondents have no reason to fear that disclosing their citizenship status will negatively affect them in any way.[25] First, as a matter of logic, non-citizen status does not imply illegal

[24] For example, *compare* Expert Report of Jorge Chapa, Ph.D. (Univ. of Ill. at Urbana-Champaign), Doc. 128-5 (Aug. 8, 2011), *with* Expert Report of Stephen Ansolabehere, Ph.D. (Harvard University), Doc. 272 (Aug. 31, 2011). *Perez v. Texas*, No. 5:11-cv-00360 (W.D. Tex.).

[25] Plaintiffs' fear is nothing new. Even in the very first census the federal government had to grapple with the fear of an undercount "because the religious scruples of some, would not allow them to give in their lists" and others "fear[ed] … that it was intended as the foundation of a tax[, which] induced them to conceal or diminished theirs." *Baldrige*, 455 U.S at 353-54, n.8 (quoting 31 The Writings of George Washington 329 (J. Fitzpatrick, ed. 1939)).

alien status. Even if the federal government sought to use census form responses to deport illegal immigrants, immigration officials would not be able to tell from the form whether a particular alien was here legally or illegally. *Cf. United States v. Greenberg*, 200 F. Supp. 382, 390-91 (S.D.N.Y. 1961) (noting that access to census lists "would be of little aid" in jury selection process).[26]

Moreover, the Bureau is statutorily prohibited from sharing any data where an "individual … can be identified." 13 U.S.C. § 9(a)(2). "Sections 8(b) and 9(a) explicitly provide for the nondisclosure of certain census data." *Baldrige*, 455 U.S. at 355. This "confidentiality of individual responses has long been assured by statute." *Franklin*, 505 U.S. at 818 n.18 (Stevens, J., concurring in part). And "the history of the Census Act and the broad language of the confidentiality provisions of § 9 make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality." *Carey v. Klutznick*, 653 F.2d 732, 739 (2d Cir. 1981) (citation and quotation marks omitted). By its text, "[n]o discretion is provided to the Census Bureau on whether or not to disclose the information referred to in §§ 8(b) and 9(a)." *Baldrige*, 455 U.S. at 355. As a result, this prohibition has been interpreted as "a flat barrier to disclosure with no exercise of discretion permitted." *Seymour v. Barabba*, 559 F.2d 806, 808 (D.C. Cir. 1977).

These protections reflect "a determination that the purpose of encouraging ready response to census inquiries would be better served by extending the privilege of confidentiality to the retained copies." *LaMorte v. Mansfield*, 438 F.2d 448, 452 (2d. Cir. 1971) (Friendly, J.); *see also Baldrige*, 455 U.S. at 361 ("[T]he Census Act embod[ies] explicit congressional intent to preclude all disclosure of raw

[26] Indeed, in quoting an Attorney General opinion, this Court previously noted: "The sole purpose of the census is to secure general statistical information regarding the population and resources of the country, and replies are required from individuals only to permit the compilation of such general statistics. No person can be harmed in any way by furnishing the information required. The census has nothing to do with taxation, with military or jury service, with the compulsion of school attendance, with the regulation of immigration or with the enforcement of any national, state or local law or ordinance. There need be no fear that any disclosure will be made regarding any individual person or his affairs." *FTC v. Orton*, 175 F. Supp. 77, 79-80 (S.D.N.Y. 1959) (quoting 36 Op. Att'y. Gen. 362, 366 (1930)).

census data reported by or on behalf of individuals.").[27] This "strong policy of nondisclosure" was implemented "to encourage public participation and maintain public confidence that information given to the Census Bureau would not be disclosed." *Id.* Indeed, the "Congressional purpose that filed information be kept inviolate is underscored by [o]ther section[s] which impos[e] substantial criminal sanctions for any unauthorized disclosure." *Bethlehem Steel Corp.*, 21 F.R.D. at 572 (citing 13 U.S.C. § 214); *see also* 13 U.S.C. § 213.

As a result, this Court and others have staunchly protected the confidentiality of census response forms. *Fed. Trade Com. v. Dilger*, 276 F.2d 739, 744 (7th Cir. 1960) (holding retained copies of response forms are protected from disclosure); *United States v. Int'l Bus. Machs. Corp.*, 20 Fed. R. Serv. 2d 1082, 1975 WL 905 (S.D.N.Y. 1975) (holding the Bureau's refusal to release responses does not violate due process); *Orton*, 175 F. Supp. at 78-79 (holding responses are protected from disclosure to federal agencies); *Bethlehem Steel Corp.*, 21 F.R.D. at 572 (holding responses could not be disclosed because of Congress' "clear and unambiguous" intention to keep them privileged); *see also St. Regis Paper Co. v. United States*, 368 U.S. 208, 218 (1961) (noting the importance of "free and full" submissions by the public to the Bureau); *Little*, 321 F. Supp. at 392 ("[T]he information obtained by the census questionnaire is strictly confidential. It may not be used other than for statistical reporting and may never be disclosed in any manner so as to identify any individual who has answered the questions.") (citation omitted). Not even States have a right to obtain census information that the Bureau deems confidential. *Senate of State of Cal. v. Mosbacher*, 968 F.2d 974, 978-79 (9th Cir. 1992) (California not entitled to Bureau's statistical methods because actual enumeration clause offers no right to

