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INTEREST OF AMICI CURIAE

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is the nation's oldest, largest, and most diverse coalition of more than 200 national organizations committed to the protection of civil and human rights in the United States. The Leadership Conference was founded in 1950 by leaders of the civil rights and labor rights movements, grounded in the belief that civil rights would be won not by one group alone but through a coalition. The Leadership Conference works to build an America that is inclusive and as good as its ideals by promoting laws and policies that further civil and human rights for all individuals in the United States.

The Brennan Center for Justice at N.Y.U. School of Law ("The Brennan Center") is a not-for-profit, nonpartisan think tank and public interest law institute that seeks to improve systems of democracy and justice. The Brennan Center was founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr., to American law and society. Through its Democracy Program, The Brennan Center seeks to bring the ideal of representative self-government closer to reality by protecting the right to vote and promoting a full and accurate census count. The Brennan Center conducts empirical, qualitative, historical, and legal

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No counsel for a party authored this brief in whole or in

research on the census and regularly participates in voting rights cases before this Court.

Additional amici, listed in the Appendix, are grassroots, advocacy, labor, legal services, education, faith-based, and other organizations committed to the protection of civil and human rights in the United States. Amici are united by an interest in ensuring that all communities—particularly immigrants, low-income communities, and communities of color—continue to enjoy the recognition, freedom, and economic and political power to which they are entitled under the United

turns in part on whether Secretary Ross's reliance on the Department of Justice's proffered explanation for this decision—that including a citizenship question is

The public comments that the Census Bureau received regarding Secretary Ross's decision reflect this broad understanding of the citizenship question's negative consequences for the communities amici represent: A staggering 99.1 percent of the nearly 150,000 comments received related to the citizenship question (some 136,400 comments) opposed adding the question.

Under these circumstances, Petitioners' proffered VRA justification for the citizenship question is so implausible that it is impossible to treat it as a predicate for reasonable government action.

In short, including a citizenship question on the 2020 census will inflict grievous harm on poor people, immigrant communities, and communities of color with no countervailing benefit—and certainly not with the supposed voting rights benefit on which Petitioners stake their defense. The Court should affirm the decision below.

tice Management Division of the U.S. Department of Justice (the "Gary Letter")—a divi

litigation, there have been 117 "reported Section 2 cases leading to favorable results for minority voters" between the Act's reauthorization in 1982 and 2006. And since that report was published in 2006, amici and their allies have used existing citizenship data to enforce the VRA successfully on myriad occasions.

That number likely dramatically undercounts the incidence of successful vote dilution challenges because it includes only reported litigation with favorable outcomes. The number of successful Section 2 cases is even higher if unreported decisions and settlements are included. For example, one study of nine States with histories of voting-related discrimination found that "approximately ten times the number of" cases go unreported than reported. Successful VRA cases in turn have led to reforms in numerous counties and multiple electoral systems within those counties. The same 2006 study referenced [illegible] determined that plaintiffs prevailed in 653 reported and unreported cases across those nine states, affecting the voting populations in

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National Commission on the Voting Rights Act, [illegible] *A* [illegible] *1982-2005*, at 88 (Feb. 2006).

[illegible] v. [illegible], 291 F. Supp. 3d 1088 (E.D. Cal. 2018); [illegible] v. [illegible] & [illegible], 301 F. Supp. 3d 1297 (M.D. Ga. 2018); [illegible] v. [illegible], 230 F. Supp. 3d 667 (S.D. Tex. 2017); [illegible] v. [illegible], 198 F. Supp. 3d 896 (W.D. Wis. 2016); [illegible] *AA* v. [illegible], 831 F.3d 204 (4th Cir. 2016); [illegible] v. [illegible] *A* [illegible], 94 F. Supp. 3d 302 (N.D.N.Y. 2015); [illegible] v. [illegible], 40 F. Supp. 3d 1377 (E.D. Wash. 2014); [illegible] v. [illegible], 709 F. Supp. 2d 1176

subsets of the country's population. Because it is not sent to everyone in the country, the ACS (like the long-form census before it) relies on sampling, which the Census Bureau has determined is a more accurate way to gather citizenship data than asking everyone about their citizenship status, which would suppress census response rates and lead to less accurate citizenship data. Part II. In fact, in recognition of the harms that asking about citizenship on the decennial census would entail, when DOJ has sought to collect additional citizenship data in the past, it has requested that such data be collected from the ACS, not the decennial census.

