



Rules and Executive Nominations Committee  
Maryland House of Delegates  
March 2, 2020

### **Testimony of Campaign Legal Center in Support of House Bill 818**

On behalf of Campaign Legal Center (“CLC”), we are pleased to offer this testimony in support of House Bill 818.

CLC is a nonpartisan, nonprofit organization dedicated to advancing democracy through law. Through our extensive work on redistricting and the decennial census, CLC seeks to ensure that every United States resident receives fair legislative representation at the federal, state, and local levels. We strongly support H.B. 818 because it would clarify that in Maryland, no one can be denied representation based on citizenship status.

#### **I. Background**

After each decennial census, Maryland redraws the district boundaries for the General Assembly and for the state’s congressional seats. Local governments throughout the state also redistrict their own legislative bodies, such as county commissions and city councils.

The U.S. Constitution requires each district of the same type in a redistricting plan to have approximately the same population.<sup>1</sup> To comply with this mandate, Maryland begins with population data from the federal census, then adjusts these data to count incarcerated people at their pre-incarceration addresses, rather than the location of the prison.<sup>2</sup> The resulting data form the “population base” to be equalized in redistricting.

<sup>1</sup> Evenwel v. Abbott, 136 S. Ct. 1120, 1124, 1124 n.1 (2016). For example, in a legislative body elected entirely from single-member districts, each district must have approximately the same population.

<sup>2</sup> See Md. State Gov’t Code § 2-2A-01; Md. Local Gov’t Code § 1-1307; Md. Election Law § 8-701. As of March 2, 2020, Maryland is one of seven states—along with California, Delaware, Nevada, New Jersey, New York, and Washington—whose current laws require

Historically, Maryland has included non-U.S. citizens and children in the redistricting population base, even though those groups are generally ineligible to vote. In fact, all 50 states currently include these non-voter groups in their population bases.<sup>3</sup> The U.S. Supreme Court has approved this “well-functioning” practice, although it has not yet explicitly ruled on whether the Constitution *requires* the inclusion of non-U.S. citizens and children.<sup>4</sup>

In keeping with the nationwide norm of redistricting based on total population rather than voter-eligible population, the U.S. Census Bureau in recent decades has not published citizenship data designed for use in balancing district population.<sup>5</sup> However, after the 2020 Census, the Census Bureau plans to release estimates of the citizen voting-age population (“CVAP”) of each census block in the nation. Because the census itself will not include a citizenship question, the Bureau will instead use information from administrative records to estimate each person’s probability of being a U.S. citizen.<sup>6</sup> President Trump has suggested that states could try using the Bureau’s new CVAP estimates as a redistricting population base.<sup>7</sup>

Despite Maryland’s history of including non-U.S. citizens and children in its population base, the state currently has no explicit law to prevent map-drawers at the state and local levels from experimenting with CVAP-based redistricting. H.B. 818 would change that by providing that the population counts used to redistrict Maryland’s congressional seats, the General

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adjustments to census data to avoid counting incarcerated people as residents of their places of incarceration. *See* Cal. Elec. Code § 21003(5); 29 Del. Code § 804A; Nev. Rev. Stat. 360.288; N.J. Stat. 52:4-1.4; N.Y. Leg. Law § 83-m(13); Rev. Code Wash. 44.05.140. In addition, the Colorado General Assembly has passed a similar bill, which is awaiting the governor’s signature. *See* H.R. 1010, 72d Gen. Assemb., 2020 Reg. Sess. (Colo. 2020), available at <https://leg.colorado.gov/bills/hb20-1010>.

<sup>3</sup> Evenwel, 136 S. Ct. at 1124. The constitutions of Maine and Nebraska contain provisions that purport to authorize the exclusion of non-U.S. citizens. Me. Const. art. IV, pt. 1, § 2; Neb. Const. art. III, § 5. In practice, however, Maine and Nebraska include non-U.S. citizens in their population bases. Evenwel, 136 S. Ct. at 1124 n.3.

<sup>4</sup> Evenwel, 136 S. Ct. at 1132-33.

<sup>5</sup> *See* Brief of Former Directors of the U.S. Census Bureau as *Amici Curiae* in Support of Appellants at 4-5, Evenwel v. Abbott, 136 S. Ct. 1120 (2016) (No. 14-940).

