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Pa'lante VI: Alzando Nuestra Voz

March 12, 2016 | 1:50 p.m. – 3:15 p.m.
Panel: Demystifying the Deep, Dark Web: A Guide for Attorney's

CLE Materials

- UNITED STATES OF AMERICA -v- ROSS WILLIAM ULBRICHT, a/k/a "Dread Pirate Roberts," a/k/a "DPR," a/k/a "Silk Road," Defendant.
- SUE EVENWEL, et al, Appellants, v. GREG ABBOTT, GOVERNOR OF TEXAS, et al., Appellees.
- Speaker Biographies

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
-v-	:	14-cr-68 (KBF)
ROSS WILLIAM ULBRICHT, a/k/a "Dread Pirate Roberts," a/k/a "DPR," a/k/a "Silk Road,"	:	OPINION & ORDER
Defendant.	:	

KATHERINE B. FORREST, District Judge:

On February 4, 2014, a Grand Jury sitting in the Southern District of New York returned Indictment 14 Cr. 68, charging Ross Ulbricht ("the defendant" or "Ulbricht") on four counts for participation in a narcotics trafficking conspiracy (Count One), a continuing criminal enterprise ("CCE") (Count Two), a computer hacking conspiracy (Count Three), and a money laundering conspiracy (Count Four). (Indictment, ECF No. 12.) Pending before the Court is the defendant's motion to dismiss all counts. (ECF No. 19.) For the reasons set forth below, the Court DENIES the motion in its entirety.[1]

The Government alleges that Ulbricht engaged in narcotics trafficking, computer hacking, and money laundering conspiracies by designing, launching, and administering a website called Silk Road ("Silk Road") as an online marketplace for illicit goods and services. These allegations raise novel issues as they relate to the Internet and the defendant's role in the purported conspiracies.

[1] This Opinion & Order addresses various issues both as background informing its decision herein and to preview for the parties a number of issues that are relevant to the trial of this matter.

A conspiracy claim is premised on an agreement between two or more people to achieve an unlawful end. The Government alleges that by designing, launching, and administering Silk Road, Ulbricht conspired with narcotics traffickers and hackers to buy and sell illegal narcotics and malicious computer software and to launder the proceeds using Bitcoin. There is no allegation that Ulbricht conspired with anyone prior to his launch of Silk Road. Rather, the allegations revolve around the numerous transactions that occurred on the site following its launch.

The Government alleges that Silk Road was designed to operate like eBay: a seller would electronically post a good or service for sale; a buyer would electronically purchase the item; the seller would then ship or otherwise provide to the buyer the purchased item; the buyer would provide feedback; and the site operator (i.e., Ulbricht) would receive a portion of the seller's revenue as a commission. Ulbricht, as the alleged site designer, made the site available only to those using Tor, software and a network that allows for anonymous, untraceable Internet browsing; he allowed payment only via Bitcoin, an anonymous and untraceable form of payment.

Following the launch of Silk Road, the site was available to sellers and buyers for transactions. Thousands of transactions allegedly occurred over the course of nearly three years – sellers posted goods when available; buyers purchased goods when desired. As website administrator, Ulbricht may have had some direct contact with some users of the site, and none with most. This online marketplace thus allowed the alleged designer and operator (Ulbricht) to be

anywhere in the world with an Internet connection (he was apprehended in California), the sellers and buyers to be anywhere, the activities to occur independently from one another on different days and at different times, and the transactions to occur anonymously.

A number of legal questions arise from conspiracy claims premised on this framework. In sum, they address whether the conduct alleged here can serve as the basis of a criminal conspiracy – and, if so, when, how, and with whom.

Question One: Can there be a legally cognizable "agreement" between Ulbricht and one or more coconspirators to engage in narcotics trafficking, computer hacking, and money laundering by virtue of his and their conduct in relation to Silk Road? If so, what is the difference between what Ulbricht is alleged to have done and the conduct of designers and administrators of legitimate online marketplaces through which illegal transactions may nevertheless occur?

Question Two: As a matter of law, who are Ulbricht's alleged coconspirators and potential coconspirators? That is, whose "minds" can have "met" with Ulbricht's in a conspiratorial agreement? What sort of conspiratorial structure frames the allegations: one large, single conspiracy or multiple smaller ones?

Question Three: As a matter of law, when could any particular agreement have occurred between Ulbricht and his alleged coconspirators? Need each coconspirator's mind have met simultaneously with Ulbricht's? With the minds of the other coconspirators? That is, if Ulbricht launched Silk Road on Day 1, can he be said, as a matter of law, to have entered into an agreement with the user who

joins on Day 300? Did Ulbricht, simply by designing and launching Silk Road, make an enduring showing of intent?

Question Four: As a matter of law, is it legally necessary, or factually possible, to pinpoint how the agreement between Ulbricht and his coconspirators was made? In this regard, does the law recognize a conspiratorial agreement effected by an end user interacting with computer software, or do two human minds need to be simultaneously involved at the moment of agreement?

Question Five: If Ulbricht was merely the facilitator of simple buy-sell transactions, does the "buyer-seller" rule apply, which in certain circumstances would preclude a finding of a criminal conspiracy?

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The defendant also raises the following additional arguments with respect to Counts One, Two, and Three: the rule of lenity, the doctrine of constitutional avoidance, the void-for-vagueness doctrine, constitutionally defective over-breadth, and a civil immunity statute for online service providers. The Court refers to these collectively as the "Kitchen Sink" arguments. While this is a case of first impression as to the charged conduct, the fact that the alleged conduct constitutes cognizable crimes requires no legal contortion and is not surprising. These arguments do not preclude criminal charges.

With regard to Count Two, the defendant alleges that, as a matter of law, his conduct cannot constitute participation in a CCE (under the so-called "kingpin" statute). The defendant argues that the Indictment fails to allege that he had the

requisite managerial authority in the conspiracy and that the Indictment fails to allege a sufficient "continuing series" of predicate violations. The Court disagrees and finds that the allegations in the Indictment are sufficient.

With regard to Count Three, the defendant contends that the allegations in the Indictment are insufficient to support the type of conduct covered by a computer hacking conspiracy. The defendant confuses the requirement for establishing the violation of the underlying offense with the requirements for establishing a conspiracy to commit the underlying offense; he finds ambiguity where there is none. The Government alleges a legally cognizable claim in Count Three.

Finally, with respect to Count Four, the defendant alleges that he cannot have engaged in money laundering because all transactions occurred through the use of Bitcoin and thus there was therefore no legally cognizable "financial transaction." The Court disagrees. Bitcoins carry value – that is their purpose and function – and act as a medium of exchange. Bitcoins may be exchanged for legal tender, be it U.S. dollars, Euros, or some other currency. Accordingly, this argument fails.

I. THE INDICTMENT

Rule 7(c)(1) of the Federal Rules of Criminal Procedure provides that an indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c). It need not contain any other matter not necessary to such statement. Id. ("A count may allege that the

means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means.").

An indictment must inform the defendant of the crime with which he has been charged. United States v. Doe, 297 F.3d 76, 87 (2d Cir. 2002). "By informing the defendant of the charges he faces, the indictment protects the defendant from double jeopardy and allows the defendant to prepare his defense." Id.; United States v. Dhinsa, 243 F.3d 635, 667 (2d Cir. 2001). Rule 7(c) is intended to "eliminate prolix indictments," United States v. Carrier, 672 F.2d 300, 303 (2d Cir. 1982), and "secure simplicity in procedure." United States v. Debrow, 346 U.S. 374, 376 (1953). The Second Circuit has "consistently upheld indictments that do little more than track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." United States v. Walsh, 194 F.3d 37, 44 (2d Cir. 1999) (internal quotation marks and citation omitted); see also United States v. Cohen, 518 F.2d 727, 733 (2d Cir. 1975).

