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10 **IN THE UNITED STATES DISTRICT COURT**  
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
12 **SAN FRANCISCO DIVISION**

13 STATE OF CALIFORNIA,  
14 Plaintiffs,

15 vs.

16 WILBUR L. ROSS, JR., *et al.*,  
17 Defendants.

18 -----  
19 CITY OF SAN JOSE, *et al.*,  
20 Plaintiffs,

21 vs.

22 WILBUR L. ROSS, JR., *et al.*,  
23 Defendants.

Case Nos. 3:18-cv-01865-RS,  
3:18-cv-2279-RS

**BRIEF OF *AMICI CURIAE* CURRENT  
MEMBERS OF CONGRESS AND  
BIPARTISAN FORMER MEMBERS OF  
CONGRESS IN SUPPORT OF  
PLAINTIFFS**

Date: August 9, 2018  
Time: 1:30 p.m.  
Judge: Honorable Richard Seeborg  
Dept.: 3

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**INTEREST OF *AMICI CURIAE*<sup>1</sup>**

*Amici curiae* are current members of Congress and bipartisan former members of Congress who have a strong interest in ensuring that the Census Bureau respects its constitutional duty to count all persons living in the United States, citizen and noncitizen alike. As current and former members of Congress, *amici* know that Census data is used to make critically important decisions, including regarding how representatives are apportioned in Congress; how Electoral College votes are distributed amongst the states; how state, local, and congressional districts are drawn; and how billions of dollars of federal funds to local communities are allocated. Thus, *amici* also appreciate that failing to count *all* persons in the United States—as our Constitution requires—would be enormously damaging, and the consequences of an unfair, inaccurate count would endure for at least the next ten years, and possibly much longer. *Amici* thus have a strong interest in this case.

**INTRODUCTION**

The Census is the cornerstone of our democracy. To ensure equal representation for all, the Constitution, through both Article I, Section 2 and the Fourteenth Amendment, explicitly requires the federal government to accurately conduct an “actual Enumeration” of the people. U.S. Const. art. I, § 2, cl. 3. This critical, all-inclusive constitutional language places a clear duty on the federal government to count the “whole number of persons in each State.” U.S. Const. amend. XIV, § 2. In other words, the federal government must count *all* people living in the United States, whether they are citizens or noncitizens, whether they were born in the United States or in a distant part of the world. The total-population standard—chosen by our Constitution’s Framers more than two centuries ago and reaffirmed following a bloody civil

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<sup>1</sup> No person or entity other than *amici* and their counsel assisted in or made a monetary contribution to the preparation or submission of this brief.

1 war—was considered the “natural & precise measure of Representation,” 1 *The Records of the*  
2 *Federal Convention of 1787*, at 605 (Max Farrand ed., 1911), and “the only true, practical and  
3 safe republican principle,” Cong. Globe, 39th Cong., 1st Sess. 2767 (1866). “Numbers, not  
4 voters; numbers, not property; this is the theory of the Constitution.” *Id.* “As the Framers of the  
5 Constitution and the Fourteenth Amendment comprehended, representatives serve all residents.”  
6 *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016). The Constitution draws no distinction between  
7 citizens and noncitizens, but rather requires that the “whole immigrant population should be  
8 numbered with the people and counted as part of them.” Cong. Globe, 39th Cong., 1st Sess. 432.  
9 It imposes a constitutional duty on the federal government to conduct a complete and accurate  
10 count of everyone in order to realize the “Constitution’s plain objective of making equal  
11 representation for equal numbers of people the fundamental goal for the House of  
12 Representatives.” *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

15 The Constitution’s mandate that the federal government count the population of the entire  
16 nation to ensure equal representation for all persons creates a “strong constitutional interest in  
17 accuracy.” *Utah v. Evans*, 536 U.S. 452, 478 (2002). The Framers knew that “those who have  
18 power in their hands will . . . always when they can . . . increase it,” 1 *The Records of the*  
19 *Federal Convention* at 578, and they enshrined the requirement that all persons be counted  
20 directly into the Constitution to “shut[] the door to partiality or oppression,” *The Federalist No.*  
21 *36*, at 188 (Hamilton) (Clinton Rossiter rev. ed., 1999), and prevent the government from using  
22 “a mode” of taking the census “as will defeat the object[] and perpetuate the inequality,” 1 *The*  
23 *Records of the Federal Convention* at 571. The federal government may not manipulate the  
24 Census in order to make an end run around the Constitution’s requirement to count all persons,  
25 citizen and noncitizen alike. Yet that is what is happening.

1 On March 26, 2018—many years into preparation and testing for the 2020 Census—the  
2 Secretary of the U.S. Department of Commerce ordered the Census Bureau to add a citizenship  
3 question to the Census, turning a blind eye to the overwhelming evidence that this question will  
4 deter participation by immigrants across the country, who do not want an official record of their  
5 immigration status and fear that their responses will be used by the government to harm them  
6 and their families. See First Am. Compl., *California v. Ross*, ¶¶ 35-46; Compl., *City of*  
7 *San Jose v. Ross*, ¶¶ 64, 71-84.

