

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

LA UNIÓN DEL PUEBLO ENTERO, *et al.*,)
)
 Plaintiffs,)
)
 v.)
)
 WILBUR L. ROSS, in his official capacity as)
 U.S. Secretary of Commerce, *et al.*,)
)
 Defendants.)

**CIVIL ACTION
No. 8:19-cv-02710-PX**

**BRIEF OF TOM WOLF, GOVERNOR OF PENNSYLVANIA, AS AMICUS CURIAE IN
OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS**

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction.....	1
II. Statement of Interest.....	1
III. Legal Standard	2
IV. Argument.....	3
A. Plaintiffs Have Adequately Pleaded Standing	3
1. Plaintiffs Have Met Their Burden at This Stage.....	3
2. Defendants Set The Standing Bar Too High.....	6
3. Defendants Ignore Important Limits on Redistricting	7
B. The Case Is Ripe For A Decision Now.....	8
1. Courts Do Not Wait To Decide Census-Related Cases	8
2. Failure to Decide These Issues Will Result in Avoidable Chaos	9
3. When Racial Animus Motivates Government Action, Courts May Step In	12
C. The Court Should Consider The Context For This Motion	12
1. The Presidential Advisory Committee on Election Integrity.....	13
2. The Census Question	14
V. Conclusion	15

TABLE OF AUTHORITIES

Cases

6th Cong. Dist. Republican Comm. v. Alcorn,
913 F.3d 393 (4th Cir. 2019)..... 3

Agre v. Wolf,
No. 17-4392, 2017 U.S. Dist. LEXIS 190136 (E.D. Pa. Nov. 16, 2017)..... 2

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 2

Bishop v. Bartlett,
575 F.3d 419 (4th Cir. 2009)..... 3

Cent. Radio Co. v. City of Norfolk,
811 F.3d 625 (4th Cir. 2016)..... 13

Clapper v. Amnesty Int’l USA,
568 U.S. 398 (2013) 6

Common Cause v. Rucho,
No. 1:16-CV-1026, 2018 WL 4214334 (M.D.N.C. Sept. 4, 2018)
vacated, 139 S.Ct. 2484 (2019)..... 11

Cooksey v. Futrell,
721 F.3d 226 (4th Cir. 2013)..... 4

Davis v. Fed. Election Comm’n,
554 U.S. 724 (2008) 4

Dep’t of Commerce v. New York,
139 S. Ct. 2551 (2019) 6, 8, 15

Dep’t of Commerce v. U.S. House of Representatives,
525 U.S. 316 (1999) 5, 8

Frank Krasner Enters. v. Montgomery Cty., Md.,
401 F.3d 230 (4th Cir. 2005)..... 4

Friends for Ferrell Parkway, LLC v. Stasko,
282 F.3d 315 (4th Cir. 2002)..... 4

Kravitz v. United States Dep’t of Commerce,
366 F. Supp. 3d 681 (D. Md. 2019) 7

Kravitz v. United States Dep’t of Commerce,
382 F. Supp. 3d 393 (D. Md. 2019) 14, 15

<i>League of Women Voters v. Commonwealth</i> , 645 Pa. 1 (Pa. 2018)	2
<i>Liberty Univ., Inc. v. Lew</i> , 733 F.3d 72 (4th Cir. 2013).....	3
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	3
<i>Monsanto Co. v. Geertson Seed Farms</i> , 561 U.S. 139 (2010)	6
<i>NAACP v. Bureau of the Census</i> , 945 F.3d 183 (4th Cir. 2019).....	9, 12, 15
<i>Nat. Res. Def. Council, Inc. v. Watkins</i> , 954 F.2d 974 (4th Cir. 1992).....	4
<i>Robertson v. Sea Pines Real Estate Cos.</i> , 679 F.3d 278 (4th Cir. 2012).....	2
<i>Susan B. Anthony List v. Driehaus</i> , 573 U.S. 149 (2014)	5
<i>United States v. Garcia</i> , 855 F.3d 615 (4th Cir. 2017).....	5
<i>Walters v. McMahan</i> , 684 F.3d 435 (4th Cir. 2012).....	2
<i>Wikimedia Found. v. Nat’l Sec. Agency</i> , 857 F.3d 193 (4th Cir. 2017).....	4, 6
Constitutional Provisions	
Pa Const. Art. II, § 17	7, 10
Wash. Const. art. II, § 43	11
Statutes	
Ariz. Rev. Stat. Ann. § 16-1103.....	7
Ariz. Rev. Stat. Ann. § 16-201.....	11
Rev. Code Wash. § 44.05.100.....	11
Rev. Code Wash. § 29A.24.050.....	11