Nevertheless, "[a] criminal defendant is entitled to an indictment that states the essential elements of the charge against him." United States v. Pirro, 212 F.3d 86, 91 (2d Cir. 2000). "[F]or an indictment to fulfill the functions of notifying the defendant of the charges against him and of assuring that he is tried on the matters considered by the grand jury, the indictment must state some fact specific enough to describe a particular criminal act, rather than a type of crime." Id. at 93.

"An indictment must be read to include facts which are necessarily implied by the specific allegations made." United States v. Stavroulakis, 952 F.2d 686, 693

(2d Cir. 1992) (internal quotation marks and citations omitted). "[C]ommon sense and reason prevail over technicalities." United States v. Sabbeth, 262 F.3d 207, 218 (2d Cir. 2001) ("[A]n indictment need not be perfect."). While an indictment must give a defendant "sufficient notice of the core of criminality to be proven against him," United States v. Pagan, 721 F.2d 24, 27 (2d Cir. 1983) (citation omitted), the "'core of criminality' of an offense involves the essence of the crime, in general terms," and not "the particulars of how a defendant effected the crime." United States v. D'Amelio, 683 F.3d 412, 418 (2d Cir. 2012) (citation omitted).

As with all motions to dismiss an indictment, the Court accepts as true the allegations set forth in the charging instrument for purposes of determining the sufficiency of the charges. See United States v. Sampson, 371 U.S. 75, 78-79 (1962); United States v. Goldberg, 756 F.2d 949, 950 (2d Cir. 1985).

The Indictment here alleges that Ulbricht designed, created, operated, and owned Silk Road, "the most sophisticated and extensive criminal marketplace on the Internet." (Ind. ¶¶ 1-3.) Silk Road operated using Tor, software and a network that enables users to access the Internet anonymously – it keeps users' unique identifying Internet Protocol ("IP") addresses obscured, preventing surveillance or tracking. All purchases occurred on Silk Road using Bitcoin, an anonymous online currency.

Silk Road allegedly functioned as designed – tens of thousands of buyers and sellers are alleged to have entered into transactions using the site, violating numerous criminal laws. Over time, thousands of kilograms of heroin and cocaine

were allegedly bought and sold, as if the purchases were occurring on eBay or any other similar website.

Count One charges that, from in or about January 2011 up to and including October 2013, the defendant engaged in a narcotics trafficking conspiracy. To wit, "the defendant . . . designed [Silk Road] to enable users across the world to buy and sell illegal drugs and other illicit goods and services anonymously and outside the reach of law enforcement." (Ind. ¶ 1.) The defendant allegedly "controlled all aspects of Silk Road, with the assistance of various paid employees whom he managed and supervised." (Ind. ¶ 3.) "It was part and object of the conspiracy" that the defendant and others "would and did deliver, distribute, and dispense controlled substances by means of the Internet" and "did aid and abet such activity" in violation of the law. (Ind. ¶ 7.) The controlled substances allegedly included heroin, cocaine, and lysergic acid diethylamide ("LSD"). (Ind. ¶ 9.) The defendant allegedly "reaped commissions worth tens of millions of dollars, generated from the illicit sales conducted through the site." (Ind. ¶ 3.) According to the Indictment, the defendant "pursued violent means, including soliciting the murder-for-hire of several individuals he believed posed a threat to that enterprise." (Ind. ¶ 4.)

Count Two depends on the conduct in Count One. Count Two alleges that Ulbricht's conduct amounted, over time, to his position as a "kingpin" in a continuing criminal enterprise (again, "CCE"). (Ind. ¶ 12.) Ulbricht is alleged to have engaged in a "continuing series of violations" in concert "with at least five other persons with respect to whom Ulbricht occupied a position of organizer, a

supervisory position, and a position of management, and from which . . . Ulbricht obtained substantial income and resources." (Id.)

Count Three charges that Ulbricht also designed Silk Road as "a platform for the purchase and sale of malicious software designed for computer hacking, such as password stealers, keyloggers, and remote access tools." (Ind. ¶ 14.) "While in operation, the Silk Road website regularly offered hundreds of listings for such products." (Id.) The object of this conspiracy was to "intentionally access computers without authorization, and thereby [to] obtain information from protected computers, for purposes of commercial advantage and financial gain." (Ind. ¶ 16.)

Count Four alleges that Ulbricht "designed Silk Road to include a Bitcoin-based payment system that served to facilitate the illegal commerce conducted on the site, including by concealing the identities and locations of the users transmitting and receiving funds through the site." (Ind. ¶ 18.) "[K]nowing that the property involved in certain financial transactions represented proceeds of some form of unlawful activity," Ulbricht and others would and did conduct financial transactions with the proceeds of specified unlawful activity, "knowing that the transactions were designed . . . to conceal and disguise the nature, the location, the source, the ownership and the control of the proceeds." (Ind. ¶ 21.)

II. THE LAW OF CONSPIRACY

A. Elements of a Conspiracy

"The essence of the crime of conspiracy . . . is the agreement to commit one or more unlawful acts." United States v. Praddy, 725 F.3d 147, 153 (2d Cir. 2013)

(emphasis in original) (citation omitted); see also Ianelli v. United States, 420 U.S. 770, 777 (1975) ("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act."); United States v. Falcone, 311 U.S. 205, 210 (1940); United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1191 (2d Cir. 1989) ("The gist of conspiracy is, of course, agreement."); United States v. Rosenblatt, 554 F.2d 36, 38 (2d Cir. 1977). Put differently, a conspiracy is the "'combination of minds for an unlawful purpose.'" Smith v. United States, – U.S. – , 133 S.Ct. 714, 719 (2013) (quoting United States v. Hirsch, 100 U.S. 33, 34 (1879)).[2]

1. Agreement

A meeting of the minds is required in order for there to be an agreement. Krulewich v. United States, 336 U.S. 440, 447-48 (1949) (Jackson, J. concurring); Rosenblatt, 554 F.2d at 38. Two people have to engage in the "act of agreeing" in order for this requirement to be met. Rosenblatt, 554 F.2d at 38 (internal quotation marks and citation omitted). The conspirators must agree to the object, or unlawful end, of the conspiracy. Id. While the coconspirators need not agree to every detail, they must agree to the "essential nature" of the plan. Blumenthal v. United States, 332 U.S. 539, 557 (1947); Praddy, 725 F.3d at 153 (internal quotation marks and

[2] There is no overt act requirement to establish a violation of a drug conspiracy prosecuted under 21 U.S.C. § 846. See United States v. Shabani, 513 U.S. 10, 11 (1994); United States v. Anderson, 747 F.3d 51, 60 n.7 (2d Cir. 2014). Similarly, a conviction for conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h) does not require proof of an overt act in furtherance of the conspiracy. Whitfield v. United States, 543 U.S. 209, 219 (2005).

citations omitted); United States v. Geibel, 369 F.3d 682, 689 (2d Cir. 2004) (internal quotation marks and citations omitted); Rosenblatt, 554 F.2d at 38.[3]

"It is not necessary to prove that the defendant expressly agreed with other conspirators on a course of action; it is enough, rather, to show that the parties had a tacit understanding to carry out the prohibited conduct." Anderson, 747 F.3d at 61 (internal quotation marks, alteration, and citation omitted). However, "a defendant's mere presence at the scene of a crime, his general knowledge of criminal activity, or his simple association with others engaged in a crime are not, in themselves, sufficient to prove the defendant's criminal liability for conspiracy." Id. (citations omitted).