Given the availability of citizenship data from other sources, "there is not one" case—across all of the Section 2 cases brought by the DOJ over the past 19 years, by both Republican and Democratic administrations—"in which a decennial enumeration would have enabled enforcement that the existing survey data on citizenship did not permit. Indeed, not one of these cases has realistically been close to the line." While "[a]dding private litigation expands the sample set," it is still "exceedingly rare for plaintiffs enforcing the Voting Rights Act to run into trouble based on the adequacy of the Census's survey data, in any way that asking a citizenship question on the decennial enumeration might

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U.S. Census Bureau,

U.S. Census Bureau,

Levitt Testimony 13-14.

at 18 & n.77 (gathering cases).

In support of the request for census citizenship data, the Gary Letter observed that "[m]ultiple federal courts of appeals have held that … citizen voting-age population is the proper metric for determining whether a racial group could constitute a majority in a single-member district," citing five cases. Pet. App. 565a. Those cases, the letter contended, "make clear that, in order to assess and enforce compliance with Section 2's protection against discrimination in voting, the Department needs to be able to obtain citizen voting-age population data for census blocks, block groups, counties, towns, and other locations where potential Section 2 violations are alleged or suspected." . 566a.

None of the cases the Gary Letter cited supports the anomalous and damaging request to include a citizenship question on the 2020 census. While these cases confirm that citizenship is a consideration in Section 2 cases, they offer no indication that existing data are .

In cases in which plaintiffs have not met the first precondition, including those cases cited in the Gary Letter, they have failed for reasons wholly unrelated to the adequacy of existing citizenship data. In several cases, plaintiffs'

districts." 113 F.3d 1563, 1568 (11th Cir. 1997). The court's conclusion rested on its analysis of existing citizenship data and identified no flaw or deficiency in that information.

Similarly, in . . v. . . , . . , the district court did not question the accuracy or sufficiency of existing data; rather, it concluded that such data "conclusively establishes that neither hispanics nor blacks can constitute a majority of the voters of any single member district." 665 F. Supp. 853, 858 (C.D. Cal. 1987), . . , 883 F.2d 1418 (9th Cir. 1989). In other cases, plaintiffs have been unable to show the existence of any illustrative district. And in some cases,

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. . . . , 556 U.S. at 14 (plurality) (African-Americans represented only 39.36 percent of voting-age population); v. . , 385 F.3d 421, 430 (4th Cir. 2004) ("The plaintiffs concede that black voters cannot form a majority in the Fourth District, and thereby elect a candidate, without the support of voters from other racial or ethnic groups."); v. . . . . , 376 F.3d 1260, 1269 (11th Cir. 2004) ("As of the last census, the African-American population of Baldwin County had declined to less than 10% of the county's total voting-age population."); v. . . . ., 851 F.2d 937, 944 (7th Cir. 1988) ("[B]lacks … would not comprise a majority of the voting age population in either single-member district."); . - . . v. . . ., 51 F. Supp. 3d 1215, 1225 (M.D. Fla. 2014) (trial expert "was uncertain as to whether Latino citizens of voting age were actually a majority" in the district).

. . , v. . . . . & . . , 2014 WL 1347427, at *2 (M.D. Ga. Apr. 3, 2014) (plaintiff "did not propos 1 Tf0.006 T8o0.6(o)-2(r)-3.8( )10d(h)3.8(t)-2.4( ).9(n)38(A)-7..7(p).699 0 .3(;)-1(1 Tf0u9(d)5

plaintiffs have proposed illustrative districts that were not "geographically compact." In none of these cases did the courts express any concerns about existing citizenship data.

In other words, plaintiffs have failed to meet the first

yet it provides no valid connection between the two. Indeed, none of the reasons presented in the Gary Letter suggests that adding the citizenship question will lead to more accurate citizenship data. To the contrary, and as the district court found, "adding a citizenship question to the census will result in accurate and complete citizenship data." Pet. App. 290a.