Tex. Elec. Code § 172.023..... 11

Wash. Rev. Code Ann. § 44.05.090..... 7

Other Authorities

Amended Complaint, *Fish v. Kobach*, 2:16-cv-02105-JAR
(D. Kan. March 17, 2016), Dkt. 39 13

Congressional Maps Get DOJ Approval, Ariz. Indep. Redistricting Comm’n (Apr. 9, 2012),
available at <https://tinyurl.com/r82vn8b>..... 11

Executive Order 13380, 84 Fed. Reg. 33821 (July 11, 2019) 4, 7

Executive Order 13799, 82 Fed. Reg. 22389 (May 11, 2017)..... 13

Findings of Fact and Conclusions of Law, *Fish v. Kobach*,
2:16-cv-02105-JAR (D. Kan. June 18, 2018) Dkt. 542 14

Governor Tom Wolf, Exec. Order 2018-7: Pennsylvania Redistricting Reform Commission
(Nov. 29, 2018), <https://www.governor.pa.gov/newsroom/executive-order-2018-07-pennsylvania-redistricting-reform-commission/> 2

Letter from Members of Congress to Attorney General William P. Barr (July 10, 2019),
available at <https://tinyurl.com/tuh5drl>..... 5

Letter to Kris W. Kobach from Governor Tom Wolf (June 30, 2017),
<https://www.governor.pa.gov/wp-content/uploads/2017/06/Kobach.pdf> 14

Order, *Fish v. Kobach*,
2:16-cv-02105-JAR, (D. Kan. June 23, 2017), Dkt. 355 13

Pa. S.B. 1249, 2011 Gen. Assemb., Reg. Sess
(introduced Sept. 14, 2011) (enacted as 2011 Act 131 Dec. 22, 2011)..... 9

Pennsylvania Redistricting Reform Commission Report, (Aug. 29, 2019),
<https://www.dos.pa.gov/VotingElections/Pages/Redistricting-Report-2019.aspx>..... 2

President Donald J. Trump (@realDonaldTrump), Twitter (Nov. 27, 2016, 12:30 PM),
available at <https://tinyurl.com/hlodj9x> (last visited January 16, 2020)..... 13

Redistricting and Use of Census Data, National Conference of State Legislatures (July 8, 2019),
available at <https://tinyurl.com/y4hrcwp4> 7

Statement by the Press Secretary on the Presidential Advisory Commission on Election Integrity,
(Jan. 3, 2018), *available at* <https://tinyurl.com/qsu37e2>..... 14

Statement from Kris Kobach, Secretary of State and Vice Chair of the Presidential Advisory
Commission on Election Integrity (July 5, 2017), *available at* <https://tinyurl.com/qn3m4wx> 13

I. INTRODUCTION

The Pennsylvania Office of the Governor (“Governor”) submits this *amicus* brief out of its interest in an accurate census and a fair and orderly election process, and respectfully asks this Court to deny the Motion to Dismiss and to consider the important issues raised by this suit. Precedent favors resolving such disputes before the census, and delaying litigation until states draw new district maps would provide a narrow—and perhaps impossible—window of time for resolution of the disputes, potentially depriving voters of any remedy prior to the 2022 election.

The Governor is also concerned by Defendants’ attempt to raise the bar for standing at this stage of the litigation, and to distort the actual governmental actions which provide the backdrop for this suit. Executive Order 13380 seeks to provide states with a redistricting citizenship dataset so those officials can engage in citizen voting age population (CVAP) redistricting, and it explicitly says that the Department of Commerce intends to provide that information. Defendants implausibly claim that Plaintiffs lack standing because states’ use of CVAP redistricting is so hypothetical and speculative that it is impossible to plead a plausible injury resulting from the federal government’s collection and sharing of citizenship data.

Finally, Defendants’ discussion of the factors relevant to discriminatory animus presents a deceptively selective slice of the relevant facts, and the Governor provides some further context for the Court’s consideration.