2. Object of the Conspiracy

To be convicted of a conspiracy, a defendant must know what "'kind of criminal conduct was in fact contemplated.'" Rosenblatt, 554 F.2d at 38 (quoting United States v. Gallishaw, 428 F.2d 760, 763 n.1 (2d Cir. 1970)). That is, the defendant has to know what the "object" of the conspiracy he joined was. A "general agreement to engage in unspecified criminal conduct is insufficient to identify the essential nature of the conspiratorial plan." Rosenblatt, 544 F.2d at 39. Indeed, "[t]he government must prove that the defendant agreed to commit a particular offense and not merely a vague agreement to do something wrong." United States v. Salameh, 152 F.3d 88, 151 (2d Cir. 1998) (citation and internal quotation marks omitted) (emphasis in original). That said, "[t]he government need not show that

[3] In Rosenblatt, the Second Circuit overturned a conspiracy conviction on the basis that while two individuals agreed to commit offenses against the United States, they did not agree to commit the same offenses and therefore were not conspirators. 554 F.2d at 40.

the defendant knew all of the details of the conspiracy, so long as he knew its general nature and extent." United States v. Huezo, 546 F.3d 174, 180 (2d Cir. 2008) (citation and internal quotation marks omitted).[4]

3. Participation

The crime of conspiracy requires that a defendant both know the object of the crime and that he knowingly and intentionally join the conspiracy. United States v. Torres, 604 F.3d 58, 66 (2d Cir. 2010). The requisite knowledge can be proven through circumstantial evidence. Id.

The quantum of proof necessary at trial to sustain a finding of knowledge varies. "A defendant's knowing and willing participation in a conspiracy may be inferred from, for example, [his] presence at critical stages of the conspiracy that could not be explained by happenstance, . . . a lack of surprise when discussing the conspiracy with others, . . . [or] evidence that the defendant participated in conversations directly related to the substance of the conspiracy; possessed items important to the conspiracy; or received or expected to receive a share of the profits from the conspiracy." United States v. Aleskerova, 300 F.3d 286, 293 (2d Cir. 2002) (citations omitted). Indeed, under the appropriate circumstances, "[a] defendant's participation in a single transaction can suffice to sustain a charge of knowing

[4] A defendant may also be found culpable under the conscious avoidance doctrine. Under such circumstances, a crime's "knowledge element is established if the factfinder is persuaded that the defendant consciously avoided learning [a given] fact while aware of a high probability of its existence, unless the factfinder is persuaded that the defendant actually believed the contrary." United States v. Finkelstein, 229 F.3d 90, 95 (2d Cir. 2000). "The rationale for imputing knowledge in such circumstances is that one who deliberately avoided knowing the wrongful nature of his conduct is as culpable as one who knew." Id.

participation in an existing conspiracy." United States v. Zabare, 871 F.2d 282, 287 (2d Cir. 1989); see also United States v. Murray, 618 F.2d 892, 903 (2d Cir. 1980).

B. Types of Conspiracies

Conspiracies come in myriad shapes and sizes: from a small conspiracy involving two people to achieve a limited end to a large one involving numerous participants and with an expansive scope. Similarly, a defendant may participate in a single conspiracy or multiple conspiracies. Most questions as to size and number are left to trial. Here, the Court addresses these issues only insofar as they inform whether and how the Government might ultimately prove the conspiracies alleged in the Indictment.

"Whether the government has proven the existence of the conspiracy charged in the indictment and each defendant's membership in it, or, instead, has proven several independent conspiracies is a question of fact for a properly instructed jury." United States v. Johansen, 56 F.3d 347, 350 (2d Cir. 1995); see also United States v. Barret, 824 F. Supp. 2d 419, 445 (E.D.N.Y. 2011) (citing cases); United States v. Ohle, 678 F. Supp. 2d 215, 222 (S.D.N.Y. 2010); United States v. Rajaratnam, 736 F. Supp. 2d 683 (S.D.N.Y. 2010) (citing cases). Where an indictment charges a single conspiracy and the evidence later shows multiple conspiracies, the court will only set aside a jury's guilty verdict due to the variance if the defendant can show "substantial prejudice, i.e. that the evidence proving the conspiracies in which the defendant did not participate prejudiced the case against him in the conspiracy in which he was a party." Johansen, 56 F.3d at 351 (emphasis in original).

1. Overview of Single Conspiracies

"[A]cts that could be charged as separate counts of an indictment may instead be charged in a single count if those acts could be characterized as part of a single continuing scheme." United States v. Aracri, 968 F.2d 1512, 1518 (2d Cir. 1992) (internal quotation marks and citations omitted). In determining whether a single conspiracy involving many people exists, the question is whether there is a "mutual dependence" among the participants. Geibel, 369 F.3d at 692 (citation omitted); United States v. Williams, 205 F.3d 23, 33 (2d Cir. 2000). The Government must show that each alleged member of the conspiracy agreed to participate "'in what he knew to be a collective venture directed towards a common goal.'" United States v. Eppolito, 543 F.3d 25, 47 (2d Cir. 2008) (quoting United States v. Berger, 224 F.3d 107, 114 (2d Cir. 2000)); see also Geibel, 369 F.3d at 692 (explaining that when two participants do not mutually benefit from the other's participation, a finding of a single conspiracy is less likely).

A "'single conspiracy is not transformed into multiple conspiracies merely by virtue of the fact that it may involve two or more spheres or phases of operation, so long as there is sufficient proof of mutual dependence and assistance.'" Geibel, 369 F.3d at 689 (quoting Berger, 224 F.3d at 114-15). Neither changing membership nor different time periods of participation by various coconspirators precludes the existence of a single conspiracy, "especially where the activity of a single person was 'central to the involvement of all.'" Eppolito, 543 F.3d at 48 (quoting United States v. Langford, 990 F.2d 65, 70 (2d Cir. 1993) (citations omitted)); United States v.

Jones, 482 F.3d 60, 72 (2d Cir. 2006) ("Changes in membership, differences in time periods, and/or shifting emphases in the location of operations do not necessarily require a finding of more than one conspiracy.").

The Second Circuit has outlined three "hypothetical avenues" for establishing a single conspiracy:

> 1. The scope of the agreement was broad enough to include activities by or for persons other than the small group of core conspirators;
> 2. The coconspirators reasonably foresaw, "as a necessary or natural consequence of the unlawful agreement," the participation of others; or
> 3. "Actual awareness" of the participation of others.

Geibel, 369 F.3d at 690 (citing United States v. McDermott, 245 F.3d 133, 137-38 (2d Cir. 2001); United States v. Carpenter, 791 F.2d 1024, 1036 (2d Cir. 1986)). Alternatively, a jury may find a single conspiracy provided "'(1) that the scope of the criminal enterprise proven fits the pattern of the single conspiracy alleged in the indictment, and (2) that the defendant participated in the alleged enterprise with a consciousness as to its general nature and extent.'" Eppolito, 543 F.3d at 48 (quoting United States v. Rosa, 11 F.3d 315, 340 (2d Cir. 1993) (internal citation omitted)).

2. Types of Single Conspiracies

Courts often conceptualize single conspiracies using either a "chain" or a "hub-and-spoke" metaphor. United States v. Borelli, 336 F.2d 376, 383 (2d Cir. 1964).

a) Chain conspiracies

A chain conspiracy refers to a situation in which there are numerous conspiring individuals, each of whom has a role in a "chain" that serves the conspiracy's object. For example, in a narcotics conspiracy, a chain may be comprised of producers, exporters, wholesalers, middlemen, and dealers. The success of each "link" in the chain depends on the success of the others, even though each individual conspirator may play a role that is separated by great distance and time from the other individuals involved. Id.; United States v. Mallah, 503 F.2d 971, 984 (2d Cir. 1974); United States v. Agueci, 310 F.2d 817, 826 (2d Cir. 1962).[5]

For a chain conspiracy to exist, the ultimate purpose of the conspiracy must be to place the "forbidden commodity into the hands of the ultimate purchaser." Agueci, 310 F.2d at 826 (citation omitted). This form of conspiracy "is dictated by a division of labor at the various functional levels." Id. In Agueci, the Second Circuit found that "the mere fact that certain members of the conspiracy deal recurrently with only one or two other conspiracy members does not exclude a finding that they were bound by a single conspiracy." Id. "An individual associating himself with a 'chain' conspiracy knows that it has a 'scope' and that for its success it requires an organization wider than may be disclosed by [one's] personal participation." Id. at 827. That is, to support a chain conspiracy, a participant must know that combined efforts are required. Id.