9 The Census Bureau has long recognized that “any effort to ascertain citizenship will  
10 inevitably jeopardize the overall accuracy of the population count.” *Fed’n for Am. Immigration*  
11 *Reform v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980) (three-judge court). This is  
12 particularly true today, given threats by the Trump Administration that every undocumented  
13 immigrant in the country “should be uncomfortable,” “should look over [their] shoulder,” and  
14 “need[s] to be worried.” *Immigration and Customs Enf’t and Customs and Border Protection*  
15 *Fiscal Year 2018 Budget Request: Hearing Before the Subcomm. on Homeland Sec. of the H.*  
16 *Comm. on Appropriations*, 115th Cong. 279 (2017) (statement of Thomas D. Homan, Acting  
17 Dir., Immigration and Customs Enf’t). Indeed, the Census Bureau’s own evidence demonstrated  
18 “an unprecedented ground swell in confidentiality and data sharing concerns, particularly among  
19 immigrants or those who live with immigrants.” Mikelyn Meyers, Ctr. For Survey Mgmt., U.S.  
20 Census Bureau, *Respondent Confidentiality Concerns and Possible Effects on Response Rates*  
21 *and Data Quality for the 2020 Census* 15 (Nov. 2, 2017),  
22 <https://www2.census.gov/cac/nac/meetings/2017-11/Meyers-NAC-Confidentiality->  
23 [Presentation.pdf](https://www2.census.gov/cac/nac/meetings/2017-11/Meyers-NAC-Confidentiality-Presentation.pdf). But the Secretary added the citizenship question to the 2020 Census anyway,  
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1 ignoring the overwhelming evidence that it would undermine the constitutionally required count  
2 of all persons.

3 To make matters worse, the Secretary of Commerce announced that the government  
4 would use administrative records to double-check the accuracy of responses to the citizenship  
5 question, *see* Paul Overberg & Janet Adamy, *Trump Administration Plans To Check Your*  
6 *Answer on Census Citizenship Question*, Wall St. J. (Apr. 3, 2018),  
7 [https://www.wsj.com/articles/trump-administration-plans-to-check-your-answer-on-new-census-](https://www.wsj.com/articles/trump-administration-plans-to-check-your-answer-on-new-census-citizenship-question-1522781033)  
8 [citizenship-question-1522781033](https://www.wsj.com/articles/trump-administration-plans-to-check-your-answer-on-new-census-citizenship-question-1522781033), exponentially increasing the chilling effect of the citizenship  
9 inquiry, and refused to subject the citizenship question to the careful testing the Census Bureau  
10 routinely uses to ensure that the questions on the Census accurately count all persons, *see* First  
11 Am. Compl., *California v. Ross*, ¶¶ 35-46; Compl., *City of San Jose v. Ross*, ¶¶ 64, 71-84. In the  
12 past, the Census Bureau has rigorously tested Census questions, recognizing that there are no do-  
13 overs when it comes to the Census, but inexplicably the Secretary refused to test the citizenship  
14 question at all. These actions, absent this Court’s intervention, threaten to undermine the  
15 constitutional requirement that there be an “actual Enumeration” of all persons in the country.

16 Urging this Court to dismiss this case at the outset, the Department of Justice offers an  
17 extremely cramped interpretation of the Census Clause. According to the Department of Justice,  
18 the Constitution does not require the government to produce an accurate count of all persons at  
19 all, but simply requires it to “put in place procedures to count the population,” Mem. of Law in  
20 Supp. of Defs.’ Mot. to Dismiss, *California v. Ross*, at 2; *id.* at 26-27; Mem. of Law in Supp. Of  
21 Defs.’ Mot. to Dismiss, *City of San Jose v. Ross*, at 2; *id.* at 27-28, even if those procedures skew  
22 the count and bias the results, as the citizenship question certainly would. This view is at odds  
23 with the constitutional commitment to count all persons, which reflects a “strong constitutional  
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1 interest in accuracy,” *Evans*, 536 U.S. at 478, and it would license the kind of political  
2 manipulation of our Constitution’s promise of equal representation that the Framers wrote the  
3 Census Clause to prevent. The government may not rig the constitutionally required count to  
4 produce a disproportionate undercount of disfavored segments of the population.  
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6 The Secretary, of course, has broad powers, delegated by Congress, to conduct the  
7 Census, and “so long as the Secretary’s conduct of the census is ‘consistent with the  
8 constitutional language and the constitutional goal of equal representation,’ it is within the limits  
9 of the Constitution.” *Wisconsin v. City of New York*, 517 U.S. 1, 19-20 (1996) (quoting *Franklin*  
10 *v. Massachusetts*, 505 U.S. 788, 804 (1992)). But the addition of the citizenship question bears  
11 no “relationship to the accomplishment of an actual enumeration of the population, keeping in  
12 mind the constitutional purpose of the census.” *Id.* at 20. It is inconsistent with the text of the  
13 Constitution, which requires counting all persons, citizens and noncitizens alike, and would  
14 undermine the constitutional goal of equal representation, producing a disproportionate  
15 undercount of hard-to-count immigrant communities. Indeed, the Secretary has offered no  
16 Census-related purpose for asking all persons to divulge their citizenship status. The citizenship  
17 question will undermine—not realize—the “actual Enumeration” the Constitution mandates.  
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19 The Secretary justified the decision to add the citizenship question to the 2020 Census  
20 solely on the ground that it was necessary to enforce the Voting Rights Act, but the Secretary has  
21 no expertise or authority to enforce the Act, and his reasoning is manifestly false. A citizenship  
22 question has never been viewed as necessary to ensure robust protection of the right to vote free  
23 from racial discrimination. Indeed, since the passage of the Voting Rights Act in 1965, the  
24 Census has never asked all persons to report their citizenship status. This is a specious  
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1 justification for undercutting what the Constitution mandates: a count of *all* the people,  
2 regardless of their citizenship status.

