

No. 18-557

IN THE
Supreme Court of the United States

IN RE UNITED STATES
DEPARTMENT OF COMMERCE, ET AL.,

Petitioners,

On Petition for a Writ of Mandamus to the
United States District Court for the
Southern District of New York

**Motion for Leave to File and Brief of the Public
Interest Legal Foundation as *Amicus Curiae* in
Support of Petitioners**

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MOTION FOR LEAVE TO FILE

Movant Public Interest Legal Foundation (“Foundation”) respectfully requests leave to file the accompanying brief as *amicus curiae* in support of the Petitioners. The Court’s order in this case on November 6, 2018 set forth that any *amicus curiae* briefs must be filed by November 13, 2018. In light of this briefing schedule, it was not possible for the Foundation to provide the 10 days advance notice ordinarily required by Supreme Court Rule 37(2)(a). The Foundation did promptly inform each party of its intention to file this brief and sought the parties’ consent. The parties consent to the filing of the Foundation’s brief.

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

in enforcing the Voting Rights Act and the Help America Vote Act of 2002, as well as a commissioner on the Federal Election Commission.

The Foundation believes that this brief—drawing from the expertise of the Foundation’s counsel and the Foundation’s experience itself—will aid in the Court’s consideration of the purpose of collecting citizenship data in the Decennial Census. Specifically, the Foundation’s brief addresses the following points:

- 1) Concerns regarding Respondents’ assertions of discriminatory intent;
- 2) How citizenship data from the 1950 Census was critical to a recent finding of a violation of the right to vote;
- 3) How citizenship data is used in the enforcement of the Voting Rights Act; and
- 4) How citizenship data will assist in the private enforcement of federal law.

CONCLUSION

For these reasons, the Foundation respectfully requests leave to file the enclosed *amicus curiae* brief.

Respectfully submitted,

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Dated: November 13, 2018

QUESTION PRESENTED

Whether, in an action seeking to set aside agency action under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, a district court may order discovery outside the administrative record to probe the mental processes of the agency decisionmaker—including by compelling the testimony of high-ranking Executive Branch officials—when there is no evidence that the decisionmaker disbelieved the objective reasons in the administrative record, irreversibly prejudged the issue, or acted on a legally forbidden basis.

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Interest of Amicus Curiae¹

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

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

of the Foundation’s counsel and the Foundation’s experience itself—will aid in the Court’s consideration of the purpose of collecting citizenship data in the Decennial Census.

SUMMARY OF ARGUMENT

Collecting robust citizenship data on the Decennial Census will help enforce the Voting Rights Act. The U.S. Department of Justice (“DOJ”) determined that gathering citizenship “data is critical to the Department [of Justice]’s enforcement of Section 2 of the Voting Rights Act.” Petition Appendix (“App.”) 152a. The DOJ, as a statutorily designated enforcer of the Voting Rights Act, understands the importance of “a reliable calculation of the citizen voting age population in localities where voting rights violations are alleged or suspected.” App. 152a-53a. Nevertheless, in authorizing extra-record discovery, the district court determined that “plaintiffs have made at least a prima facie showing that Secretary Ross’s stated justification for reinstating the citizenship question—namely, that it is necessary to enforce Section 2 of the Voting Rights Act—was pretextual.” App. 99a. The Petition for Writ of Mandamus should be granted for four additional reasons not presented by the Petitioners.

First, one of the district court’s stated justifications for extra-record discovery, that “Secretary Ross overruled senior Census Bureau career staff,” App. 98a, raises an important constitutional question regarding the power of the Executive under Article II of the Constitution.

Second, courts have relied on Census citizenship data to enter summary judgment against a jurisdiction in a voting rights case. Specifically, citizenship data from the 1950 Decennial Census—the last Census in which such data was requested of all participants—was central to the finding of a violation of the right to vote in a recent case concerning the U.S. territory of Guam. In *Davis v. Guam*, the district court relied heavily on data showing which inhabitants of the territory were U.S. citizens and which ones were non-U.S. citizens, data that was collected by the 1950 Census. *Davis v. Guam*, No. 11-00035, 2017 U.S. Dist. LEXIS 34240, at *15 (D. Guam Mar. 8, 2017). Because citizenship data was available for analysis, the court was able to ascertain that a Guam law restricting the right to vote in a particular election to only “Native Inhabitants of Guam” was a race-based restriction in violation of the Fifteenth Amendment to the Constitution. *Id.* at *37.

Third, the Civil Rights Division of the Department of Justice relies on citizenship data in cases it has brought to enforce the Voting Rights Act. This past reliance does not support the position that data from the Decennial Census is unnecessary to the enforcement of the Act. Rather, these cases demonstrate that the DOJ is familiar with the data presently available. The DOJ has determined that obtaining more robust citizenship data will allow those officials charged with enforcing the Voting Rights Act to enjoy more precise citizen population data, particularly in small jurisdictions, and thus enhance enforcement of civil rights laws. Such a decision is not “pretext”; it is progress.