[5] The extreme ends of such a conspiracy – for instance, numerous narcotics dealers who each obtain the narcotics they sell from a single wholesaler or middleman – may have elements of a hub-and-spoke conspiracy. Borelli, 336 F.2d at 383.

b) Hub-and-spoke conspiracies

In a hub-and-spoke (or "wheel") conspiracy, one person typically acts as a central point while others act as "spokes" by virtue of their agreement with the central actor. See Kotteakos v. United States, 328 U.S. 750, 754-55 (1946). Put another way, in a hub-and-spoke conspiracy, "members of a 'core' group deal with a number of contacts who are analogized to the spokes of a wheel and are connected with each other only through the core conspirators." United States v. Manarite, 448 F.2d 583, 589 (2d Cir. 1971).

To prove a single conspiracy in such a situation, the Government must show that there was a "rim" around the spokes, such that the "spokes" became coconspirators with each other. To do so, the Government must prove that "each defendant . . . participated in the conspiracy with the common goal or purpose of the other defendants." United States v. Taggert, No. 09 Cr. 984 (BSJ), 2010 WL 532530, at *1 (S.D.N.Y. Feb. 11, 2010) (internal quotation marks and citation omitted).

In the absence of such a "rim," the spokes are acting independently with the hub; while there may in fact be multiple separate conspiracies, there cannot be a single conspiracy. See Zabare, 871 F.2d at 287-88; see also Dickson v. Microsoft Corp., 309 F.3d 193, 203 (4th Cir. 2002) ("A rimless wheel conspiracy is one in which various defendants enter into separate agreements with a common defendant, but where the defendants have no connection with one another, other

than the common defendant's involvement in each transaction." (citing Kotteakos, 328 U.S. at 755)).

C. The Buyer-Seller Exception

Of course, not all narcotics transactions occur within a conspiracy. A conspiracy to distribute narcotics does not arise between a buyer and seller simply because they engage in a narcotics transaction. That is, the mere purchase and sale of drugs does not, without more, amount to a conspiracy to distribute narcotics. See, e.g., United States v. Parker, 554 F.3d 230, 234 (2d Cir. 2009) (explaining that the buyer-seller rule is a narrow one). "[I]n the typical buy-sell scenario, which involves a casual sale of small quantities of drugs, there is no evidence that the parties were aware of, or agreed to participate in, a larger conspiracy." United States v. Hawkins, 547 F.3d 66, 71-72 (2d Cir. 2008) (citations omitted); see also United States v. Mims, 92 F.3d 461, 465 (7th Cir. 1996) (clarifying that "a buyer-seller relationship alone is insufficient prove a conspiracy"); United States v. Medina, 944 F.2d 60, 65 (2d Cir. 1991); United States v. Valencia, 226 F. Supp. 2d 503, 510-11 (S.D.N.Y. 2002) (Chin, J.). "It is sometimes said that the buyer's agreement to buy from the seller and the seller's agreement to sell to the buyer cannot 'be the conspiracy to distribute, for it has no separate criminal object.'" Parker, 554 F.3d at 235 (quoting United States v. Wexler, 522 F.3d 194, 208 (2d Cir. 2008) (internal alterations omitted)).

When wholesale quantities are involved, however, the participants may be presumed to know that they are involved in a venture, the scope of which is larger

than the particular role of any individual. Murray, 618 F.2d at 902; see also Valencia, 226 F. Supp. 2d at 510-11.

D. The Role of Middlemen

In some cases involving narcotics trafficking, defendants are alleged to have acted as middlemen. Middlemen may be found to have conspired with a buyer, a seller, or both. United States v. Bey, 725 F.3d 643, 649 (7th Cir. 2013). "Evidence that the middleman had a clear stake in the seller's sales is typically sufficient to permit the jury to infer the existence of an agreement with the seller." Id. at 650; United States v. Colon, 549 F.3d 565, 568-70 (7th Cir. 2008) (citations omitted). There is no legal doctrine that defines a middleman as having a lesser role than other conspiracy members. Indeed, there is no legal reason why someone characterized as a middleman cannot be a powerful, motivating force behind a conspiracy.

III. DISCUSSION OF CONSPIRATORIAL AGREEMENT

The Indictment alleges that Ulbricht designed Silk Road specifically to enable users to anonymously sell and purchase narcotics and malicious software and to launder the resulting proceeds. On this motion to dismiss, the Court's task is a narrow one – it is not concerned with whether the Government will have sufficient evidence to meet its burden of proof as to each element of the charged conspiracies at trial. Instead, the Court is concerned solely with whether the nature of the alleged conduct, if proven, legally constitutes the crimes charged, and

whether the defendant has had sufficient notice of the illegality of such conduct. See D'Amelio, 683 F.3d at 418; Pagan, 721 F.2d at 27.

The defendant argues that Counts One and Three in the Indictment are legally insufficient for failure to allege a cognizable conspiratorial agreement. (Def.'s Reply at 2-3.) He does not make the same argument with regard to Count Four, but certain aspects of the issue apply to that Count as well.

The Court has set forth five questions that concern the potential existence of a conspiratorial agreement in this case. Each question is now taken up in turn.

> Question One: Can there be a legally cognizable "agreement" between Ulbricht and one or more coconspirators to engage in narcotics trafficking, computer hacking, and money laundering by virtue of his and their conduct in relation to Silk Road? If so, what is the difference between what Ulbricht is alleged to have done and the conduct of designers and administrators of legitimate online marketplaces through which illegal transactions may nevertheless occur?

The "gist" of a conspiracy charge is that the minds of two or more people met – that they agreed in some manner to achieve an unlawful end. For the reasons explained below, the design and operation of Silk Road can result in a legally cognizable conspiracy.

According to the Indictment, Ulbricht purposefully and intentionally designed, created, and operated Silk Road to facilitate unlawful transactions. Silk Road was nothing more than code unless and until third parties agreed to use it. When third parties engaged in unlawful narcotics transactions on the site, however, Ulbricht's design and operation gave rise to potential conspiratorial conduct. The subsequent sale and purchase of unlawful narcotics and software on Silk Road may,

as a matter of law, constitute circumstantial evidence of an agreement to engage in such unlawful conduct. See United States v. Svoboda, 347 F.3d 471, 477 (2d Cir. 2003) ("A conspiracy need not be shown by proof of an explicit agreement but can be established by showing that the parties have a tacit understanding to carry out the prohibited conduct.") (internal quotation marks and citation omitted); United States v. Miranda-Ortiz, 926 F.2d 172, 176 (2d Cir. 1991) ("The defendant's participation in a single transaction can, on an appropriate record, suffice to sustain a charge of knowing participation in an existing conspiracy.") (citations omitted); United States v. Roldan-Zapata, 916 F.2d 795, 803 (2d Cir. 1990) (affirming the conviction of a defendant based on his admitted "involvement in narcotics dealing and [ ] a pattern of trafficking," combined with other circumstantial evidence). Additionally, the Indictment charges that Ulbricht obtained significant monetary benefit in the form of commissions in exchange for the services he provided via Silk Road. He had the capacity to shut down the site at any point; he did not do so. The defendant allegedly used violence in order to protect the site and the proceeds it generated.