3 The motions to dismiss should be denied.

## 4 ARGUMENT

### 5 **I. The Text and History of the Census Clause Require the Federal Government To** 6 **Count All Persons To Ensure Equal Representation for All Persons.**

7 In order to ensure that “the foundations of this government should be laid on the broad  
8 basis of the people,” 4 *The Debates in the Several State Conventions on the Adoption of the Federal*  
9 *Constitution* 21 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter “*Elliot’s Debates*”], Article I,  
10 Section 2 provides that “Representatives . . . shall be apportioned among the several States which  
11 may be included within this Union, according to their respective Numbers, which shall be  
12 determined by adding to the whole Number of free Persons . . . three fifths of all other Persons.”  
13 U.S. Const. art. I, § 2, cl. 3. To ensure a proper count of the nation’s total population, Article I,  
14 Section 2 requires that an “actual Enumeration shall be made within three Years after the first  
15 Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in  
16 such Manner as they shall by Law direct.” *Id.*

17 In choosing the total-population standard, the Framers decreed “that as all authority was  
18 derived from the people, equal numbers of people ought to have an equal no. of representatives.”  
19 1 *The Records of the Federal Convention* at 179. Determining representation in Congress based  
20 on a count of all persons reflected that “every individual of the community at large has an equal  
21 right to the protection of government.” *Id.* at 473; *id.* at 477 (“[T]he people shd. be repre[se]nted  
22 in proportion to [their] numbers, the people then will be free.”); *Evenwel*, 136 S. Ct. at 1129  
23 (explaining that “the principle of representational equality figured prominently in the decision to  
24 count people, whether or not they qualify as voters”). The idea that all persons should enjoy equal  
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1 representation had deep roots in America’s bid for independence from England. The Framers were  
2 familiar with what James Madison called the “vicious representation in G. B.,” 1 *Records of the*  
3 *Federal Convention* at 464, in which “so many members were elected by a handful of easily  
4 managed voters in ‘pocket’ and ‘rotten’ boroughs, while populous towns went grossly  
5 underrepresented or not represented at all,” Jack N. Rakove, *Original Meanings: Politics and Ideas*  
6 *in the Making of the Constitution* 210 (1996). The Declaration of Independence charged that King  
7 George III had forced the colonists to “relinquish the right of Representation in the Legislature, a  
8 right inestimable to them and formidable to tyrants only.” The Declaration of Independence para.  
9 5 (1776). Having seen the political system manipulated for partisan ends in England, the Framers  
10 strove to design a system that would reflect the principle that a “free and equal representation is  
11 the best, if not the only foundation upon which a free government can be built.” 2 *Elliot’s Debates*  
12 at 25. Of all “the electoral safeguards for the representational system,” none “was as important to  
13 Americans as equality of representation.” Gordon S. Wood, *The Creation of the American*  
14 *Republic, 1776-1787*, at 170 (2d ed. 1998).

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18 To achieve these goals, the Framers imposed on the federal government a duty to conduct  
19 a complete and accurate count of all people residing in the nation, creating a structural protection  
20 for equal representation. This was a revolutionary undertaking. “While other nations had  
21 attempted population counts, none had made the count itself an important method of maintaining  
22 democracy by mandating it through a founding document.” *Evans*, 536 U.S. at 510 (Thomas, J.,  
23 concurring in part and dissenting in part); Margo Anderson, *The Census and the Federal Statistical*  
24 *System: Historical Perspectives*, 631 *Annals of Am. Acad. of Poli. & Soc. Sci.* 152, 154 (2010)  
25 (“With th[e Census Clause’s] words, the United States became the first nation in the history of the  
26 world to take a population census and use it to allocate seats in a national assembly according to  
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1 population.”). Thus, at a time when “democratic self-government existed almost nowhere on  
2 earth,” Akhil Reed Amar, *America’s Constitution: A Biography* 8 (2005), the Framers made the  
3 Census the cornerstone of the democratic system of government they created.

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5 The text of Article I, Section 2 provided a “conjectural ratio” for the apportionment of  
6 representatives “to prevail in the outset,” but the Framers refused to permit guesswork to be used  
7 going forward. 1 *Records of the Federal Convention* at 578; *Evans*, 536 U.S. at 475 (“[T]he  
8 original allocation of seats in the House was based on a kind of ‘conjectur[e],’ in contrast to the  
9 deliberately taken count that was ordered for the future.” (quoting 1 *Records of the Federal*  
10 *Convention* at 578-79)). As George Mason argued, “a Revision from time to time according to  
11 some permanent & precise standard” was “essential to [the] fair representation required in the 1st.  
12 branch.” 1 *Records of the Federal Convention* at 578. While the Framers did not prescribe a  
13 “detailed census methodology,” *Evans*, 536 U.S. at 479, they established a firm rule that the  
14 political branches cannot vary: all persons must be counted, regardless of where they are from.

15  
16 Wary that those in power might try to undermine the promise of equal representation for  
17 all, the Framers insisted on an “actual Enumeration”—a national count of all inhabitants—once  
18 every ten years. As Founding-era dictionaries make clear, “an ‘enumeration’ requires an actual  
19 counting.” *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346 (1999) (Scalia,  
20 J., concurring in part) (collecting dictionary definitions); *Evans*, 536 U.S. at 475 (“Late-18<sup>th</sup>-  
21 century dictionaries define the word simply as an ‘act of numbering or counting over[.]’” (quoting  
22 1 Samuel Johnson, *A Dictionary of the English Language* 658 (4th rev. ed. 1773))). As James  
23 Madison observed during debates over the First Census Act, while “there will be more difficulty  
24 attendant on taking the census, in the way required by the [C]onstitution,” a count of all persons  
25 would provide “an exact number” rather than “assertions and conjectures.” James Madison,  
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1 *Census* (Feb. 2, 1790), in 13 *The Papers of James Madison* 15-16 (Charles F. Hobson & Robert  
2 A. Rutland eds., 1981). The constitutional requirement of an “actual Enumeration” would help  
3 ensure that “every individual of the community at large has an equal right to the protection of  
4 government,” 1 *Records of the Federal Convention* at 473, and prevent political manipulation of  
5 our democratic system of government.  
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7 As the debates in the Constitutional Convention over the Census Clause reflect, the  
8 Framers understood that “those who have power in their hands will not give it up while they can  
9 retain it. On the [c]ontrary we know they will always when they can rather increase it.” *Id.* at 578;  
10 *Evans*, 536 U.S. at 500 (Thomas, J., concurring in part and dissenting in part) (observing that  
11 “[d]ebate about apportionment and the census . . . focused for the most part on creating a standard  
12 that would limit political chicanery”). The Framers’ decision to mandate a national count of all  
13 inhabitants every ten years to ensure equal representation for all persons “had the recommendation  
14 of great simplicity and uniformity in its operation, of being generally acceptable to the people, and  
15 of being less liable to fraud and evasion, than any other, which could be devised.” 2 Joseph Story,  
16 *Commentaries on the Constitution* § 633, at 141 (1833). As Alexander Hamilton emphasized,  
17 “[a]n actual census or enumeration of the people must furnish the rule, a circumstance which  
18 effectively shuts the door to partiality or oppression.” *The Federalist No. 36, supra*, at 188  
19 (Hamilton).  
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22 During the debate on the Census Clause in the Constitutional Convention, both supporters  
23 and opponents recognized that a fixed constitutional standard would limit opportunities for  
24 manipulation of our representative democracy. Gouverneur Morris opposed the Census Clause as  
25 “fettering the Legislature too much,” but he recognized that if the mode for taking the Census was  
26 “unfixt the Legislature may use such a mode as will defeat the object[] and perpetuate the  
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1 inequality.” 1 *Records of the Federal Convention* at 571. In response, Edmund Randolph pointed  
2 out that “if the danger suggested by Mr. Govr. Morris be real, of advantage being taken of the  
3 Legislature in pressing moments, it was an additional reason for tying their hands in such a manner  
4 that they could not sacrifice their trust to momentary considerations.” *Id.* at 580. This argument  
5 carried the day, and the Framers concluded that “the *periods & the rule* of revising the  
6 Representation ought to be fixt by the Constitution.” *Id.* at 582.