<sup>6</sup> *See Memorandum of Understanding Through Which the U.S. Census Bureau Is Acquiring Administrative Data from the Nebraska Department of Motor Vehicles* 11-12 (Nov. 7, 2019), available at <https://www.documentcloud.org/documents/6555710-Nov-7-2019-Memo-of-Understanding-Between.html> (“Nebraska MOU”).

<sup>7</sup> *See* Exec. Order No. 13880, Collecting Information About Citizenship Status in Connection With the Decennial Census, 84 Fed. Reg. 33821, 33823-24 (July 11, 2019).

Assembly, and local legislative bodies “may not exclude individuals based on citizenship status.”<sup>8</sup>

## II. Reasons to Support H.B. 818

### A. Denying equal legislative representation to non-U.S. citizens would be unfair and legally dubious.

Maryland’s historical practice of including all *bona fide* residents in the redistricting population base, regardless of citizenship status, is a sound policy that deserves to be codified explicitly. Consistent with constitutional principles long recognized by the Supreme Court, Maryland’s practice recognizes that everyone should have equal legislative representation, including non-U.S. citizens and children.

In Maryland and throughout the country, legislators serve a constituency broader than adult U.S. citizens. As the Supreme Court rightly observed in *Evenwel v. Abbott*, “[n]onvoters have an important stake in many policy debates—children, their parents, even their grandparents, for example, have a stake in a strong public-education system.”<sup>9</sup> When redistricting reflects total population, non-voters have an equitable opportunity to influence these policy debates because their representative is “subject to requests and suggestions from the same number of constituents” as any other legislator.<sup>10</sup>

Even if an individual non-voter does not personally send “requests and suggestions” to her legislator, she still receives a meaningful form of representation because she counts toward the legislative power of the community where she lives. For example, because Maryland communities that are diverse in immigration status have legislative representation that reflects their whole populations, they have equal opportunities to influence the state’s spending on infrastructure and public works. When a legislator succeeds in bringing state-funded projects to her district, the whole local community benefits, including non-U.S. citizens and children.

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<sup>8</sup> H.R. 818, 2020 Leg., 441st Sess. (Md. 2020), available at <http://mgaleg.maryland.gov/mgaweb/site/Legislation/Details/hb0818>.

<sup>9</sup> 136 S. Ct. at 1132; *see also* Calderon v. City of Los Angeles, 481 P.2d 489, 493-94 (Cal. 1971) (“Adherence to a population standard, rather than one based on registered voters, is more likely to guarantee that those who cannot or do not cast a ballot may still have some voice in government. Thus a 17-year-old, who by state law is prohibited from voting, may still have strong views on the Vietnam War which he wishes to communicate to the elected representative from his area.”).

<sup>10</sup> *Evenwel*, 136 S. Ct. at 1132; *see also* Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969) (“Equal representation for equal numbers of people” prevents “diminution of access to elected representatives.”).

Additionally, voters and non-voters have an equally valid interest “in receiving constituent services, such as help navigating public-benefits bureaucracies.”<sup>11</sup> Total-population-based redistricting recognizes this reality by ensuring that all representatives elected from districts of the same type have roughly the same number of constituents to serve.

By contrast, a redistricting plan that excludes non-U.S. citizens, children, or both from consideration would result in unequal representation and unequal access to constituent services. This result would be not only unfair, but also likely unconstitutional.

To begin with, a *congressional* redistricting plan that excludes groups of *bona fide* residents from the population base would be virtually certain to violate the U.S. Constitution. The Supreme Court has explained in a congressional redistricting case that federal census data—specifically, total-population data from the decennial person-by-person headcount—“represents the best population data available” and therefore “is the only basis for good-faith attempts to achieve population equality.”<sup>12</sup> Other courts have stated even more explicitly that states must draw congressional districts with equal total population, as measured by the census.<sup>13</sup>

This rule makes abundant sense. The clear text of the Constitution requires congressional seats to be divided among the states based on the “whole number of persons” in each state, regardless of age or citizenship status.<sup>14</sup> It would be “incongruous” to conclude that the apportionment of congressional seats *between* states and the distribution of those seats *within* states could be based on different population counts.<sup>15</sup> Such a system would also be patently unjust, since it would allow a state to deny congressional representation to certain residents while relying on the presence of those same residents to justify the state’s entitlement to a certain number of congressional seats.<sup>16</sup>

A redistricting plan for the General Assembly or a local legislature would also likely violate the Constitution if it excluded non-U.S. citizens or children. In

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<sup>11</sup> Evenwel, 136 S. Ct. at 1132.