Rather than defend the Gary Letter's reasoning (likely because they cannot), Petitioners now argue that Secretary Ross "was entitled to rely on" the Letter's analysis, regardless of how flawed or pretextual it was. Pet. Br. 36. But the APA does not allow agencies to make decisions based on reasoning as fatally flawed as the Gary Letter's reasoning, for decisions based on illogical fallacies are arbitrary and capricious by definition—as even the cases Petitioners rely on recognize. v. , 460 F.3d 53, 75 (D.C. Cir. 2006) ("[T]he critical question is whether

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Two district courts have now concluded that Secretary Ross's proffered rationale was pretextual. Pet. App. 311a-321a; , 2019 WL 1052434, at **61-62. Based on the administrative record alone, the district court in this case emphasized that "Secretary Ross had made the decision to add the citizenship question well before DOJ requested its addition in December 2017"; that the administrative record did not contain "any mention, , of VRA enforcement discussions of adding the question [before] the Gary Letter"; that Commerce Department staff had "unsuccessful[ly] attempt[ed] … to shop around for a request by another agency regarding citizenship data"; and that the Gary Letter arose only after "Secretary Ross's personal outreach to Attorney General Sessions." Pet. App. 313a. The district court also noted that Secretary Ross's interest in adding the citizenship question emerged only after discussions with political actors including then-White House advisor Steve Bannon and Kansas Secretary of State Kris Kobach, who served as Vice Chair of the controversial Presidential Commission on Election Integrity. . 79a-80a; , 2019 WL 1052434, at **33, 47-48, 61-62.

the action agency's . was arbitrary and capri-

ty—an altogether and necessarily different analysis than redistricting.

The Gary Letter also posits that census citizenship data "would align in time with the total and voting-age population data from the census that jurisdictions already use in redistricting." Pet. App. 568a. But Section 2 lawsuits brought in the middle of a decade rely on intra-decade election results. Census citizenship data would therefore not assist plaintiffs attempting to show a shift in the population of minority voters in the 10 years following the census. For example, in - v. , the court rejected the plaintiffs' argument that the share of Latino CVAP had risen since the last census to now capture a majority of votes. 690 F. Supp. 2d 451, 459 (N.D. Tex. 2010). The court's ruling was not based, however, on any flaw in the plaintiffs' data that could be addressed by altering the decennial census. Rather, the court faulted the plaintiffs' reliance on a single year's worth of ACS data, instead of more accurate five-year ACS data. . at 458-459. Citizenship data collected in a census, which occurs once every 10 years, would be of no use to plaintiffs bringing mid-decade redistricting challenges.

Petitioners' amici conveniently draw on a one-person, one-vote case to assert that Respondents previously "acknowledged the inferiority of ACS citizenship data." Oklahoma et al. Amicus Br. 13. Respondents previously acknowledged that ACS data would not be sufficient for redistricting purposes but said nothing about VRA enforcement. Moreover, in that same brief, Respondents expressly noted that asking about citizenship data on the census "could chill participation" in the census and therefore lead to less accurate census data. New York et al. Amicus Br. 17, - v. , No. 14-940 (U.S. Sept. 25, 2015).

have corresponding margins of error. Even the definition of a "district-sized population" is a range, given that the "Supreme Court has repeatedly held that district sizes may vary—for state and local districts, up to a presumptively valid 10% population disparity, and in some instances beyond." It is therefore inconsequential for VRA plaintiffs that the decennial census could generate CVAP data at the smaller block level.

In touting the increased "precision" of these data, Petitioners and the Gary Letter also ignore the fact that census block-level data cou3(or)4nu3(or)4nVAP data atata im-1(er)4(a5-2(s)4(i)

non-response follow-up procedures historically have proved unable to identify uncounted minorities. If the citizenship question proceeds, the undercount of minority communities will be exacerbated and minorities will find it substantially , to successfully bring VRA cases.

As this Court has recognized, "the purpose of the Voting Rights Act" is "to eliminate the negative effects of past discrimination on the electoral opportunities of minorities." , 478 U.S. at 65 (Brennan, J., Opinion). Additional citizenship data would thus be useful only if it more accurately counted historically disenfranchised and underrepresented groups. But as amici are acutely aware, adding a citizenship question on the 2020 census will result in a differential undercount of precisely these segments of the population. That undercount will impede rather than assist the litigation of Section 2 cases.