II. STATEMENT OF INTEREST

Plaintiffs in this case are citizens of Arizona, Texas, and Washington, and the Governor believes that this is a case of nationwide importance, and that its holding may avert—or spawn—litigation in the Commonwealth of Pennsylvania (“Commonwealth”) and across the Nation. The Governor has a distinct interest in resolving these issues now, instead of waiting to begin litigation until just before the 2022 election cycle. This interest is particularly acute because

contentious, last-minute litigation has characterized Pennsylvania’s recent elections. *See League of Women Voters v. Commonwealth*, 645 Pa. 1, 108 (Pa. 2018); *Agre v. Wolf*, No. 17-4392, 2017 U.S. Dist. LEXIS 190136 (E.D. Pa. Nov. 16, 2017). In the wake of this intense redistricting litigation, Governor Tom Wolf signed Executive Order 2018-07, which establishes a Redistricting Reform Commission because, *inter alia*, “Pennsylvania’s past processes may have led to underrepresentation of minority groups....” Governor Tom Wolf, Exec. Order 2018-7: Pennsylvania Redistricting Reform Commission (Nov. 29, 2018), <https://www.governor.pa.gov/newsroom/executive-order-2018-07-pennsylvania-redistricting-reform-commission/>. Indeed, the report of that Commission expressly recognizes that the Commonwealth’s citizens desire a redistricting process that is “straightforward, open, and transparent.” Pennsylvania Redistricting Reform Commission Report at 5, (Aug. 29, 2019), <https://www.dos.pa.gov/VotingElections/Pages/Redistricting-Report-2019.aspx>.

III. LEGAL STANDARD

At the pleading stage, the question for the Court is whether the Complaint pushes the claim “across the line from conceivable to plausible.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A “plaintiff need not ‘forecast’ evidence sufficient to prove the elements of the claim.” *Walters v. McMahan*, 684 F.3d 435, 439 (4th Cir. 2012). This is because “*Iqbal* and *Twombly* do not require a plaintiff to prove his case in the complaint. The requirement of nonconclusory factual detail at the pleading stage is tempered by the recognition that a plaintiff may only have so much information at his disposal at the outset.” *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 291 (4th Cir. 2012).

IV. ARGUMENT

A. Plaintiffs Have Adequately Pleaded Standing

Defendants' core argument is that Plaintiffs lack standing because any injury would result from a "highly attenuated chain of possibilities, including the independent decisions of states and localities to use (or not use) citizenship data." Memorandum of Law In Support of Defendants' Motion to Dismiss 2 ("Br."). Specifically, Defendants contend that "States must make two independent decisions: (i) whether to 'exclu[de] [] non-citizens from the population base used for redistricting congressional, state legislative[,] and local districts,' and (ii) whether to use 'citizenship data' provided by the Census Bureau 'along with the total population tabulations[.]'" Br. 13. But Defendants ignore the phased inquiry at the heart of standing, the legal standard, and the existence of factual and state law limits on redistricting procedures.

1. Plaintiffs Have Met Their Burden at This Stage

Article III standing "requires an injury in fact that is caused by the challenged conduct and is likely to be redressed by a favorable decision." *6th Cong. Dist. Republican Comm. v. Alcorn*, 913 F.3d 393, 405 (4th Cir. 2019). An "injury in fact" occurs "where a harm is concrete, though widely shared," and "[t]he deprivation of the right to vote is just such a concrete harm." *Bishop v. Bartlett*, 575 F.3d 419, 425 (4th Cir. 2009). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," because courts "presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* at 424 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotations omitted)). A plaintiff "need only plausibly allege" injury at this stage. *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 89–90 (4th Cir. 2013). The causation prong of the standing test sets a lower bar than "a requirement of tort causation." *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 324 (4th Cir. 2002) (citing *Nat. Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974,

980 n. 7 (4th Cir. 1992)). And “the redressibility requirement is satisfied where there is ‘a non-speculative likelihood that the injury would be redressed by a favorable judicial decision.’” *Cooksey v. Futrell*, 721 F.3d 226, 238 (4th Cir. 2013) (quoting *Frank Krasner Enters. v. Montgomery Cty., Md.*, 401 F.3d 230, 234 (4th Cir. 2005)). Standing is not a static inquiry: “the proof required to establish standing increases as the suit proceeds.” *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 734 (2008). And discovery is proper where the claim to standing is plausible. *See, e.g., Wikimedia Found. v. Nat’l Sec. Agency*, 857 F.3d 193, 211 (4th Cir. 2017).