[27] And as this Court has previously noted: "One need not probe far to understand that when Congress imposed upon citizens the duty of disclosing information of a confidential and intimate nature, its purpose was to protect those who complied with the command of the statute. Apart from giving assurance to citizens that the integrity of the information would be preserved by the Government, another purpose was to encourage citizens to submit freely all data desired in recognition of its importance in the enactment of laws and other purposes in the national interests." *United States v. Bethlehem Steel Corp.*, 21 F.R.D. 568, 570 (S.D.N.Y. 1958).

disclosure). Nor, as a legal matter, should this Court rest its judgment on the assumption that federal executive officers will violate statutory law. If indeed there is a significant undercount of immigrant residents in the 2020 Census, it will only be because certain actors have politicized a commonsense issue by choosing to fan unsubstantiated fears that may deter non-citizens from participating in the census, rather than assuring the public that their responses are protected by the most robust legal mechanisms. These false rumors risk becoming a self-fulfilling prophecy.

C. The Bureau has the discretion to include a citizenship question, in light of its significant benefits and, at most, minimal costs.

The Bureau is charged with wide discretion in "prepar[ing] questionnaires, and … determin[ing] the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses." 13 U.S.C. § 5; *cf. id.* § 4 (authoring Secretary to "issue such rules and regulations as he deems necessary to carry out such functions and duties"); *id.* § 12 (authorizing Secretary to conduct electronic development work "as he may determine to be in the best interest of the Government"); *id.* § 13 (giving the Secretary discretion to procure professional services); *id.* § 141 ("In connection with any such census, the Secretary is authorized to obtain such other census information as necessary."). Here, the benefits are certain, known, and substantial. The costs are non-existent, or at most theoretical and insubstantial. In light of these competing concerns, the Bureau properly exercised its discretion to weigh the costs and benefits of including a citizenship question in this upcoming census, as the Bureau has done for many decades—and as civilizations have done for millennia.

CONCLUSION

When it comes to the census, "[t]he wisdom of its classifications is not for [courts] to decide in light of Congress' 180 years' experience with the census process." *Baldrige*, 455 U.S. at 361. In this case, Plaintiffs "are asking [this Court] to take sides in a dispute among statisticians, demographers,

and census officials." *City of Detroit*, 4 F.3d at 1378 (quoting *Tucker*, 958 F.2d at 1418). This, the Court should decline to do. For these reasons, this Court should GRANT Defendants' Motion to Dismiss

Respectfully submitted,

/s/ Mithun Mansinghani

Mike Hunter
Attorney General of Oklahoma
Mithun Mansinghani (*pro hac vice*)*
Solicitor General
Michael K. Velchik
Assistant Solicitor General
OKLAHOMA OFFICE OF THE
ATTORNEY GENERAL
313 NE 21st Street
Oklahoma City, OK 73105
P: (405) 522-4392

*Counsel of Record for the States of Oklahoma, Louisiana, Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, by and through Governor Matthew G. Bevin, Maine, by and through Governor Paul R. LePage, Michigan, Missouri, Montana, Nebraska, South Carolina, Tennessee, and Texas, and the People of the State of Colorado *ex rel.* Cynthia H. Coffman, in her official capacity as Colorado Attorney General.

Cynthia H. Coffman
Attorney General of Colorado
Frederick R. Yarger
Solicitor General
Glenn E. Roper
Deputy Solicitor General

Jeff Landry
Attorney General of Louisiana
Elizabeth Murrill
Solicitor General

Steve Marshall
Attorney General of Alabama

Leslie Rutledge
Attorney General of Arkansas

Pamela Jo Bondi
Attorney General of Florida

Christopher M. Carr
Attorney General of Georgia

Curtis T. Hill, Jr.
Attorney General of Indiana

Derek Schmidt
Attorney General of Kansas

Matthew G. Bevin
Governor of Kentucky

Paul R. LePage
Governor of Maine

Bill Schuette
Attorney General of Michigan

Josh Hawley
Attorney General of Missouri

Tim Fox
Attorney General of Montana

Doug Peterson
Attorney General of Nebraska

Alan Wilson
Attorney General of South Carolina

Herbert H. Slatery III
Attorney General and Reporter, State of Tennessee

Ken Paxton
Attorney General of Texas