Finally, the reinstatement of the citizenship question on the 2020 Census enriches the ability of private

citizens to enforce federal law. As part of its mission, the Foundation strives to ensure that voter rolls are being lawfully maintained nationwide. The Foundation relies upon citizenship data in its analysis of the nation’s rolls. Robust citizenship data—including data from smaller jurisdictions—from the Decennial Census will aid the Foundation and others in this important task.

ARGUMENT

I. Disagreement Between Executive Branch Officials and Career Bureaucrats Cannot Support a Finding of Discriminatory Intent without Raising Serious Constitutional Concerns.

One of the district court’s stated justifications for extra-record discovery was that “Secretary Ross overruled senior Census Bureau career staff.” App. 98a. In its opinion on the Petitioners’ motion to dismiss, below, the district court found that the organizational Plaintiffs’ “Complaint pleads facts that show ‘[d]epartures from the normal procedural sequence’” under *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). *New York v. United States DOC*, 315 F. Supp. 3d 766, 808 (S.D.N.Y. 2018). Specifically, the district court stated that allegations of “overruling career staff” are examples of such a departure. *Id.*

Under *Arlington Heights*, the court may consider “[d]epartures from the normal procedural sequence,” among other factors, to evaluate whether discriminatory intent is present. 429 U.S. at 267-68. The district court’s presumption that deference is due to career bureaucrats and that a lack of deference is evidence

of discriminatory intent under *Arlington Heights* turns the foundational principle of a unitary Executive on its head.

Article II, § 1, cl. 1, of the Constitution of the United States makes plain that “executive Power shall be vested in a President of the United States of America.” As the Supreme Court has stated, “The insistence of the Framers upon unity in the Federal Executive—to insure both vigor and accountability—is well known.” *Printz v. United States*, 521 U.S. 898, 922-23 (1997) (citing *The Federalist* No. 70 (A. Hamilton); 2 *Documentary History of the Ratification of the Constitution* 495 (M. Jensen ed. 1976) (statement of James Wilson), and Calabresi & Prakash, *The President’s Power to Execute the Laws*, 104 *Yale L. J.* 541 (1994)). The unitary Executive is essential for individual liberty. “The President is directly dependent on the people, and since there is only *one* President, *he* is responsible. The people know whom to blame, whereas ‘one of the weightiest objections to a plurality in the executive ... is that it tends to conceal faults and destroy responsibility.’” *Morrison v. Olson*, 487 U.S. 654, 729 (1988) (Scalia, dissenting) (quoting *Federalist* No. 70 at 427) (emphasis in original).

At the core, “[i]t is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they all are.” *Morrison*, 487 U.S. at 709 (Scalia, dissenting). Disagreements between Secretary Ross and career bureaucrats cannot support a finding of discriminatory intent and, therefore, cannot be a justification for extra-record discovery.

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

Robust citizenship data aids enforcement of the Voting Rights Act and federal protections regarding voting rights. The district court allowed extra-record discovery, in part, based on its finding that the plaintiffs had made a prima facie showing that the stated purpose for adding citizenship data to the Decennial Census was pretextual. App. 99a. In so doing, the court stated that, to its knowledge, “the Department of Justice and civil rights groups have never, in 53 years of enforcing Section 2, suggested that citizenship data collected as part of the decennial census, data that is by definition quickly out of date, would be helpful let alone necessary to litigating such claims.” *Id.* A cursory review of actual voting rights enforcement reveals that citizenship data derived from the Census is central to recent judicial decisions upholding the right to vote as well as actions by the United States to enforce Section 2 of the Voting Rights Act.

Davis v. Guam

Census citizenship data derived from the 1950 Census was essential to the decision of the United States District Court for the District of Guam in *Davis v. Guam* (hereinafter, “*Davis*”).

In *Davis*, the court confronted a Guam law establishing a “Political Status Plebiscite” that would allow those on the island to vote in a referendum regarding the territory’s future status with the United States. *Davis*, 2017 U.S. Dist. LEXIS 34240, at *3. The plaintiff was denied the right to register to vote in the pleb-

iscite due to the fact that he did not meet the definition of “Native Inhabitant of Guam.” *Id.* Eligibility to vote was anchored to 1950. An eligible “Native Inhabitant of Guam” means “those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Guam Organic Act and descendants of those persons.” *Id.* (quoting 3 Guam Code Ann. § 21001(e)). Those who were on Guam in 1950 and became citizens by virtue of the 1950 Organic Act, and their blood descendants, were eligible to vote in the status plebiscite. Thus, the composition of citizens as compared to non-citizens on Guam in 1950 became highly relevant. Thankfully, the 1950 Census included a citizenship question.