Plaintiffs have met their burden to show standing at the pleading stage. They have alleged that the Census Bureau is motivated by racial animus in collecting citizenship data as part of a “conspiracy intended to dilute the representation of non-citizens and Latinos,” Compl. ¶ 4. They have also explained the precise mechanism through which use of that citizenship data would dilute their votes. Compl. ¶¶ 86-87. In fact, the Executive Order cited in the Complaint claims that states are already asking for citizenship data for CVAP redistricting, and the Department of Commerce must provide that data:

The Department has said that if the officers or public bodies having initial responsibility for the legislative districting in each State indicate a need for tabulations of citizenship data, the Census Bureau will make a design change to make such information available. ***I understand that some State officials are interested in such data for districting purposes. This order will assist the Department in securing the most accurate and complete citizenship data so that it can respond to such requests from the States.***

Executive Order 13380, 84 Fed. Reg. 33821 (July 11, 2019) (“Executive Order 13380”) (emphasis added). These facts establish “a substantial risk” that vote dilution will occur as a result of the collection of citizenship data in the decennial census. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). This is particularly true where the Supreme Court has explicitly recognized that “the threat of vote dilution” arising from improper census procedures

“is concrete and actual or imminent, not conjectural or hypothetical.” *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 332 (1999) (internal quotations omitted).

Defendants argue that “[m]erely collecting citizenship data and potentially providing it to the States cannot have the challenged effect on redistricting unless *States* decide to use CVAP for redistricting.” Br. 14 (emphasis in original). This is thoroughly flawed: it (1) ignores the Executive Order, which suggests that Defendants are creating a redistricting dataset because they know states will use CVAP to draw districts, (2) flips the motion to dismiss standard on its head by asking the Court to draw inferences in favor of Defendants, (3) asks the Court to resolve the factual question of whether CVAP will be used without considering any evidence, and (4) simply contradicts the Complaint, which alleges that states *will* use CVAP. *See* Compl. ¶¶ 15, 87.

Moreover, Defendants’ suggestion that states might not implement CVAP redistricting once they receive the redistricting citizenship dataset departs from reality. Defendants themselves acknowledge that multiple states, including Texas, have a longstanding “desire for CVAP redistricting.” Br. 12, n. 8. Just last summer, multiple members of Congress from Texas and Arizona wrote to Attorney General Barr that “citizenship is unquestionably germane to carrying out our duty to apportion representatives.” Letter from Members of Congress to Attorney General William P. Barr at 1 (July 10, 2019), *available at* <https://tinyurl.com/tuh5drl>.¹ But this Court need not resolve the question of whether states will use that citizenship data in a way that dilutes Plaintiffs’ votes. Plaintiffs have plausibly alleged that they will, which is what matters at this stage.

¹ This Court may take judicial notice of “information contained on state and federal government websites.” *United States v. Garcia*, 855 F.3d 615, 621 (4th Cir. 2017).

2. Defendants Set The Standing Bar Too High

Defendants' interpretation of the proper legal standard is wrong in two ways. First, Defendants suggest that "allegations of *possible* future injury are not sufficient" for Constitutional standing. Br. 15 (quoting *Wikimedia Found.*, 857 F.3d at 207-08 (alterations omitted)). This relies on a selective quotation of the *Clapper* decision, and ignores the Supreme Court's clarification the next year that "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List*, 573 U.S. at 158; *see also Kenny v. Wilson*, 885 F.3d 280, 287 (4th Cir. 2018) (citing *Susan B. Anthony List*). Thus, a plaintiff need not show it is "literally certain that the harms they identify will come about." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013). In a census case, a plaintiff may establish standing based on "the predictable effect of Government action on the decisions of third parties." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019).

Second, Defendants suggest that any injury to Plaintiffs would result from states' "own independent decisions," Br. 12, and that to establish standing, Plaintiffs would have to show that "Defendant's mere collection of citizenship data somehow coerces States into using that data for CVAP redistricting," *id.* n. 8. This, too, is wrong. In *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 155 (2010), the Supreme Court held that alfalfa farmers had standing to challenge deregulation of genetically engineered crops by a federal agency when there was a "significant risk" that engineered crops from neighboring farms would contaminate plaintiffs' alfalfa, and that risk was "readily attributable" to the deregulation decision. Defendants' insistence that Plaintiffs lack standing to challenge the Census Bureau's actions until states apportion using CVAP would be akin to the Supreme Court deciding that the alfalfa farmers in *Monsanto* lacked

standing until after their neighbors decided to plant harmful crops. That is simply not the standard. Plaintiffs are entitled to the opportunity to proceed to the next stage of the case.