Ulbricht argues that his conduct was merely as a facilitator – just like eBay, Amazon, or similar websites.[6] Even were the Court to accept this characterization of the Indictment, there is no legal prohibition against such criminal conspiracy charges provided that the defendant possesses (as the Indictment alleges here) the requisite intent to join with others in unlawful activity.

[6] While the defendant refers to Amazon and eBay as similar, there are certain important factual differences between them. For instance, Amazon has warehouses which may fulfill certain orders. Silk Road is not alleged to have ever possessed products for fulfillment.

Moreover, in this case, the charges in the Indictment go further than Ulbricht acknowledges. The Indictment alleges that Ulbricht engaged in conduct that makes Silk Road different from other websites that provide a platform for individual buyers and sellers to connect and engage in transactions: Silk Road was specifically and intentionally designed for the purpose of facilitating unlawful transactions. The Indictment does not allege that Ulbricht is criminally liable simply because he is alleged to have launched a website that was – unknown to and unplanned by him – used for illicit transactions. If that were ultimately the case, he would lack the mens rea for criminal liability. Rather, Ulbricht is alleged to have knowingly and intentionally constructed and operated an expansive black market for selling and purchasing narcotics and malicious software and for laundering money. This separates Ulbricht's alleged conduct from the mass of others whose websites may – without their planning or expectation – be used for unlawful purposes.

It is certainly true that the principles set forth in this Opinion would apply to other third parties that engaged in conduct similar to that alleged here; but it is also true that the essential elements for (by way of example) a narcotics conspiracy would be absent if a website operator did not intend to join with another to distribute (for instance) narcotics. Thus, administrators of an eBay-like site who intend for buyers and sellers to engage in lawful transactions are unlikely to have the necessary intent to be conspirators.

> Question Two: As a matter of law, who are Ulbricht's alleged coconspirators and potential coconspirators? That is, whose "minds" can have "met" with Ulbricht's in a conspiratorial agreement? What sort of conspiratorial structure frames the allegations: one large single conspiracy or multiple small conspiracies?

The Indictment charges a single conspiracy in each of Counts One, Three, and Four. Ulbricht's alleged coconspirators are "several thousand drug dealers and other unlawful vendors." (Ind. ¶ 2.) If these individuals possessed the requisite intent, there is no legal reason they could not be members of the conspiracies charged in the Indictment.

A more complicated question is whether any or all of Ulbricht's coconspirators also conspired with each other, so as to create a potentially vast single conspiracy. In this regard, the Government may argue that the conspiracy was a "chain" conspiracy or that it was a "hub-and-spoke" conspiracy (in which case it would be necessary for the Government to prove the existence of a "rim"). Each approach has its own complexities regarding the (largely anonymous) inter-conspirator relationships on the Internet. While this is not an issue the Government need address at this stage, see D'Amelio, 683 F.3d at 418; Pagan, 721 F.2d at 27, it will be relevant as the proof comes in at trial.

Of course, ultimately, the form of the conspiracy is not as important as a determination that at least one other person joined in the alleged conspiratorial agreement with Ulbricht. With respect to the narcotics conspiracy charge, to prove that the drug types and quantities alleged in the Indictment were the objects of a conspiracy Ulbricht knowingly and intentionally joined, the Government will have

to prove either a single such conspiratorial agreement or an aggregation of conspiracies.[7] While, as explained, proof of participants' intent could involve numerous complexities, these are issues for trial and not for this stage.

> Question Three: As a matter of law, when could any particular agreement have occurred between Ulbricht and his alleged coconspirators? Need each coconspirator's mind have met simultaneously with Ulbricht's? With the minds of other coconspirators? That is, if Ulbricht launched Silk Road on Day 1, can he be said, as a matter of law, to have entered into an agreement with the user who joins on Day 300? Did Ulbricht, simply by designing and launching Silk Road, make an enduring showing of intent?

The issue here is one of temporal proximity. For the sake of illustration, assume that Ulbricht launched Silk Road on Day 1. A narcotics trafficker posted illegal drugs on the site on Day 2 and another posted on Day 300. Does the Day 2 trafficker enter into a conspiratorial agreement with Ulbricht on Day 2 and the Day 300 trafficker on Day 300? More importantly, can Ulbricht have agreed to a conspiracy on Day 1 with an alleged coconspirator who, at that time, had not even contemplated engaging in an unlawful transaction, and determined to do so only on, for example, Day 300?[8]

One way of thinking about this issue is to look to the basic contract principles of offer and acceptance. On Day 1, according to the Indictment, Ulbricht "offers" to work with others to traffic illegal narcotics, engage in computer hacking, and launder money. He makes this offer by creating and launching a website specifically designed and intended for such unlawful purposes. Ulbricht's continued

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[7] There are additional complexities when other factors such as differences in types of drugs, temporal proximity, and the roles of coconspirators are taken into account. These too are questions for trial.
[8] As suggested in connection with Question One, another question is whether the Day 2 and the Day 300 trafficker could ever enter into a conspiracy with each other.

operation of the site evinces an enduring intent to be bound with those who "accept" his offer and utilize the site for its intended purpose. It is as though the defendant allegedly posted a sign on a (worldwide) bulletin board that said: "I have created an anonymous, untraceable way to traffic narcotics, unlawfully access computers, and launder money. You can use the platform as much as you would like, provided you pay me a percentage of your profits and adhere to my other terms of service." Each time someone "signs up" and agrees to Ulbricht's standing offer, it is possible that, as a matter of law, he or she may become a coconspirator.

To put this another way, the fact that Ulbricht's active participation may occur at a different point in time from the agreement by his coconspirator(s) does not render the conspiracy charges legally defective. Courts have long recognized that members of a conspiracy may be well removed from one another in time. See, e.g., Borelli, 336 F.3d at 383-84. The law has similarly recognized that coconspirators need not have been present at the outset of a conspiracy in order to be found criminally responsible; they may join at some later point. See, e.g., id.; United States v. Nersesian, 824 F.2d 1294, 1303 (2d Cir. 1987). A lapse in time – in particular in a narcotics chain conspiracy, where a manufacturer creates a substance months prior to a wholesale or retailer selling it, not knowing (and perhaps never knowing) who, precisely, will ultimately distribute it – does not ipso facto render the alleged conspiracy defective as a matter of law. Similarly, the law long ago accepted that coconspirators may not know each other's identity. Blumenthal, 332 U.S. at 557-58. The alleged conduct here is another step along

this established path. The common law anticipates and accepts application to new fact patterns.

> Question Four: As a matter of law, is it legally necessary, or factually possible, to pinpoint how the agreement between Ulbricht and his coconspirators was made? In this regard, does the law recognize a conspiratorial agreement effected by an end user interacting with computer software, or do two human minds need to be simultaneously involved at the moment of agreement?

Another issue raised by this case is whether a conspiratorial agreement may be effected through what are primarily automated, pre-programmed processes. This is not a situation in which Ulbricht is alleged to have himself approved or had a hand in each individual transaction that occurred on Silk Road during the nearly three-year period covered by the Indictment. Instead, he wrote (or had others write) certain code that automated the transaction. Yet, as a legal matter, this automation does not preclude the formation of a conspiratorial agreement. Indeed, whether an agreement occurs electronically or otherwise is of no particular legal relevance.