8 The Constitution’s rule that representatives would be apportioned based on an “actual  
9 Enumeration” of the people, however, was undercut by the Three-Fifths Clause, which provided  
10 that, for the purpose of determining representation in Congress, enslaved persons would be counted  
11 as three-fifths of a person. “The more slaves the Deep South could import from the African  
12 continent—innocents born in freedom and kidnapped across an ocean to be sold on auction  
13 blocks—the more seats it would earn in the American Congress.” Amar, *supra*, at 90. During the  
14 debates in the Convention, Gouverneur Morris and others argued strenuously against the adoption  
15 of the Three-Fifths Clause, pointedly asking “[u]pon what principle is it that the slaves shall be  
16 computed in the representation? Are they men? Then make them Citizens & let them vote? Are  
17 they property? Why then is no other property included?” 2 *The Records of the Federal Convention*  
18 at 222. The upshot of the Clause was that “the inhabitant of Georgia and S. C. who goes to the  
19 coast of Africa, and . . . tears away his fellow creatures from their dearest connections & dam(n)s  
20 them to the most cruel bondages, shall have more votes in a Govt. instituted for protection of the  
21 rights of mankind.” *Id.* Despite these arguments, the Convention approved the Three-Fifths  
22 Clause, which it deemed a compromise necessary to ensure the Constitution’s ratification. Nearly  
23 80 years later, following a bloody civil war fought over our nation’s original sin of slavery, the  
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1 Framers of the Fourteenth Amendment would revisit the Constitution’s system of representation  
2 in the wake of emancipation and abolition, as the next Section discusses.

3 **II. The Fourteenth Amendment Reaffirmed the Constitutional Obligation To Count All**  
4 **Persons, Citizens and Noncitizens Alike.**

5 With the adoption of Section 2 of the Fourteenth Amendment, which provides that  
6 “Representatives shall be apportioned among the several States according to their respective  
7 numbers, counting the whole number of persons in each State, excluding Indians not taxed,” U.S.  
8 Const. amend XIV, § 2, the Founding generation’s commitment to equal representation for all as  
9 determined by a national count of all persons was finally realized. Yet it took seven months of  
10 heated debate for this guarantee of equal representation for all persons to emerge. During the  
11 debates over the Fourteenth Amendment, many in Congress sought a drastic change in our  
12 constitutional principles of equal representation, arguing that only citizens or voters should be  
13 counted in determining representation. The Framers of the Fourteenth Amendment decisively  
14 rejected those arguments and reaffirmed total population as the Constitution’s basis for  
15 representation. *Evenwel*, 136 S. Ct. at 1128. As Jacob Howard explained in introducing the  
16 Fourteenth Amendment, “numbers,” i.e., total population, is “the most just and satisfactory basis,  
17 and this is the principle upon which the Constitution itself was originally framed, that the basis of  
18 representation should depend upon numbers; and such . . . is the safest and most secure principle  
19 upon which the Government can rest. Numbers, not voters; numbers, not property; this is the  
20 theory of the Constitution.” Cong. Globe, 39th Cong., 1st Sess. 2767.  
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23

24 When the Thirty-Ninth Congress met in December 1865, questions of representation were  
25 front and center. With the Three-Fifths Clause a nullity and the full personhood of formerly  
26 enslaved African Americans recognized for the purpose of representation, the Framers of the  
27 Fourteenth Amendment were concerned that the Southern states would gain an ill-gotten windfall:  
28



1 far more representation in Congress and in the Electoral College than they had before they had  
2 seceded from the Union. *See, e.g., id.* at 357 (“Shall the death of slavery add two fifths to the  
3 entire power which slavery had when slavery was living?”). As the Joint Committee on  
4 Reconstruction, which was tasked with writing the Fourteenth Amendment, explained, “[t]he  
5 increase of representation necessarily resulting from the abolition of slavery was considered the  
6 most important element in the questions arising out of the changed condition of affairs, and the  
7 necessity for some fundamental action in this regard seemed imperative.” *Report of the Joint*  
8 *Committee on Reconstruction, at the First Session Thirty-Ninth Congress* xiii (1866).