3. Defendants Ignore Important Limits on Redistricting

Defendants suggest that Plaintiffs' states may, under federal law, draw districts based on datasets other than the decennial census, including "either voter-registration data or the Census Bureau's ACS-based citizenship data." Br. 13-14. But regardless of federal law, most states use the decennial census for drawing districts, by command of their state constitutions, state statutes, or long-standing practices. *See* Redistricting and Use of Census Data, National Conference of State Legislatures (July 8, 2019), *available at* <https://tinyurl.com/y4hrcwp4>. In Pennsylvania, for example, the state constitution establishes that state legislative districts must be drawn upon receipt of "population data for the Commonwealth as determined by the Federal decennial census." Pa Const. Art. II, § 17. In Washington, district populations must be "based on the population reported in the federal decennial census." Wash. Rev. Code Ann. § 44.05.090. Arizona law similarly ties redistricting data to the decennial census. Ariz. Rev. Stat. Ann. § 16-1103. Thus, in many states, any CVAP redistricting must be done using the decennial census dataset—which perhaps explains Defendants' rush to compile citizenship data "in connection with the census[.]" Executive Order 13380, 84 Fed. Reg. 33825.

Discovery is essential to resolve this case fairly. Fact-bound legal, practical, and historical frameworks governing redistricting—and questions of data sufficiency and practicality—will almost surely be the subject of expert testimony. *Cf. Kravitz v. United States Dep't of Commerce*, 366 F. Supp. 3d 681, 740 (D. Md. 2019) ("Plaintiffs' experts consistently opined that it was highly unlikely that Plaintiffs' injuries would be remedied by third-party conduct, even if that conduct was in the realm of lawful possibilities."). Defendants recognize this, as they quote "experienced demographers" to claim that states can use ACS data (rather

than decennial census data) for redistricting purposes. Br. 14 n. 10. This dive into disputed facts in the Motion to Dismiss highlights why factual development is necessary, and why the Court would err by disposing of this case on the pleadings, without the benefit of any evidence.

B. The Case Is Ripe For A Decision Now

Defendants argue that this case is unripe because (1) “it is far from certain that Plaintiffs would suffer any redistricting harm whatsoever,” and (2) collection of citizenship data “neither obligates Plaintiffs to, nor prohibits Plaintiffs from, any action.” Br. 23. The first point essentially restates Defendants’ standing arguments, and fails for the same reasons. The second point ignores Plaintiffs’ claim of vote dilution, census jurisprudence from all relevant courts, the extreme timing and practical challenges that would result from evading this issue, and the critical importance of eliminating racial animus from government action.

1. Courts Do Not Wait To Decide Census-Related Cases

Last summer, the Supreme Court emphasized that “[t]he taking of the census is not one of those areas traditionally committed to agency discretion. We and other courts have entertained both constitutional and statutory challenges to census-related decisionmaking.” *New York*, 139 S. Ct. at 2568. And in census-related vote dilution cases, “it is certainly not necessary for this Court to wait until the census has been conducted to consider the issues presented here, because such a pause would result in extreme—possibly irremediable—hardship.” *U.S. House of Representatives*, 525 U.S. at 332. The Fourth Circuit has recognized that “the hardship that the plaintiffs would experience from the delay” in a census challenge “is well established.” *NAACP v. Bureau of the Census*, 945 F.3d 183, 193 (4th Cir. 2019). The proper time to resolve census-related issues is before the census.

Defendants nonetheless claim that Plaintiffs’ sole remedy is a suit against their “respective States,” Br. 14-15, and then “only when Plaintiffs’ state and local officials choose to

use CVAP *with discriminatory intent*,” Br. 20 (emphasis original). Under this view, there would be no recourse when the Census Bureau itself creates a citizenship dataset for use in redistricting, or modifies the data it provides to the states, with discriminatory animus. This is, in essence, an argument for discrimination laundering: federal officials may conduct the census with discriminatory intent, but the poison of discrimination is beyond the reach of the courts once the data is provided to the states.

2. Failure to Decide These Issues Will Result in Avoidable Chaos

The reality of the redistricting process following the decennial census means that residents of the Commonwealth would have a dangerously small window of opportunity to litigate complex factual and legal issues. The Governor is concerned that delay in addressing the important matters raised here would result in unnecessary chaos, and could prevent judges from fashioning workable remedies prior to the 2022 election cycle. This would effectively leave Plaintiffs defenseless against the known danger of vote dilution.