It is well-established that the act of agreeing, or having a meeting of the minds, may be proven through circumstantial evidence. United States v. Rodriguez, 394 F.3d 539, 544 (2d Cir. 2004). There is no requirement that any words be exchanged at all in this regard, so long as the coconspirators have taken knowing and intentional actions to work together in some mutually dependent way to achieve the unlawful object. See Diaz, 176 F.3d at 97. In this regard, "how" any agreement between two coconspirators may be proven at trial depends solely on the evidence presented. See Anderson, 747 F.3d at 61. Though automation may enable

a particular transaction to take place, it is the individuals behind the transaction that take the necessary affirmative steps to utilize that automation. It is quite clear, for example, that if there were an automated telephone line that offered others the opportunity to gather together to engage in narcotics trafficking by pressing "1," this would surely be powerful evidence of the button-pusher's agreement to enter the conspiracy. Automation is effected through a human design; here, Ulbricht is alleged to have been the designer of Silk Road, and as a matter of law, that is sufficient.[9]

> Question Five: If Ulbricht was merely the facilitator of simple buy-sell transactions, does the "buyer-seller" rule apply, which in certain circumstances would preclude a finding of a criminal conspiracy?

Ulbricht is not alleged to have been a buyer or seller of narcotics or malicious software. Following the design and launch of Silk Road, his role is alleged to have been that of an intermediary. While it will be for the Government to prove the defendant's specific role vis-à-vis his alleged coconspirators at trial, one issue that may arise is whether the participation of an intermediary could itself (all other factors remaining the same) eliminate the applicability of the "buyer-seller" rule to a given narcotics transaction involving a small quantities bought and sold on the site. In other words, can mere buyers and sellers of small quantities of narcotics –

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[9] Acceptance of the terms of service, the payment of commissions, placing Bitcoins in escrow, and other intervening steps involved in the transactions that allegedly occurred on Silk Road could, in this regard, perhaps constitute evidence that Silk Road users entered into an unlawful conspiracy with Ulbricht (and others). It will be for the Government to prove which conduct in fact occurred, and how, at trial. See, e.g., United States v. Lorenzo, 534 F.3d 153, 161 (2d Cir. 2008) (noting that "a defendant's knowing agreement to join a conspiracy must, more often than not, be proven through circumstantial evidence" and there are "cases where the circumstantial evidence considered in the aggregate demonstrates a pattern of behavior from which a rational jury could infer knowing participation") (internal quotation marks and citations omitted).

who might not otherwise legally be coconspirators if the transactions occurred in the brick-and-mortar world – become conspirators due to the interposition of a website or website administrator? Plainly, the level of involvement in any transaction by the website would be relevant. And there are certainly instances in which the participation of three participants renders what might otherwise be a simple purchase or sale into a conspiracy. See, e.g., Medina, 944 F.2d at 65. There can be no hard and fast rule that answers this question – its ongoing relevance will depend on how the proof comes in at trial.

IV. OTHER LEGAL ISSUES RAISED WITH REGARD TO COUNT ONE

The defendant argues that while Count One charges him with conspiracy to possess with intent to distribute various controlled substances (i.e., heroin, cocaine, and LSD), Ulbricht is not alleged to have himself been a buyer, seller, or possessor of any of the controlled substances at any point during the conspiracy. (Def.'s Mem. at 9.)[10] And, by alleging only that he designed, launched, and operated a website, the Government has not described the conduct of a coconspirator in a narcotics conspiracy. (Id. at 10.) At most, argues the defendant, the Government has alleged that Ulbricht has acted in a manner akin to that of a landlord, and the law is clear that merely acting as a landlord to drug dealers is itself insufficient to make one a coconspirator in narcotics transactions occurring on the premises. (Id. at 10-13.)

[10] The defendant argues that imposing criminal liability for Ulbricht's alleged conduct would constitute "an unprecedented and extraordinarily expansive theory of vicarious liability." (Def.'s Mem. at 1.) This is incorrect. The Government alleges direct – not indirect – participation in the crimes charged. The law of conspiracy (see supra) has long recognized the many varied roles participants may play.

According to the defendant, the statutory violation that occurs when one "knows" his premises have been or are being used for unlawful activities is either civil forfeiture pursuant to 21 U.S.C. § 881(a)(7) or the "crack house" statute passed by Congress in 1986, 21 U.S.C. § 856. (Id. at 11.) The statute outlaws the knowing operation, management, or leasing of premises where crack cocaine and other illicit drugs are manufactured, distributed, or used. 21 U.S.C. § 856(a). The defendant argues that because Silk Road is, at most, a type of "premise" for the distribution of narcotics, he should have been charged under either §§ 881 or 856, not with a narcotics conspiracy under §§ 841 or 846. (Def.'s Mem. at 12.) Alternatively, the defendant argues that his conduct should be analogized to that of a "steerer" in a drug transaction, not a coconspirator.[11] (Id. at 13.)

The defendant's arguments stem from an incorrect set of assumptions: first, that conduct may constitute only one type of statutory violation or must seek civil forfeiture relief to the exclusion of criminal liability. While the defendant may be chargeable with a violation of the "crack house" statute, he may well be chargeable with other crimes as well. How a defendant is charged is within the discretion of the prosecution. United States v. Batchelder, 442 U.S. 114, 124 (1974); United States v. Stanley, 928 F.2d 575, 580-81 (2d Cir. 1991). Additionally, no legal principle prevents the Government from seeking to impose civil forfeiture along

[11] Conduct demonstrating that an individual merely helps a willing buyer find a willing seller, and is therefore acting as a mere "steerer," is, without more, insufficient to establish a conspiratorial agreement. See United States v. Tyler, 758 F.2d 66, 69 (2d Cir. 1985); United States v. Hysohion, 448 F.2d 343, 347 (2d Cir. 1971). However, when a defendant steers buyers to sellers as part of a continuing business arrangement, or is otherwise the "conduit" for the transaction, criminal liability may attach. See, e.g., United States v. Vargas-Nunez, 115 F. App'x 494, 495-96 (2d Cir. 2004) (discussing defendant's purported role as a "steerer" in the sentencing context); United States v. Esadaille, 769 F.2d 104, 108-09 (2d Cir. 1985).

with criminal liability – and it is done all the time. Here, in addition to criminal conspiracy, the Government has separately sought civil forfeiture under 18 U.S.C. § 982(a)(1)(A), see Case No. 13-cv-6919 (JPO), as well as in the Indictment itself. (Ind. ¶¶ 22-24.)

Nor is the Government limited to charging a violation of the "crack house" statute simply because facilities (whether electronic or physical) are alleged to be at issue. It may well be that the Government could have charged such a violation – but that does not mean it is necessarily limited to that. When conduct allows for multiple charges – as is alleged here – a court does not second guess which charge is chosen. See Stanley, 928 F.2d at 581.

In this case, the Government has alleged that more is in play than the conduct which is encompassed by the "crack house" statute, or in the context of a non-conspiratorial "steerer." The Government has alleged that the defendant set up a platform for illicit drug transactions designed with the specific needs of his buyers and sellers in mind. Thus, Ulbricht's alleged conduct is not analogous to an individual who merely steers buyers to sellers; rather, he has provided the marketing mechanism, the procedures for the sale, and facilities for the actual exchange. He is alleged to know that his facilities would be used for illicit purposes and, in fact, that he designed and operated them for that purpose. In this regard, he is alleged to have "intentionally and knowingly" "combine[d], conspire[d], confederate[d], and agree[d]" with others to violate United States criminal law. (Ind. ¶ 5.) Ulbricht's alleged conduct is more akin to a builder who designs a house

complete with secret entrances and exits and specially designed traps to stash drugs and money; this is not an ordinary dwelling, but a drug dealer's "dream house."