9  
10  
11 During debates over the Fourteenth Amendment, many urged a fundamental change in  
12 constitutional principles of equal representation, insisting that “representation shall be based on  
13 citizens of the United States who may be male adult voters” so that “every voter should be equal  
14 in political power all over the Union.” *Cong. Globe, 39th Cong., 1st Sess.* 404. Some even called  
15 for overhauling the Census Clause and putting in its place a “true census of the legal voters.” *Id.*  
16 at 10. But, as the Supreme Court has recognized, “[v]oter-based apportionment proponents  
17 encountered fierce resistance . . . . Much of the opposition was grounded in the principle of  
18 representational equality.” *Evenwel*, 136 S. Ct. at 1128. Supporters of the Fourteenth Amendment  
19 argued that such a change in our Constitution’s system of representation would be “an  
20 abandonment of one of the oldest and safest landmarks of the Constitution” and would “introduce[]  
21 a new principle in our Government, whose evil tendency and results no man can measure to-day.”  
22 *Cong. Globe, 39th Cong., 1st Sess.* 377. Instead, the Reconstruction Framers insisted on “leav[ing]  
23 the primary basis of representation where it was placed by our fathers, the whole body of the  
24 people.” *Id.* at 385.  
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1           Particularly relevant here, Rep. John Bingham argued that it would be unwise to “strike  
2 from the basis of representation the entire immigrant population not naturalized,” observing that  
3 “[u]nder the Constitution as it now is and as it always has been, the entire immigrant population  
4 of this country is included in the basis of representation.” *Id.* at 432. In his view, the “whole  
5 immigrant population should be numbered with the people and counted as part of them.” *Id.*; *id.*  
6 at 411 (arguing that representation based on number of voters “takes from the basis of  
7 representation all unnaturalized foreigners”). Others made similar arguments, insisting that  
8 representation should be based “on the largest basis of population, counting every man, woman,  
9 and child,” *id.* at 1280, and that “the whole population is represented; that although all do not vote,  
10 yet all are heard. That is the idea of the Constitution,” *id.* at 705. The Fourteenth Amendment  
11 proponents refused to “throw[] out of the basis at least two and a half millions of unnaturalized  
12 foreign-born men and women,” insisting that “[a] community may be represented, every man in  
13 the community may be represented, and every woman and child in the community may be  
14 represented, and yet not every man twenty-one years of age be a voter.” *Id.* at 1256, 1279-80.  
15 “All the people, or all the members of a State or community, are equally entitled to protection;  
16 they are all subject to its laws; they must all share its burdens, and they are all interested in its  
17 legislation and government.” *Id.* at 2962.

18           These proponents of equal representation ultimately carried the day, and Congress adopted  
19 the Fourteenth Amendment, insisting that total population, not citizen or voter population, was the  
20 basis for our Constitution’s system of representation. The Fourteenth Amendment, which was  
21 approved by the people and became a part of the Constitution in 1868, reaffirmed that our  
22 Constitution’s system of equal representation for all depends on a count of the nation’s entire  
23 population, including noncitizens. As this history shows, the purpose of the Census required by  
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1 the Constitution has never been to count just citizens, but rather to count “the whole body of the  
2 people.” *Id.* at 385.

3 **III. Congress’s Power To Determine the “Manner” of Taking the Census Does Not**  
4 **Permit an End Run Around the Constitutional Duty To Count All Persons.**

5 As the Complaints allege, the Secretary’s eleventh-hour decision to add an untested  
6 citizenship question to the 2020 Census and to double-check individual responses, which will  
7 deter participation by citizens and noncitizens in immigrant communities, cannot be squared with  
8 the constitutional requirement to count all persons. First Am. Compl., *California v. Ross*, ¶¶ 47-  
9 52; Compl., *City of San Jose v. Ross*, ¶¶ 1-10, 90-96. This decision will undermine the  
10 constitutionally required count, create a disproportionate undercount of disfavored groups, and  
11 skew the data used to ensure equal representation for all persons. The federal government,  
12 however, contends that it may ask all persons to divulge their citizenship because “the  
13 Constitution commits the ‘[m]anner’ of conducting the census to Congress, and Congress has  
14 delegated that authority to the Secretary in . . . broad terms,” Mem. of Law in Supp. of Defs.’  
15 Mot. to Dismiss, *California v. Ross*, at 11; Mem. of Law in Supp. of Defs.’ Mot. to Dismiss, *City*  
16 *of San Jose v. Ross*, at 11. But the Secretary’s authority to prescribe the “[m]anner” for taking  
17 the constitutionally required count of all persons is not a blank check. The Secretary’s  
18 discretion, though undeniably broad, does not permit him to make an end run around the  
19 Constitution’s mandate to count all persons, citizens and noncitizens alike. The Secretary cannot  
20 rig the Census to disproportionately undercount disfavored groups of persons. As the Supreme  
21 Court’s cases make clear, the principle of equal representation for all persons remains the  
22 touchstone. *See Wisconsin*, 517 U.S. at 19-20 (“[S]o long as the Secretary’s conduct of the  
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1 census is ‘consistent with the constitutional language and the constitutional goal of equal  
2 representation,’ it is within the limits of the Constitution.” (quoting *Franklin*, 505 U.S. at 804)).

3  
4 Curbing manipulation of the Census by the political branches was one of the main  
5 reasons for writing the Census directly into the Constitution. The Framers knew that “those who  
6 have power in their hands will not give it up while they can retain it. On the [c]ontrary we know  
7 they will always when they can rather increase it.” 1 *The Records of the Federal Convention* at  
8 578. Aware that population counts could be skewed, the Framers wrote the requirement for a  
9 count of all persons directly into the Constitution to “shut[] the door to partiality or oppression,”  
10 *The Federalist No. 36, supra*, at 188 (Hamilton), and prevent the government from using “a  
11 mode” of taking the Census “as will defeat the object[] and perpetuate the inequality,” 1 *The*  
12 *Records of the Federal Convention* at 571. The Framers “t[ied] their hands” and prevented the  
13 political branches from “sacrific[ing] their trust to momentary considerations.” *Id.* at 580. If the  
14 federal government had the unfettered power to manipulate the rule of the Census to undercount  
15 disproportionately a disfavored group of persons, it could undo “our Constitution’s plain  
16 objective of making equal representation for equal numbers of people the fundamental goal for  
17 the House of Representatives.” *Wesberry*, 376 U.S. at 18; *Dep’t of Commerce*, 525 U.S. at 348  
18 (Scalia, J., concurring in part) (rejecting construction of the “Manner” clause that would give  
19 “the party controlling Congress” the power “to distort representation in its own favor”). “It is  
20 inconceivable that guaranties embedded in the Constitution of the United States may thus be  
21 manipulated out of existence.” *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 831 (1995)  
22 (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960)).