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

An appeal of the summary judgment finding in the plaintiff’s favor is pending in the Ninth Circuit. No.

17-15719. On appeal, the United States filed an *amicus curiae* brief supporting the plaintiff-appellee and requesting that the district court decision be affirmed. The United States relies on the citizenship data collected in the 1950 Census to support its position. Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellee and Urging Affirmance, No. 17-15719 at 4, 12-13, 18 (9th Cir., filed Nov. 28, 2017), available at https://www.cir-usa.org/legal_docs/davis_v_guam_doj_amicus.pdf.

The citizenship data collected during the 1950 Census was essential to the determination that Guam’s plebiscite law unconstitutionally imposed a race-based restriction in violation of the Fifteenth Amendment. This case supports the DOJ’s determination that the collection of citizenship data is critical to the enforcement of federal law.

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

When the United States brings a case pursuant to Section 2 of the Voting Rights Act,² there are three so-called “preconditions” that it must show are present. See *Thornburgh v. Gingles*, 478 U.S. 30 (1986). The first *Gingles* precondition is that the minority group “is sufficiently large and geographically compact to constitute a majority in a single member district.” *Id.* at 50-51. To establish this precondition, the

² All cases brought under Section 2 of the Voting Rights Act, with the complaints and other documents linked, are listed at the DOJ website under “Cases Raising Claims Under Section 2 of the Voting Rights Act,” <https://www.justice.gov/crt/cases-raising-claims-under-section-2-voting-rights-act-0>.

United States has historically used citizen voting age populations, or “CVAP.”

CVAP, while reliable, is an estimation based on ongoing surveying conducted every year by the Census Bureau’s American Community Survey (ACS). See Citizen Voting Age Population (CVAP) Special Tabulation from the 2012-2016 5-Year American Community Survey (ACS), *available at* https://www2.census.gov/programs-surveys/decennial/rdo/technical-documentation/special-tabulation/CVAP_2012-2016_ACS_documentation.pdf. Additionally, CVAP data is not available for all jurisdictions. The DOJ correctly noted that more robust citizenship data will allow it to better enforce federal law. App. 152a-157a. This is hardly a pretext for discrimination. A cursory review of the record of Justice Department Voting Rights Act enforcement reveals that CVAP—a value that can be determined with greater precision if the question is asked in the 2020 Census—is central to a Voting Rights Act complaint.

Currently, the Census does not capture citizenship data for smaller jurisdictions in the same way it does for larger jurisdictions. This limits the Justice Department’s ability to bring cases that enjoy greater clarity and confidence. A rare Voting Rights Act case brought against a smaller jurisdiction was against Lake Park, a small town in Palm Beach County, Florida. Complaint, *United States v. Town of Lake Park, FL*, No. 09-80507 (S.D. Fla. 2009). In the 2000 Census, 48 percent of Lake Park residents were black, but in 2009 not a single black candidate for town council had ever won a seat in the at-large voting plan. A large non-citizen Haitian population, however, made it less than clear what the precise black citizenship

population was in Lake Park. The United States could not turn to the Decennial Census for precise citizenship data because precise citizenship data were not collected in the 2000 Census. While it is true that the United States alleged in the Lake Park complaint a sufficiently large black citizenship population to justify bringing the case, the extraordinarily large black population (more than 40%) made that an easier assertion to make. *See* Complaint at ¶ 8, *United States v. Town of Lake Park, FL*, No. 09-80507 (S.D. Fla. 2009) (“The black population of the Town is sufficiently numerous and geographically compact that a properly apportioned single-member district plan for electing the Defendant Commission can be drawn in which black persons would constitute a majority of the total population, voting age population, and citizen voting age population in at least one district.”).

For larger jurisdictions, the importance of CVAP in a Voting Rights Act case is obvious. While the following cases rely on ACS estimates rather than the sort of enumeration which will be part of the 2020 Census, these cases illustrate the importance of citizenship data to a cause of action under Section 2. While in the past the United States used ACS estimates, seeking more precise and unimpeachable data would aid enforcement of the law. The justification for including the citizenship question is hardly a pretext for an impermissible intent. Rather, it is an enforcement agency seeking to better enforce the law. Previous examples of the United States relying on citizenship data to enforce the Voting Rights Act include:

Euclid City (OH)

The Complaint alleged, “The at-large method of electing the Euclid Board of Education dilutes the voting strength of African-American *citizens*, in violation of Section 2 of the Voting Rights Act....” Complaint at ¶ 6, *United States v. Euclid City School District Board of Education, OH*, No. 1:08-cv-02832 (N.D. Ohio 2008) (emphasis added).