The defendant argues that Count One must be dismissed because he is not alleged to have distributed or possessed any controlled substance. No such allegation is required. The law of conspiracy recognizes that members of a conspiracy may serve different roles. See United States v. Santos, 541 F.3d 63, 72 (2d Cir. 2008); United States v. Garcia-Torres, 280 F.3d 1, 4 (1st Cir. 2002) ("[A] drug conspiracy may involve ancillary functions (e.g., accounting, communications, strong-arm enforcement), and one who joined with drug dealers to perform one of those functions could be deemed a drug conspirator."); United States v. Burgos, 94 F.3d 849, 859 (4th Cir. 1996) (explaining that "a variety of conduct, apart from selling narcotics, can constitute participation in a conspiracy sufficient to sustain a conviction"). There are numerous examples of participants in narcotics conspiracies who did not themselves intend physically to possess or distribute narcotics; an individual may have been a middleman, the protective muscle, the lookout, a decoy, a person with information or contacts, etc. – in any event, the individual may nonetheless be found to be part of the conspiratorial enterprise. See, e.g., United States v. Pitre, 960 F.2d 1112, 1121-22 (2d Cir. 1992) (affirming conviction of defendant where evidence revealed that defendant was acting as a lookout and was carrying a beeper to facilitate narcotics transactions); United States v. Barnes, 604 F.2d 121, 161 (2d Cir. 1979) (explaining that defendant's "actions as a 'middleman'

in three transactions . . . constituted sufficient evidence of knowledgeable participation in the operations of the conspiracy with an expectation of benefiting from them").

Finally, Ulbricht expresses surprise that the Government states in its opposition brief that by operating Silk Road, Ulbricht "entered into a joint venture with thousands of drug dealers around the world to distribute drugs online." (Gov't Opp'n at 9.) This characterization of the defendant's alleged conduct is substantively no different than the allegation in the Indictment that several thousand drug dealers and hundreds of thousands of buyers used the site. (Ind. ¶ 2.) However, the fact that such an allegation falls within a reasonable reading of the Indictment is a separate question from whether the Government will in fact be able to prove one joint venture or single conspiracy at trial. As noted above, proving that thousands of dealers were in a single joint venture together with each other as well as with Ulbricht presents numerous challenges due to temporal and other considerations.

Count One adequately alleges both the elements of a narcotics conspiracy as well as the conduct alleged underlying the charges; the defendant is sufficiently on notice of the charges against him so as to preclude later issues of double jeopardy.

V. OTHER LEGAL ISSUES RAISED WITH REGARD TO COUNT TWO

Count Two alleges that the defendant's conduct amounted to participation in a CCE in violation of 21 U.S.C. § 848(a). As an initial matter, a "continuing criminal enterprise" requires a determination that a provision of the Controlled

Substances Act has been violated. Ulbricht's liability under this provision is therefore premised on a conviction on Count One, the narcotics conspiracy. Next, the trier of fact will need to determine if the violation of the Controlled Substances Act (that is, the narcotics conspiracy) was one of a series of such violations. 21 U.S.C. § 848(c). The law has defined "a series" as constituting at least three violations. See United States v. Flaharty, 295 F.3d 182, 197 (2d Cir. 2002) (explaining that the Second Circuit has "interpreted 'a continuing series' to mean at least three felony drug violations committed over a definite period of time") (citation omitted).

Finally, Ulbricht must have undertaken this series of violations in concert with five or more persons with respect to whom he occupied a position of organizer, supervisor, or manager, and he must have obtained substantial income or resources from such conduct. 21 U.S.C. § 848(c).

Ulbricht argues (1) that the Indictment fails to allege sufficiently that he occupied the requisite position vis-à-vis five persons, and that, in this regard, the Government has failed to allege (and could not allege) that he acted in concert with the buyers and sellers on the site; and (2) that the Indictment fails to enumerate a predicate series of violations. (Def.'s Mem. at 13.) Ulbricht is correct that Count Two does not explicitly identify the five individuals whom he is alleged to have organized, managed, or supervised. He similarly is correct that the Government has not specified the dates, times, or transaction details of the "series" of violations. Nonetheless, the allegations of the Indictment are sufficient. Paragraphs 11 and 12

recite the necessary statutory language to charge a continuing criminal enterprise; and the allegations set forth in Paragraphs 1 through 4 (which are incorporated by reference into Count Two) set forth necessary factual detail.

The law is clear that the Indictment should be read to incorporate those facts that while not explicitly stated, are implicit in the existing allegations. United States v. Silverman, 430 F.2d 106, 111 (2d Cir. 1970). In terms of the facts alleged, here the Indictment asserts that "several thousand drug dealers" and "well over a hundred thousand buyers worldwide" used the site. (Ind. ¶ 2.) With the "assistance of various paid employees whom he managed and supervised" (Ind. ¶ 3), Ulbricht is alleged to have controlled all aspects of Silk Road.

From these facts, the Government argues that by owning, operating, and controlling all aspects of the operation of the site (Ind. ¶¶ 2-3), Ulbricht occupied the necessary position as organizer, manager, or supervisor of the "vendors selling drugs on the site." (Gov't Opp'n at 15.) Ulbricht is alleged not only to have designed the online structure which enabled and allowed transactions, but, in controlling all aspects of its operations, to have set the rules the vendors and buyers had to follow, policed accounts for rule violations, determined commission rates, and taken commissions on every transaction. In addition, Ulbricht allegedly oversaw the efforts of others who assisted him in the administration and operation of the site. Thus, the Government contends that it has set forth sufficient allegations of Ulbricht's occupying the requisite position as organizer, manager, or supervisor. This Court agrees.

The "continuing criminal enterprise" statute is broadly worded – and broadly intends to encompass those who are leaders of a criminal enterprise which engages in a series of violations of the narcotics laws. See United States v. Scarpa, 913 F.2d 993, 1007 (2d Cir. 1990) (explaining that the operative words in the statute – "organize," "manage," and "supervise" – should be given their ordinary, everyday meanings) (citation omitted). That is precisely what the Government has alleged here. The statute does not require that Ulbricht have had a particular form of contact with each of the five or more individuals that he purportedly organized, managed, or supervised. United States v. Cruz, 785 F.2d 399, 407 (2d Cir. 1986); see also United States v. Joyner, 201 F.3d 61, 71 (2d Cir. 2000) (affirming a conviction where a defendant sold to otherwise independent resellers but required them, inter alia, to obtain permission from him to discount their prices and sell in certain locations so that he could monitor their activity).

Here, Ulbricht also argues that he cannot have had the requisite role with respect to individuals who merely assisted him with administering the site. (Def.'s Mem. at 15.) This, however, is a question of fact, not law. Whether those who assisted Ulbricht had the requisite mental state to be acting "in concert" with him is a factual inquiry. If those who assisted Ulbricht had the requisite state of mind, there is no legal reason why they could not constitute the necessary group of "five or more."

Ulbricht argues that he cannot separately have had the requisite position vis-à-vis the buyers and sellers, as they are referred to as having "used" the site, and

not, for instance, as employees. (Ind. ¶ 2).[12] In this regard, the defendant argues that, at most, his alleged conduct amounted to his being a conduit or facilitator for those engaging in illegal activity. This is, again, a factual argument cast as a legal one. There is no legal reason why one who designs, launches, and operates a website or any facility for the specific purpose of facilitating narcotics transactions that he knows will occur, and acts as the rule-maker of the site – determining the terms and conditions pursuant to which the sellers are allowed to sell and the buyers are allowed to buy, taking disciplinary actions to protect that enterprise (allegedly including murder-for-hire on more than one occasion) – could not be found to occupy the requisite position. See Cruz, 785 F.2d at 407 (no distinction between salaried employees and independent contractors). In this regard, the allegations amount to Ulbricht acting as a sort of "godfather" – determining the territory, the actions which may be undertaken, and the commissions he will retain; disciplining others to stay in line; and generally casting himself as a leader – and not a service provider. Again, whether the Government can prove the facts alleged is not a question at this stage of the proceedings.