23  
24 Recognizing that the federal government may not use its authority to determine the  
25 “manner” of conducting the Census to make an end run around its duty to count all persons is  
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1 consistent with limits on similar grants of power in the Constitution. For example, the Elections  
2 Clause, which allows states to regulate the “manner” of holding federal elections, *see* U.S. Const.  
3 art. I, § 4, cl. 1, “grants to the States ‘broad power’ to prescribe the procedural mechanisms for  
4 holding congressional elections,” *Cook v. Gralike*, 531 U.S. 510, 523 (2001), but does not permit  
5 a state to “evade important constitutional restraints,” *U.S. Term Limits*, 514 U.S. at 834; *see*  
6 *Wesberry*, 376 U.S. at 6 (“[N]othing in the language of [the Elections Clause] gives support to a  
7 construction that would immunize state congressional apportionment laws which debase a  
8 citizen’s right to vote from the power of courts to protect the constitutional rights of individuals  
9 from legislative destruction.” (internal citation omitted)); *Tashjian v. Republican Party of*  
10 *Conn.*, 479 U.S. 208, 217 (1986) (“The power to regulate the time, place, and manner of  
11 elections does not justify, without more, the abridgment of fundamental rights, such as the right  
12 to vote, or . . . the freedom of political association.”). Likewise, the Full Faith and Credit Clause,  
13 which establishes a constitutional command of full faith and credit, *see V.L. v. E.L.*, 136 S. Ct.  
14 1017, 1020 (2016) (per curiam), and then grants Congress the power to “prescribe the manner”  
15 in which certain laws and proceedings “shall be proved, and the effect thereof,” U.S. Const. art.  
16 IV, § 1, does not permit Congress “to repeal, or vary the full faith and credit” required by the  
17 Clause, 3 Joseph Story, *Commentaries on the Constitution* § 1306, at 182 (1833); *see* Andrew  
18 Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 Iowa  
19 L. Rev. 1, 20-21 (1997) (“The Effects Clause is immediately preceded by a clear, self-executing  
20 command, in the first sentence of the Full Faith and Credit Clause, that full faith and credit ‘shall  
21 be given’ to each state’s laws. The second sentence should not be read in a way that contradicts  
22 the first. . . . Congress may not exercise its Effects Clause powers in a way that contradicts the  
23 self-executing command.”); Douglas Laycock, *Equal Citizens of Equal Territorial States: The*  
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1 *Constitutional Foundation of Choice of Law*, 92 Colum. L. Rev. 249, 292 (1992) (discussing the  
 2 Framers’ conscious choice to “make the clause self-executing, commanding full faith and credit  
 3 in the constitutional text and making congressional action discretionary,” instead of “leaving . . .  
 4 implementation of the command to Congress”). Thus, the Secretary’s delegated power to  
 5 determine the manner of conducting the Census, although broad, must be exercised consistent  
 6 with the Census Clause’s requirement that there be an “actual Enumeration” of all persons  
 7 residing in the United States, citizen and noncitizen alike.  
 8

9 **IV. Addition of the Untested Citizenship Question Does Not Advance Any Legitimate**  
 10 **Governmental Interest.**

11 The Secretary’s decision to add a citizenship question to the 2020 Census and double-  
 12 check individual responses bears no “relationship to the accomplishment of an actual  
 13 enumeration of the population, keeping in mind the constitutional purpose of the census.”  
 14 *Wisconsin*, 517 U.S. at 20. The citizenship question does not help fulfill the constitutionally  
 15 mandated “actual Enumeration,” and the Secretary did not claim that any Census-related,  
 16 informational purpose would be served by asking all persons to divulge their citizenship status.  
 17 Instead, the Secretary justified his decision to add the citizenship question to the 2020 Census  
 18 solely on the ground that it is necessary to enforce the Voting Rights Act, a statute that the  
 19 Secretary does not administer. This flimsy rationale cannot survive even the most cursory  
 20 review. The Secretary should not have “bootstrap[ped] [him]self into an area in which [he] has  
 21 no jurisdiction.” *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018) (quoting *Adams Fruit*  
 22 *Co. v. Barrett*, 494 U.S. 638, 650 (1990)); *id.* (“courts must exercise independent interpretative  
 23 judgment” when the statute at issue is one the relevant agency does not administer).<sup>2</sup>  
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28 <sup>2</sup> The federal government makes much of the fact that previous Censuses included questions relating to citizenship. Mem. of Law in Supp. of Defs.’ Mot. to Dismiss, *California v.*  
 BRIEF OF AMICI CURIAE MEMBERS OF CONGRESS AND BIPARTISAN FORMER MEMBERS OF CONGRESS IN SUPPORT OF PLAINTIFFS Case Nos. 3:18-cv-01865-RS, 3:18-cv-2279-RS

1 First, since the passage of the Voting Rights Act in 1965, the Census has never asked all  
2 persons to report their citizenship status. Such data is not necessary to enforce the Voting Rights  
3 Act. For the last 53 years—until this eleventh-hour proposal to add a citizenship question to the  
4 2020 Census—no one has ever suggested that enforcement of the Voting Rights Act was  
5 hampered by the failure of the Census Bureau to ask all persons residing in the United States to  
6 divulge their citizenship status. Neither members of Congress, nor civil rights lawyers who bring  
7 lawsuits to enforce the Voting Rights Act, nor the U.S. Department of Justice, nor state and local  
8 governmental entities that defend their electoral practices, have claimed that citizenship should  
9 be asked of all persons on the Census to ensure proper enforcement of the Act. *See, e.g.,*  
10 *Progress Report on the 2020 Census: Hearing Before the H. Comm. on Oversight & Gov't*  
11 *Reform*, 115th Cong. 14 (2018) (testimony of Professor Justin Levitt) (“Despite a deep  
12 commitment to enforcing the Voting Rights Act . . . we never requested that the decennial  
13 enumeration include a question relating to citizenship. Nor had the Civil Rights Division of any  
14 Justice Department, under any Administration, for the previous 53 years.”). The citizenship  
15 question is a solution in search of a problem.