<sup>12</sup> Karcher v. Daggett, 462 U.S. 725, 738 (1983).

<sup>13</sup> Travis v. King, 552 F. Supp. 554, 571 (D. Haw. 1982) (three-judge court); Preisler v. Sec’y of State of Missouri, 279 F. Supp. 952, 1002 (W.D. Mo. 1967) (three-judge court), *aff’d sub nom.* Kirkpatrick v. Preisler, 394 U.S. 526 (1969).

<sup>14</sup> U.S. Const. amend. XIV, § 2; *see also* U.S. Const. art. I, § 2, cl. 3 (“Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers”).

<sup>15</sup> Travis, 552 F. Supp. at 570 (quoting Preisler v. Sec’y of State, 279 F. Supp. at 1002).

<sup>16</sup> *See* Joseph Fishkin, *Taking Virtual Representation Seriously*, 59 WM. & MARY L. REV. 1681, 1725-26 (2018).

*Evenwel*, the Supreme Court declined to rule explicitly on the hypothetical question of whether Texas could redistrict its state legislature based on voter-eligible population.<sup>17</sup> However, the Court explained that total-population-based redistricting is not merely one permissible option, but a “well-functioning” system that “promotes equitable and effective representation” and reflects the history and purpose of the relevant constitutional provisions.<sup>18</sup> Moreover, the Court pointed out that its pre-*Evenwel* redistricting precedents show a clear pattern of focusing on total-population equality.<sup>19</sup>

If Maryland or any local government within the state tries to deny legislative representation to non-U.S. citizens or children after the 2020 Census, the resulting map is sure to be entangled in time-consuming federal litigation, which will probably result in the map being struck down. In the unlikely event that such a redistricting plan survives, it will harm Maryland’s democracy by diluting the representation of communities that are diverse in immigration status and age. Because U.S.-citizens-only redistricting is both unfair and likely illegal, the General Assembly should prohibit it by passing H.B. 818.

B. Any attempt to exclude non-U.S. citizens from legislative representation in 2021 would do grave collateral damage to the representation of U.S. citizens.

Even if it were acceptable in theory to exclude non-U.S. citizens from legislative representation, it would be impossible to accomplish this goal without also excluding many U.S. citizens and harming the political representation of those citizens’ communities. This is true for at least two reasons.

*First*, the Census Bureau does not plan to publish data that would enable map-drawers to exclude non-U.S. citizens without excluding U.S. citizen children. For each census block, the Bureau will publish a total-population count and an estimate of CVAP.<sup>20</sup> However, the Bureau has not suggested that it will disaggregate the non-CVAP portion of each block’s population into non-U.S. citizen adults, non-U.S. citizen children, and U.S. citizen children. Without

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<sup>17</sup> *Evenwel*, 136 S. Ct. at 1133.

<sup>18</sup> *Id.* at 1132.

<sup>19</sup> *See id.* at 1131 (“[T]he Court has consistently looked to total-population figures when evaluating whether districting maps violate the Equal Protection Clause by deviating impermissibly from perfect population equality.”).

<sup>20</sup> *See* John M. Abowd & Victoria Velkoff, *Update on Disclosure Avoidance and Administrative Data* 11-13, U.S. CENSUS BUREAU (Sept. 13, 2019), <https://www2.census.gov/cac/sac/meetings/2019-09/update-disclosure-avoidance-administrative-data.pdf>.

such disaggregated data, map-drawings will not be able to include U.S. citizen children while excluding non-U.S. citizens.

*Second*, the Census Bureau’s proposed methodology for estimating block-level CVAP is flawed and will cause the Bureau to underestimate CVAP for many census blocks.<sup>21</sup>

Secretary of Commerce Wilbur Ross, who oversees the Census Bureau, initially sought to collect citizenship data directly from all U.S. households by including a citizenship question on the 2020 Census form. However, the Supreme Court blocked the citizenship question as a violation of administrative law in June 2019.<sup>22</sup>

In response, President Trump issued an executive order, directing the Commerce Department to produce citizenship data by using federal and state government records as a substitute for the information the citizenship question would have elicited.<sup>23</sup> Around the same time as the President’s executive order, Secretary Ross directed the Census Bureau to “produce [CVAP] information prior to April 1, 2021 that states may use in redistricting.”<sup>24</sup>

Following these instructions, the Census Bureau is now gathering administrative records that contain information on individuals’ citizenship status. The Bureau has entered an agreement to obtain immigration and citizenship records from the Department of Homeland Security,<sup>25</sup> and is asking state driver-license agencies to share their records.<sup>26</sup>

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<sup>21</sup> For a more detailed discussion of why the Census Bureau’s 2020 CVAP statistics will be inaccurate and unsuitable for use as a redistricting population base, see Comment of Campaign Legal Center re: Collection of State Administrative Records Data, OMB Control No. 0607-0995 (Jan. 17, 2020), available at <https://campaignlegal.org/sites/default/files/2020-01/Final%20Campaign%20Legal%20Center%20Comment%20OMB%20Control%20No%200607-0995.pdf>.