Pennsylvania provides a good example of why it is important to resolve census-related disputes early. In Pennsylvania, the legislative process necessary to effect Congressional redistricting historically begins only after publication of the Federal Decennial Census. *See, e.g.*, Pa. S.B. 1249, 2011 Gen. Assemb., Reg. Sess (introduced Sept. 14, 2011) (enacted as 2011 Act 131 Dec. 22, 2011). In contrast, state legislative redistricting must begin by “no later than ninety days after the [state redistricting] commission has been duly certified or the population data for the Commonwealth as determined by the Federal decennial census are available, whichever is later ...” Pa. Const. Art. II, § 17. Delays are common in these processes: following the last census, no legislation authorizing a Congressional map was available until December 22, 2011. This leaves little time to prepare for the petition circulation and filing period for congressional and legislative seats, which begins on February 15, 2022, in the upcoming cycle.

Implementing new maps, keeping voters informed, and conducting elections in compliance with state and federal law can be a daunting task following the decennial census. The Pennsylvania Department of State (“Department”) must convert map data files into lists of precincts and update the elections system database with the new precinct lists; post nomination petitions on its website; and update the voter registration files in the Statewide Uniform Registry of Electors system, a process which allows candidates to obtain updated lists of voters from the Department or from the county boards of elections. The Department must also ensure accurate information about the new maps is widely available, including through its website and social media. For state legislative districts, the Department is required to publish textual descriptions and maps in at least one newspaper of general circulation in each county in which such newspapers are published. The congressional enactment likewise usually contains a similar publication requirement. Delays in implementing the maps can cascade, as candidates rely on them to circulate and file nomination petitions; the Department must send lists of candidates’ names to the county boards of elections; and the county boards of elections must prepare balloting materials and send them to military and overseas voters.

This is all to say that waiting to litigate known issues regarding the census data file until states draw their maps will predictably throw the carefully-choreographed election process into chaos, confusing voters and disrupting essential preparations. Even worse, it is possible (and perhaps likely) that by the time a future court has considered and decided a challenge related to the redistricting citizenship dataset at issue in this suit, it will be too late to implement any

changes or re-draw electoral districts. Indeed, courts frequently find that by the time they rule on election-related matters, there is insufficient time to fashion a remedy before the next election.²

These realities affect the states in which Plaintiffs reside. In Arizona, primary elections occur “on the first Tuesday in August,” and candidates’ nomination papers must be submitted 120 to 150 days before the primary election. Ariz. Rev. Stat. Ann. § 16-201. This places the window for submissions between March and April. Following the last decennial census, Arizona finalized its maps on February 9, 2012. Congressional Maps Get DOJ Approval, Ariz. Indep. Redistricting Comm’n (Apr. 9, 2012), *available at* <https://tinyurl.com/r82vn8b>. If past is prologue, a court would have somewhere around 60 to 90 days in 2022 to rule on a challenge to Arizona’s districts. In Washington, where legislative districts would likely be finalized between January and March of 2022, candidates’ filings would be due by late May—likely between 90 and 150 days after the maps were finalized. *See* Wash. Const. art. II, § 43(6); Rev. Code Wash. §§ 44.05.100; 29A.24.050. It seems likely that Texas, too, will have a tight turnaround for any challenge to its districts, since candidates must file for primary elections even earlier than in the other states (by mid-December, 2021). Tex. Elec. Code § 172.023(a).

The Governor urges the Court to resolve these issues now. At best, declining to hear this case will result in widespread uncertainty, followed by a rush to adjudicate last-minute legal challenges regarding use of citizenship data for apportionment. At worst, delay could produce

² *See, e.g., Common Cause v. Rucho*, No. 1:16-CV-1026, 2018 WL 4214334, at *1 (M.D.N.C. Sept. 4, 2018), *vacated on other grounds*, 139 S.Ct. 2484 (2019) (holding “there is insufficient time for this Court to approve a new districting plan and for the State to conduct an election using that plan.... [I]mposing a new schedule for North Carolina’s congressional elections would, at this late juncture, unduly interfere with the State’s electoral machinery and likely confuse voters and depress turnout.”).

chaos, subject Plaintiffs to the exact vote dilution they warn of, and deprive voters of meaningful recourse to the courts.

3. When Racial Animus Motivates Government Action, Courts May Step In

Defendants have set out an extreme position: even if racial animus motivated creation of a redistricting citizenship database in connection with this census, Plaintiffs have no recourse against the federal government. Rather, “Plaintiffs’ quarrel lies with their respective States, not the President, the Secretary of Commerce, or the Census Bureau.” Br. 14. To the extent Plaintiffs challenge action by the federal government, Defendants maintain that Plaintiffs “may seek relief through the political process—not the courts.” Br. 15. This is wrong. A constitutional claim regarding the census is “not a political one” because:

If this constitutional question were beyond the reach of judicial review, the People would have no ordered redress of Legislative and Executive Branch actions or inactions that thwart their essential constitutional right. If Congress is in violation of the Enumeration Clause’s mandate, it cannot take refuge behind the fig leaf of deference to administrative procedure. Nothing is more existential to the preservation of the “Republic” than requiring an “actual Enumeration” without “partiality or oppression.”