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19 Second, citizenship data—which is just one of many pieces of evidence currently used to  
20 prove a violation of the Voting Rights Act—is already available through the American  
21 Community Survey, and litigants and courts have been using this data to evaluate Voting Rights  
22 Act claims for years. “Although U.S. Census data may not be perfectly accurate, it is routinely  
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*Ross*, at 3-5; Mem. of Law in Supp. of Defs.’ Mot. to Dismiss, *City of San Jose v. Ross*, at 3-5. But the decision to add the citizenship question now is unlike any other past decision to include the question: the Secretary plans to add a citizenship question in the face of reams of evidence that the addition of such a question will vitiate the constitutionally mandated count of all persons, without any Census-related purpose, and based on an entirely novel, unsupported voting rights justification outside the Secretary’s ken. Past practice offers no support for this decision.

1 relied upon in § 2 cases.” *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1393 (E.D. Wash.  
2 2014). The Secretary has offered no reasoned explanation that could justify turning a blind eye  
3 to more than a half-century of judicial enforcement of the Voting Rights Act without a  
4 citizenship question on the Census.  
5

6 Third, although the American Community Survey data is far from perfect, the data that  
7 will result from the addition of this citizenship question will almost certainly be even worse.  
8 Because the citizenship question will chill participation by citizens and noncitizens in immigrant  
9 communities, it will produce inaccurate data, which will skew how courts evaluate voting rights  
10 claims. This will fall hardest on the very communities the Act protects. Rather than helping to  
11 enforce the Voting Rights Act, the citizenship question will produce a disproportionate  
12 undercount of minority communities, which will make it harder for them to claim the Voting  
13 Rights Act’s protection. Thus, contrary to the Secretary’s claim, adding an untested citizenship  
14 question to the Census will actually disserve the goal of enhanced voting rights enforcement,  
15 undermining the data that courts currently use to enforce the Act.  
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**CONCLUSION**

For the foregoing reasons, the motion to dismiss should be denied.

Dated: July 19, 2018

Respectfully submitted,

/s/ Elizabeth B. Wydra

Elizabeth B. Wydra

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Brianne J. Gorod

David H. Gans

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*Counsel for Amici Members of Congress and  
Bipartisan Former Members of  
Congress*

APPENDIX – LIST OF *AMICI*

**U.S. Senators**

- Schatz, Brian  
Senator of Hawai‘i
- Bennet, Michael F.  
Senator of Colorado
- Blumenthal, Richard  
Senator of Connecticut
- Booker, Cory A.  
Senator of New Jersey
- Cardin, Ben  
Senator of Maryland
- Duckworth, Tammy  
Senator of Illinois
- Durbin, Richard  
Senator of Illinois
- Harris, Kamala D.  
Senator of California
- Hirono, Mazie  
Senator of Hawai‘i
- Nelson, Bill  
Senator of Florida
- Wyden, Ron  
Senator of Oregon

**U.S. House of Representatives**

- Maloney, Carolyn  
Representative of New York
- Barragán, Nanette Diaz  
Representative of California

**LIST OF *AMICI* – cont’d**

1  
2 Berman, Howard  
3 Former Representative of California

4 Beyer Jr., Donald S.  
5 Representative of Virginia

6 Blumenauer, Earl  
7 Representative of Oregon

8 Brown, Anthony G.  
9 Representative of Maryland

10 Capuano, Michael  
11 Representative of Massachusetts

12 Carbajal, Salud O.  
13 Representative of California

14 Cárdenas, Tony  
15 Representative of California

16 Carson, André  
17 Representative of Indiana

18 Chu, Judy  
19 Representative of California

20 Cicilline, David N.  
21 Representative of Rhode Island

22 Clarke, Yvette D.  
23 Representative of New York

24 Clay, Wm. Lacy  
25 Representative of Missouri

26 Cleaver, II, Emanuel  
27 Representative of Missouri

28 Clyburn, James  
Representative of South Carolina

Cohen, Steve  
Representative of Tennessee

**LIST OF *AMICI* – cont’d**

- 1  
2 Connolly, Gerrold  
3 Representative of Virginia  
4  
5 Correa, J. Luis  
6 Representative of California  
7  
8 Courtney, Joe  
9 Representative of Connecticut  
10  
11 Crowley, Joe  
12 Representative of New York  
13  
14 Cuellar, Henry  
15 Representative of Texas  
16  
17 Cummings, Elijah E.  
18 Representative of Maryland  
19  
20 Davis, Danny K.  
21 Representative of Illinois  
22  
23 DeGette, Diana  
24 Representative of Colorado  
25  
26 Delaney, John K.  
27 Representative of Maryland  
28  
29 DeLauro, Rosa L.  
30 Representative of Connecticut  
31  
32 DeSaulnier, Mark  
33 Representative of California  
34  
35 Deutch, Ted  
36 Representative of Florida  
37  
38 Dingell, Debbie  
39 Representative of Michigan  
40  
41 Ellison, Keith  
42 Representative of Minnesota  
43  
44 Engel, Eliot L.  
45 Representative of New York