Petitioners are well aware of the detrimental effects that will result from adding a citizenship question to the census—in fact, they "conceded at oral argument" in the district court "that there is 'credible quantifiable evidence' that 'the citizenship question could be expected to cause a decline in self-response.'" Pet. App. 150a (quoting trial transcript). This is not a new realization: The Census Bureau has long opposed efforts to determine the citizenship status of everyone because of the real likelihood that such efforts would systemically undercount people in immigrant communi-

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Even a relatively small undercount of minority communi-

ties. In 1980, the Bureau opined that "any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count" and that "[q]uestions as to citizenship are particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate." *A . . v. . .*, 486 F. Supp. 564, 568 (D.D.C. 1980) (describing Bureau's litigation position). The then-Director of the Census Bureau confirmed that conclusion in congressional testimony in 1985, explaining that questions about citizenship status would lead to the Census Bureau being "perceived as an enforcement agency," which would have "a major effect on census coverage." And when he announced his decision to add the citizenship question, Secretary Ross recognized that the career staff of "[t]he Census Bureau and many stakeholders expressed concern [that the decision] would negatively impact the response rate for noncitizens" and minorities. Pet. App. 552a.

These fears of undercounting the very populations the VRA is intended to protect are well-founded. The Census Bureau's own data from the Center for Survey Measurement (CSM) demonstrate that if a citizenship question is added to the census, formerly willing respondents will go to extraordinary lengths to avoid participating. The CSM conducted pretesting after

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the Census Scientific Advisory Committee expressed concerns "about the possibility that 2020 could be politicized" through illegal uses of census information. Through multiple methods including internet self-response; cognitive inquiry via the Census Barriers, Attitudes, and Motivators Survey; doorstep messages; and field representatives and supervisors interacting with focus groups, the CSM concluded that an unprecedented number of respondents were concerned about confidentiality and immigration status while participating. Many respondents refused to share their own information with Bureau employees after expressing privacy and safety concerns, and, more troublingly, the CSM saw extremely high levels of "deliberate falsification" of information due specifically to concerns regarding revealing immigration status to the Census Bureau. The CSM declared that its findings are "particularly troubling given that they impact hard-to-count populations disproportionately, and have implications for data quality and nonresponse."

The Census Bureau confirmed these detrimental and disproportionate effects multiple times in the months leading up to the Secretary's decision and even during this litigation. In memoranda issued on December 22, 2017, and January 3, 2018, the Census Bureau estimated that adding a citizenship question would

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Memorandum from Ron S. Jarmin, Director, U.S. Census Bureau, to Barbara Anderson, Chair, Census Scientific Advisory Comm.: [illegible] *201* [illegible] (Jan. 26, 2018).

[illegible]

. at 3.

. at 7.

terproductive to the goal of obtaining accurate citizenship data about the public" but "quite effective at depressing self-

or is likely to cause several jurisdictions to lose seats in

For example, assistance programs that use the Federal Medical Assistance Percentage (FMAP) are particularly sensitive to changes in the decennial census count. Pet. App. 179a-180a. In Fiscal Year 2015, 48 percent of the federal grants given to States relied on the FMAP to determine the federal share of the costs of programs including Medicaid, the State's Children's Health Insurance Program (CHIP), the Child Care and Development Fund Matching Funds, and the Title IV-E Foster Care and Adoption Assistance programs, in addition to many other programs that rely on census data less directly. . 179a & n.45. In that year alone, the average amount lost by a State was $1,091 missed in the 2010 census; the highest loss was in Vermont, where the State—a Respondent here—forfeited $2,309 per person missed in the decennial census. Indeed, 37 out of 50 states forfeited FMAP federal funding opportunities for each person not counted in the 2010 decennial census. This translates to 74 percent of States missing out on funding due to undercounting. And even a 1 percent increase in an undercount can have a dramatic effect on States' receipt of federal grants for these FMAP-guided programs: For example, Pennsylvania stood to lose $221,762,564 in FY2015 had there been a mere 1 percent increase in missed persons in the 2010 decennial census.