Osceola County (FL) (2008)

In that Complaint, the DOJ alleged, “The Hispanic population of the county is sufficiently numerous and geographically compact that a properly apportioned single-member district plan for electing the School Board can be drawn in which Hispanic persons would constitute a majority of the *citizen* voting-age population in one out of five districts.” Complaint at ¶ 12, *United States v. The School Board of Osceola County*, No. 6:08-cv-00582 (M.D. Fla. 2008) (emphasis added).

Georgetown County (SC)

The DOJ’s Complaint alleged, “The African-American population of the county is sufficiently numerous and geographically compact that a properly apportioned single-member district plan for electing the Defendant Board can be drawn in which black *citizens* would constitute a majority of the total population, and voting age population in three districts.” Complaint at ¶ 12, *United States v. Georgetown County School District, et. al.*, No. 2:08-cv-00889 (D.S.C. 2008) (emphasis added).

City of Boston

The DOJ’s Complaint in this matter was based explicitly on “citizen voting age population.” The Second

Cause of Action alleges, “Defendants’ conduct has had the effect of denying limited English proficient Hispanic and Asian American voters an equal opportunity to participate in the political process and to elect candidates of their choice on an equal basis with other *citizens* in violation of Section 2 of the Voting Rights Act.” Complaint at ¶ 21, *United States v. City of Boston, MA*, No. 05-11598 (D. Mass. 2005) (emphasis added).

Osceola County (FL) (2005)

The DOJ alleged, “The effects of discrimination on Hispanic *citizens* in Osceola County, including their markedly lower socioeconomic conditions relative to white *citizens*, continue to hinder the ability of Hispanic *citizens* to participate effectively in the political process in county elections.” Complaint at ¶ 17, *United States v. Osceola County*, No. 6:05-cv-1053 (M.D. Fla 2005) (emphasis added).

Alamosa County (CO)

The DOJ’s Complaint alleged, “The current at-large method of electing the members of the Alamosa County Board of Commissioners violates Section 2 of the Voting Rights Act, because it results in Hispanic *citizens* of the county having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice....” Complaint at ¶ 16, *United States v. Alamosa County*, No. 01-B-2275 (D. Colo. 2001) (emphasis added).

Charleston County (SC)

The Complaint by the United States alleged a violation of Section 2 because “the at-large election system for electing the Charleston County Council has the effect of diluting black voting strength, resulting in black *citizens* being denied an opportunity equal to that afforded to other members of the electorate to participate in the political process and elect representatives of their choice.” Complaint ¶ 15, *United States v. Charleston County*, No. 2-01-0155 (D.S.C. 2001) (emphasis added).

The DOJ relies on citizenship data to enforce the Voting Rights Act. It is familiar with the citizenship data available and has determined that more robust data will allow it to better enforce the law.

IV. Citizenship Data Will Assist in the Private Enforcement of Federal Law.

Robust citizenship data from the 2020 Census will aid in the private enforcement of federal law. For example, the National Voter Registration Act (“NVRA”), in part, requires that election officials conduct reasonable list maintenance and make available for public inspection records relating to their list maintenance. 52 U.S.C. § 20507(a)(4) and (i). The NVRA also authorizes private parties to enforce its provisions. 52 U.S.C. § 20510. The Foundation has utilized this private right of action in order to advance its mission of ensuring that voter rolls are current and accurate. In so doing, the Foundation relies on available Census data to determine which jurisdictions may be failing to comply with federal law. *See, e.g.*, Press Release, 248 Counties Have More Registered Voters Than Live

Adults (Sept. 25, 2017), *available at* <https://publicinterestlegal.org/blog/248-counties-registered-voters-live-adults/>. The Foundation then works with election officials to correct the violations of law or, if needed, files a complaint in federal court to enforce the law. *See, e.g.*, Complaint, *Public Interest Legal Foundation v. Bennett*, No. 4:18-cv-00981 (S.D. Tex.).

Courts have found the ratio of registrants on the voter rolls to eligible citizens living in a jurisdiction to be probative of whether election officials are complying with federal law. *See Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 793 (W.D. Tex. 2015), *Voter Integrity Project NC, Inc. v. Wake Cnty. Bd. of Elections*, 301 F. Supp. 3d 612, 620 (E.D.N.C. 2017), *Bellitto v. Snipes*, 302 F. Supp. 3d 1335, 1358 (S.D. Fla. 2017). Courts have also found that the current set of citizenship data obtained by the Census may contain limitations that could impair some interpretations of the data. *See Bellitto v. Snipes*, No. 16-cv-61474, 2018 U.S. Dist. LEXIS 103617, at *30 (S.D. Fla. Mar. 30, 2018).

CONCLUSION

Robust citizenship data from Decennial Censuses has aided in the enforcement of federal law in the past and will do so again. The determination to gather such data during the 2020 Census is logical and appropriate. For these reasons and the reasons set forth in the Petition, the Petition should be granted.

Respectfully submitted,

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