<sup>22</sup> Dep’t of Commerce v. New York, 139 S. Ct. 2551, 2575-76 (2019).

<sup>23</sup> Exec. Order No. 13880, *supra* note 7 at 33821-22.

<sup>24</sup> *Paperwork Reduction Act Program, Information Collection Request 2020 Census - Enumeration Operations* 18, OMB Control No. 0607-1006, U.S. DEP’T OF COMMERCE (July 3, 2019), available at <https://www.documentcloud.org/documents/6192581-2020-Census-Supporting-Statement-ARevised-July.html#document/p18/a512146>.

<sup>25</sup> *Privacy Impact Statement for the Department of Homeland Security (DHS) Immigration-Related Data Sharing with U.S. Census Bureau* 1, U.S. DEP’T OF HOMELAND SEC. (Dec. 20, 2019), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-dhs079-sharingwithcensus-december2019.pdf>.

<sup>26</sup> See Mike Schneider, *Census confirms drivers’ records request tied to citizenship*, ASSOCIATED PRESS (Oct. 16, 2019), <https://apnews.com/584d26aa91fc4004ad147d0a3ba2231e>.

The Census Bureau will attempt to match these administrative records with households' responses to the 2020 Census, then use the citizenship information in the administrative records to calculate a "citizenship probability" for each individual.<sup>27</sup> When the Bureau cannot match a person counted in the 2020 Census with administrative records, it will estimate that person's citizenship probability using "local area information and the person's demographic characteristics" as rough predictors of citizenship status.<sup>28</sup> Once the Bureau has settled on a citizenship probability for each person in the 2020 Census, those probabilities will "be combined with age, race, ethnicity, and location information from the 2020 Census to produce the [CVAP] statistics."<sup>29</sup>

This plan is a recipe for inaccurate CVAP estimates. Simply put, administrative records—especially those held by state governments—are not reliable sources of information about individuals' citizenship status. In particular, administrative records often mischaracterize naturalized U.S. citizens as non-U.S. citizens because they are not regularly updated to reflect naturalizations.<sup>30</sup>

By relying on citizenship information from administrative records, the Census Bureau will significantly underestimate the number of adult U.S. citizens living on certain census blocks. This problem will disproportionately affect specific communities, especially those that include large numbers of naturalized U.S. citizens.

Therefore, any attempt to redistrict based on the Bureau's CVAP estimates will deny legislative representation not only to non-U.S. citizens and children, but also to many adult U.S. citizens. This reality provides an additional reason for Maryland to prohibit CVAP-based redistricting.

### III. Conclusion

H.B. 818 represents an opportunity for the General Assembly to reaffirm and codify Maryland's commitment to providing equal legislative representation to

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<sup>27</sup> See Nebraska MOU, *supra* note 6 at 11.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Recent litigation in Texas illustrates this problem with administrative citizenship data. In 2019, Texas tried to use driver-license data to remove registered voters from its voter rolls on the theory that they were non-U.S. citizens. On behalf of clients including the League of United Latin American Citizens, CLC successfully sued and showed that the vast majority of the individuals Texas targeted were naturalized U.S. citizens whose driver license records had never been updated to reflect their naturalizations. See *Victory! Court Saves Texas Voters from Purge*, CAMPAIGN LEGAL CTR. (Feb. 27, 2019), <https://campaignlegal.org/press-releases/victory-court-saves-texas-voters-purge>.

all its residents, regardless of citizenship status. Consistent with the U.S. Constitution, state and local legislators in Maryland represent whole communities and provide constituent services to all residents of their districts. Redistricting based on the Census Bureau's 2020 CVAP estimates would interfere with this important tradition—harming not only non-U.S. citizens, but also U.S. citizen children and adults. The General Assembly should prevent this outcome by passing H.B. 818.

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Respectfully submitted,

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