Reamer Report 2.

. at 1.

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. at 4. The consequences for children living in Respondents' states are particularly severe. States with significant undercounts will suffer reductions in funding for programs such as

In addition to affecting the programs discussed above, a differential undercount on the census will cause the impacted communities "to lose funds from federal programs that distribute resources on the basis of census-derived data," which are critically important to many low-income and minority groups. Pet. App. 181a. These programs are, again, wide-ranging and affect all areas of life from child-abuse prevention (Community-Based Child Abuse Prevention Grants), to aging (Grants for State and Community Programs on Aging), to education (funding under the Every Student Succeeds Act), to energy (the Low-Income Home Energy Assistance Program), to criminal justice (the Victims of Crime Act program). . . . These undercounted jurisdictions would also suffer declines in programs that "provide direct funding to localities based on census-derived information," including critical housing programs such as the Community Development Block Grant, the Emergency Solutions Grant program, and the HOME Investment Partnerships Program. . . . 182a.

Amici represent communities at grave risk of suffering from a differential undercount. Their constitu-

Respectfully submitted.

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Association of University Centers on Disabilities

Bend the Arc: A Jewish Partnership for Justice

Cabarrus Rowan Community Health Centers

California Calls Education Fund

California Pan-Ethnic Health Network

Campaign Legal Center

Center for Civic Policy

Center for Law and Social Policy (CLASP)

Center for Popular Democracy

Center for the Study of Hate & Extremism-California State University, San Bernardino

Center on Privacy & Technology at Georgetown Law

Central Conference of American Rabbis

CHANGE Illinois

Child Care Aware of America

Children Now

Children's Advocacy Institute

Citizens' Committee for Children of New York

Citizens Union

Clayton Early Learning

Clearinghouse on Women's Issues

Coalition for Humane Immigrant Rights (CHIRLA)

Coalition on Human Needs

Colorado Center on Law and Policy

Colorado Children's Campaign

Hispanic Organization for Leadership & Action (HOLA)

Illinois Coalition for Immigrant and Refugee Rights

In Our Own Voice: National Black Women's Reproductive Justice Agenda

In the Public Interest

International Brotherhood of Teamsters (IBT)

International Union of Painters and Allied Trades

Jewish Council for Public Affairs

Justice in Aging

Lambda Legal Defense and Education Fund, Inc.

Latino Community Fund Inc.

League of Women Voters, U.S.

Legal Aid Justice Center

Maine Children's Alliance

Maine Immigrants' Rights Coalition

Marion County Commission on Youth, Inc.

Massachusetts Voter Table

Matthew Shepard Foundation

Men of Reform Judaism

Mi Familia Vota

Michigan Nonprofit Association

Minnesota Council on Foundations

Modern Language Association

Muslim Advocates

Muslim Anti-Racism Collaborative (MuslimARC)

Muslim Public Affairs Council (MPAC)

NALEO Educational Fund

National Asian Pacific American Women's Forum

National Association for the Advancement of Colored People

National LGBTQ Task Force

National Organization for Women Foundation

National Partnership for Women & Families

National Urban League, Inc.

National Women's Law Center

NETWORK Lobby for Catholic Social Justice

New Florida Majority

Southern Poverty Law Center

Stronger North Carolina, Inc.

Texas Progressive Action Network

The Children's Partnership

The Impact Fund

The Protect Democracy Project

The Sikh Coalition

The Southern Coalition for Social Justice

The United Food and Commercial Workers International Union

The Women's Law Center of Maryland, Inc.

Union for Reform Judaism

United Chinese Association of Brooklyn, Inc.

United Farm Workers of America

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union AFL-CIO, CLC

United We Dream

University YMCA New American Welcome Center

UUFHC

Virginia Civic Engagement Table

Virginia Coalition for Immigrant Rights

Voices for Illinois Children

Voices for Utah Children

Voices for Vermont's Children

Voto Latino

Washington Nonprofits

Wind of the Spirit Immigrant Resource Center

Wisconsin Faith Voices for Justice

Women for Afghan Women

Women of Reform Judaism

Women's March

Woodhull Freedom Foundation

Yemeni American Merchants Association - YAMA

YMCA of Greater New York

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