**LIST OF *AMICI* – cont’d**

1  
2     Espaillat, Adriano  
3         Representative of New York

4     Esty, Elizabeth  
5         Representative of Connecticut

6     Foster, Bill  
7         Representative of Illinois

8     Frankel, Lois  
9         Representative of Florida

10    Fudge, Marcia L.  
11         Representative of Ohio

12    Gallego, Ruben  
13         Representative of Arizona

14    Gomez, Jimmy  
15         Representative of California

16    Green, Gene  
17         Representative of Texas

18    Grijalva, Raúl M.  
19         Representative of Arizona

20    Gutiérrez, Luis V.  
21         Representative of Illinois

22    Hanabusa, Colleen  
23         Representative of Hawai‘i

24    Hastings, Alcee L.  
25         Representative of Florida

26    Hoyer, Steny  
27         Representative of Maryland

28    Jackson Lee, Sheila  
       Representative of Texas

      Jayapal, Pramila  
       Representative of Washington

**LIST OF *AMICI* – cont’d**

1  
2 Jeffries, Hakeem  
3 Representative of New York

4 Johnson, Jr., Henry C. “Hank”  
5 Representative of Georgia

6 Khanna, Ro  
7 Representative of California

8 Kihuen, Ruben J.  
9 Representative of Nevada

10 Kildee, Daniel T.  
11 Representative of Michigan

12 Larson, John B.  
13 Representative of Connecticut

14 Lawrence, Brenda L.  
15 Representative of Michigan

16 Lee, Barbara  
17 Representative of California

18 Lewis, John  
19 Representative of Georgia

20 Lofgren, Zoe  
21 Representative of California

22 Lowenthal, Alan  
23 Representative of California

24 Lowey, Nita  
25 Representative of New York

26 Lujan Grisham, Michelle  
27 Representative of New Mexico

28 Lynch, Stephen F.  
Representative of Massachusetts

**LIST OF *AMICI* – cont’d**

- 1  
2 Matsui, Doris  
3 Representative of California  
4  
5 McCollum, Betty  
6 Representative of Minnesota  
7  
8 McEachin, A. Donald  
9 Representative of Virginia  
10  
11 McGovern, James P.  
12 Representative of Massachusetts  
13  
14 McNerney, Jerry  
15 Representative of California  
16  
17 Meeks, Gregory W.  
18 Representative of New York  
19  
20 Meng, Grace  
21 Representative of New York  
22  
23 Moore, Gwen  
24 Representative of Wisconsin  
25  
26 Morella, Constance  
27 Former Representative of Maryland  
28  
29 Nadler, Jerrold  
30 Representative of New York  
31  
32 Napolitano, Grace F.  
33 Representative of California  
34  
35 Nolan, Rick  
36 Representative of Minnesota  
37  
38 Norcross, Donald  
39 Representative of New Jersey  
40  
41 Norton, Eleanor Holmes  
42 Representative of District of Columbia  
43  
44 Pallone, Frank Jr.  
45 Representative of New Jersey

**LIST OF *AMICI* – cont’d**

- 1  
2 Panetta, Jimmy  
3 Representative of California  
4  
5 Pascrell, Bill Jr.  
6 Representative of New Jersey  
7  
8 Pelosi, Nancy  
9 Representative of California  
10  
11 Perlmutter, Ed  
12 Representative of Colorado  
13  
14 Pingree, Chellie  
15 Representative of Maine  
16  
17 Pocan, Mark  
18 Representative of Wisconsin  
19  
20 Polis, Jared  
21 Representative of Colorado  
22  
23 Porter, John  
24 Former Representative of Illinois  
25  
26 Price, David E.  
27 Representative of North Carolina  
28  
29 Quigley, Mike  
30 Representative of Illinois  
31  
32 Raskin, Jamie  
33 Representative of Maryland  
34  
35 Rice, Kathleen M.  
36 Representative of New York  
37  
38 Rosen, Jacky  
39 Representative of Nevada  
40  
41 Roybal-Allard, Lucille  
42 Representative of California  
43  
44  
45



**LIST OF *AMICI* – cont’d**

- 1  
2 Rush, Bobby L.  
3 Representative of Illinois  
4  
5 Sánchez, Linda T.  
6 Representative of California  
7  
8 Sarbanes, John  
9 Representative of Maryland  
10  
11 Schakowsky, Janice D.  
12 Representative of Illinois  
13  
14 Schneider, Claudine  
15 Former Representative of Rhode Island  
16  
17 Serrano, Jose  
18 Representative of New York  
19  
20 Sherman, Brad  
21 Representative of California  
22  
23 Sires, Albio  
24 Representative of New Jersey  
25  
26 Skaggs, David  
27 Former Representative of Colorado  
28  
29 Smith, Adam  
30 Representative of Washington  
31  
32 Smith, Peter  
33 Former Representative of Vermont  
34  
35 Soto, Darren  
36 Representative of Florida  
37  
38 Speier, Jackie  
39 Representative of California  
40  
41 Takano, Mark  
42 Representative of California  
43  
44 Thompson, Bennie G.  
45 Representative of Mississippi

**LIST OF *AMICI* – cont’d**

1  
2  
3 Thompson, Mike  
4 Representative of California

5 Titus, Dina  
6 Representative of Nevada

7 Torres, Norma J.  
8 Representative of California

9 Vargas, Juan  
10 Representative of California

11 Vela, Filemon  
12 Representative of Texas

13 Velázquez, Nydia M.  
14 Representative of New York

15 Walz, Tim  
16 Representative of Minnesota

17 Wasserman Schultz, Debbie  
18 Representative of Florida

19 Watson Coleman, Bonnie  
20 Representative of New Jersey

21 Waxman, Henry A.  
22 Former Representative of California

23 Welch, Peter  
24 Representative of Vermont

25 Yarmuth, John  
26 Representative of Kentucky  
27  
28

**CERTIFICATE OF SERVICE**

I hereby certify that on July 19, 2018, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Dated: July 19, 2018

/s/ Elizabeth B. Wydra  
Elizabeth B. Wydra

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