NAACP, 945 F.3d at 194 (Gregory, J. concurring). Chief Judge Gregory’s beliefs regarding the Enumeration Clause apply with equal force to Plaintiffs’ claim that the Census Bureau has violated the Fifth Amendment’s Equal Protection Clause through racial animus. The Governor entirely agrees: judicial review is necessary to safeguard Constitutional and statutory rights.

C. The Court Should Consider The Context For This Motion

Defendants cite a four-part test for discriminatory intent, which focuses on a decisionmaker’s past actions, “historical background,” the “specific sequence of events” leading

up to a decision, and “contemporaneous statements” by the decisionmaker.³ Br. 33 (quoting *Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 635 (4th Cir. 2016)). Because context is so important to this inquiry, and because Defendants fault the Complaint for failing to identify a history of discrimination, the Governor will provide some background.

1. The Presidential Advisory Committee on Election Integrity

The President’s Executive Order is the latest move in a long-running and tactical pattern of discrimination and interference with the fundamental right to vote. In 2016, President-Elect Trump tweeted: “In addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally[.]” President Donald J. Trump (@realDonaldTrump), Twitter (Nov. 27, 2016, 12:30 PM), *available at* <https://tinyurl.com/hlodj9x> (last visited January 16, 2020). In May 2017, he established the Presidential Advisory Commission on Election Integrity (“Commission”) by executive order. Executive Order 13799, 82 Fed. Reg. 22389 (May 11, 2017). Kansas Secretary of State Kris Kobach was appointed Vice Chair of the Commission. Statement from Kris Kobach, Secretary of State and Vice Chair of the Presidential Advisory Commission on Election Integrity (July 5, 2017), *available at* <https://tinyurl.com/qn3m4wx>.⁴ Kobach and the Commission requested voter information from the Commonwealth, among other states. Governor Wolf responded:

³ Defendants contend that the President’s statements are irrelevant because the Secretary of Commerce is the decisionmaker. Br. 34. But the Third Count alleges that the Secretary of Commerce “improperly allow[ed] President Trump to usurp the discretion delegated to the Secretary by Congress.” Compl. ¶ 102.

⁴ As Kansas Secretary of State, Kobach was then a defendant and attorney in federal litigation regarding whether requiring voters to present proof of citizenship violated the Equal Protection Clause of the Fourteenth Amendment. See Amended Complaint, *Fish v. Kobach*, 2:16-cv-02105-JAR (D. Kan. March 17, 2016), Dkt. 39. In June of 2017, Kobach was sanctioned and fined \$1,000 in that suit for failure to produce discoverable materials after he was photographed carrying relevant documents to a meeting with President Trump. Order at 4, *Fish v. Kobach*, 2:16-cv-02105-JAR, (D. Kan. June 23, 2017), Dkt. 355. In 2018, Kobach’s lawsuit went to trial. Kobach had argued that indicia of voter fraud were just the

I have serious reservations about the true intentions of this effort in light of the false statements this administration has made regarding voting integrity, the historical suppression of voting rights, and the way that such data has been used in the past. . . . I have grave concerns your request is a mere pretense for pursuing restrictions on the fundamental right of citizens to vote. . . . Voter suppression is undemocratic and I will not allow Pennsylvania to participate in this process to further the trend of suppression seen across the country.

Letter to Kris W. Kobach from Governor Tom Wolf (June 30, 2017),

<https://www.governor.pa.gov/wp-content/uploads/2017/06/Kobach.pdf>. Kobach denied

knowledge of these requests, and the Commission was disbanded in early 2018. Statement by

the Press Secretary on the Presidential Advisory Commission on Election Integrity, (Jan. 3,

2018), *available at* <https://tinyurl.com/qsu37e2>.

2. The Census Question

During his time on the Commission, Kobach was also working to include a citizenship question in the decennial census. *Kravitz v. United States Dep't of Commerce*, 382 F. Supp. 3d 393, 397 (D. Md. 2019). In litigation connected with the citizenship question, Judge Hazel found that “Plaintiffs had presented evidence that individuals in Secretary Ross’s orbit, including the President and Mr. Kobach, did harbor discriminatory animus towards non-citizens.” *Id.* at 398. Judge Hazel also summarized a memorandum written by Dr. Thomas Hofeller, a key player in the citizenship question saga, which even Defendants refer to as the “proverbial smoking gun”:

Dr. Hofeller acknowledged that a change from redistricting based on total population to CVAP would be a “radical departure” that might alienate Hispanic voters. He noted that further research should address whether “the gain of GOP voting strength” from the use of CVAP data would be “worth the alienation of Latino voters

“tip of the iceberg,” but the Court drew “the more obvious conclusion that there is no iceberg; only an icicle, largely created by confusion and administrative error.” Findings of Fact and Conclusions of Law at 88-89, *Fish v. Kobach*, 2:16-cv-02105-JAR (D. Kan. June 18, 2018) Dkt. 542. The Judge again sanctioned Kobach for presenting undisclosed expert witness testimony at trial, and ordered him to complete Continuing Legal Education courses.

who will perceive the switch” as an “attempt to diminish their voting strength.”

Id. Dr. Hofeller’s documents, which are now available online, reveal that his Texas calculations did not just focus on CVAP, but on dividing voters between “Percent CVAP Anglo” and “Percent Hispanic CVAP.”⁵

Defendants claim that “Plaintiffs fail to plausibly allege any departures from normal procedures such that discriminatory intent could be inferred.” Br. 35. But this ignores Count III of the Complaint. *See* n. 4, *supra*. It also ignores the extraordinary fact that the Chief Justice of the Supreme Court found that Defendants’ stated reason for including the census question “seems to have been contrived.” *New York*, 139 S. Ct. 2551, 2575 (2019).

The redistricting citizenship dataset at issue is not an isolated action, as Defendants suggest. It is the latest battle in a purposeful, years-long, wide-reaching campaign by Defendants and the individuals named in the Complaint to game the voting and redistricting process. But it is also part of a larger struggle, as old as our country: “[f]rom the very beginning, the Enumeration Clause was born in the tainted cauldron of racism, sexism, and classism.” *NAACP*, 945 F.3d at 194 (Gregory, J. concurring). The Governor urges the Court to zealously protect the census and redistricting processes from gamesmanship, and to allow these claims to move forward.

V. CONCLUSION

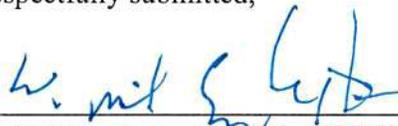
For the foregoing reasons, the Pennsylvania Office of the Governor respectfully asks that this Court deny Defendants’ Motion to Dismiss.

⁵ Dr. Hofeller’s documents are available at <https://www.thehofellerfiles.com/>.

Dated: January 16, 2020

Respectfully submitted,

By:



W. Neil Eggleston (Bar No. 09864)
Neil.Eggleston@kirkland.com
Susan Davies* (D.C. Bar No. 1015133)
Susan.Davies@kirkland.com
Daniel T. Donovan* (D.C. Bar No 459680)
DDonovan@kirkland.com
Patrick Brown* (D.C. Bar No. 1033415)
Patrick.Brown@kirkland.com
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue NW
Washington, D.C. 20004
Telephone: (202) 389-5000
Fax: (202) 389-5200

Gregory G. Schwab*
grschwab@pa.gov
General Counsel
OFFICE OF THE GOVERNOR
Commonwealth of Pennsylvania
225 Main Capitol Building
Harrisburg, PA 17120
Telephone: (717) 787-2500
Fax: (717) 772-3155

*Counsel for Amicus Curiae Tom Wolf,
Governor of Pennsylvania*

**pro hac vice forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2020, I caused the foregoing Brief of Tom Wolf, Governor of Pennsylvania, as Amicus Curiae in Opposition to Defendants' Motion to Dismiss to be served on counsel for the parties below via First Class Mail:

Stephen Ehrlich
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20005

Thomas A. Saenz
Nina Perales
Denise Hulett
Andrea Senteno
Tanya G. Pellegrini
Julia A. Gomez
Mexican American Legal Defense and Education Fund
1016 16th Street NW, Suite 100
Washington, DC 20036

John C. Yang
Niyati Shah
Terry Ao Minnis
Eri Andriola
Asian Americans Advancing Justice
1620 L Street, NW, Suite 1050
Washington, DC 20036



W. Neil Eggleston