Ulbricht also argues that Count Two fails to allege the specific series of continuing violations. The Indictment does allege thousands of separate transactions. (Ind. ¶ 2.) The type of specificity the defendant urges is not required. Flaharty, 295 F.3d at 197 (granular particularity not required). The Government need not enumerate the specific who, when, or where of the series in the

[12] Ulbricht also argues that he cannot have engaged in a CCE merely by aiding and abetting drug dealers. This is not, however, the Government's allegation. The Government contends that Ulbricht was the leader of a vast criminal enterprise.

Indictment; it is enough that it is clear from the face of the Indictment that he is alleged to have engaged in a continuing series of narcotics conspiracies punishable under 21 U.S.C. §§ 841, 843, 846. (Ind. ¶ 12). See United States v. Simmons, 923 F.2d 934, 952 (2d Cir. 1991).

VI. OTHER LEGAL ISSUES RAISED WITH REGARD TO COUNT THREE

The defendant argues that the allegations in the Indictment are insufficient to support the type of conduct covered by a computer hacking conspiracy in 18 U.S.C. § 1030 (the "Computer Fraud and Abuse Act"). (Def.'s Mem. at 21.) According to the defendant, the allegations are "only that the Silk Road website 'provided a platform for the [exchange] of malicious software.'" (Id. (quoting a portion of the Indictment at ¶¶ 15-16).)

The Indictment in fact alleges more. It alleges that "Silk Road . . . provided a platform for the purchase and sale of malicious software designed for computer hacking, such as password stealers, keyloggers, and remote access tools. While in operation, the Silk Road website regularly offered hundreds of listings for such products." (Ind. ¶ 14.) It also alleges that the defendant conspired with others to "intentionally access computers without authorization, and thereby would and did obtain information from protected computers, for commercial advantage and private financial gain." (Ind. ¶ 16.)

The defendant correctly states that to establish a violation of 18 U.S.C. §1030(a)(2)(C) requires "proof that the defendant intentionally accessed information from a protected computer." United States v. Willis, 476 F.3d 1121, 1125 (10th Cir.

2007). However, the defendant incorrectly extends this to the requirements for sufficiently alleging a computer hacking conspiracy. At this stage, such a claim requires not proof – as the defendant argues (see Def.'s Mem. at 22) – but rather, only allegations that the defendant agreed with another to "(1) intentionally access[] a computer, (2) without authorization . . . (3) and thereby obtain[] information." Willis, 476 F.3d at 1125. As with any conspiracy, the actual success or failure of the venture is irrelevant. See United States v. Perry, 643 F.2d 38, 46 (2d Cir. 1981) ("It is unnecessary to show that the conspiracy actually aided any particular sale of heroin since a conspiracy can be found though its object has not been achieved.").

It is, of course, axiomatic – as set forth at length above – that to charge a conspiracy the Government must allege that two or more people agreed to achieve an unlawful end. See Stavroulakis, 952 F.2d at 690. Each conspirator must knowingly and intentionally enter the conspiracy, Torres, 604 F.3d at 66, though it is common for coconspirators to have different roles. See, e.g., United States v. Sanchez, 925 F. Supp. 1004, 1013 (S.D.N.Y. 1996) ("There are many roles in a conspiracy.").

The defendant argues that the Government's charge must fail as it relies upon a concept of "transferred intent" – that is, that Ulbricht himself is not alleged to have had the intent to obtain unauthorized access, but only to have conspired with another who did. (Def.'s Reply at 13.) According to Ulbricht, he could not know the buyer's intent. (Id.)

As an initial matter, the law of conspiracy does not require that both participants intend to access a computer – but they must both intend that one of them will. Questions as to how the Government will prove its case as to the buyer's intent are reserved for trial.[13]

Ulbricht also argues that the statutory term "access without authorization" is undefined. (Def.'s Mem. at 39-41 (discussing § 1030(a)(2)(C).) Describing the 1996 amendments to the statute and the addition of the term "any" to unauthorized access of computers over the Internet, the defendant argues that the "ubiquitous use of computers, smartphones, tablets, or any other Internet-enabled device in today's world" places special emphasis on the meaning of the word "authorization" and may criminalize a broad amount of routine Internet activity. (Id. at 41.) The Government counters this argument only in a footnote. (Gov't Opp'n at 31 n.10.)

The defendant's argument is misplaced, or at least premature. The term "authorization" has a plain and ordinary meaning and requires no special construction. That the statute may implicate a broad swath of conduct is an issue for Congress. Whether this issue has any special significance can only be determined at trial. That is, whether Ulbricht's and his coconspirators' alleged conduct falls into the suggested grey area must await the Government's proof.

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[13] The defendant's arguments that potentially lawful uses of malicious software also fail. There are numerous examples of lawful products put to unlawful use, resulting in criminal liability. See, e.g., United States v. Zambrano, 776 F.2d 1091, 1092, 1096 (2d Cir. 1985); United States v. Orozco-Prada, 732 F.2d 1076, 1080 (2d Cir. 1984); Perry, 643 F.2d at 44.

VII. THE "KITCHEN SINK" ARGUMENTS

Ulbricht also alleges that since his alleged conduct in Counts One, Two, and Three has never before been found to constitute the crimes charged, a variety of legal principles preclude criminal liability. Those principles include the rule of lenity, the doctrine of constitutional avoidance, void-for-vagueness, and overbreadth. In addition, the defendant argues that the presence of a civil immunity statute for online providers indicates congressional "support for a free-wheeling [I]nternet, including one in which providers or users of interactive computer services can operate without fear of civil liability for the content posted by others." (Def.'s Mem. at 28.) These arguments do not preclude the criminal charges here.

As an initial matter, as set forth above, the conduct charged fits within existing law. It is certainly true that case law to date has not been applied to the type of conduct that forms the basis for the Government's charges[14] – but that is not fatal. Throughout the history of the common law system there have been times when laws are applied to new scenarios. At each new stage there were undoubtedly those who questioned the flexibility of the law. But when the principles underlying a law are consistent and clear, they may accommodate new fact patterns. See Williams v. Taylor, 529 U.S. 362, 384-85 (2000) (Opinion of Stevens, J.) ("[R]ules of law often develop incrementally as earlier decisions are applied to new factual situations."); see also, e.g., ABC, Inc. v. Aereo, Inc., – U.S. – , 2014 WL 2864485, at

[14] The Government argues that a conspiracy and CCE have previously been charged in the context of online marketplaces. (Gov't Mem. at 30.) Those cases have entirely different facts from those alleged here.

*10 (2014) (applying copyright laws customarily imposed upon cable companies to a new type of distributor). The fact that a particular defendant is the first to be prosecuted for novel conduct under a pre-existing statutory scheme does not ipso facto mean that the statute is ambiguous or vague or that he has been deprived of constitutionally appropriate notice.

The defendant's Kitchen Sink arguments are also premised on a view of his alleged conduct as being sufficiently common – i.e., that he is doing nothing more than that done by other designers and operators of online marketplaces – that he could not have known or been on notice of its illegality.

The Court disagrees. Again, on a motion to dismiss an indictment, the Court accepts as true the Government's allegations; whether and how those allegations can be proven is not a question for this stage in the proceedings.

A. The Rule of Lenity and the Doctrine of Constitutional Avoidance

The defendant's arguments with respect to the rule of lenity and the doctrine of constitutional avoidance are based on the incorrect premise that the statutes under which he has been charged in Counts One, Two, and Three are ambiguous when applied to his alleged conduct.

The rule of lenity provides that when a criminal statute is susceptible to two different interpretations – one more and one less favorable to the defendant – "leniency" requires that the court read it in the manner more favorable. See Rewis v. United States, 401 U.S. 808, 812 (1971); United States v. Ford, 435 F.3d 204, 211 (2d Cir. 2006) (explaining that "restraint must be exercised in determining the

breadth of conduct prohibited by a federal criminal statute out of concerns regarding both the prerogatives of Congress and the need to give fair warning to those whose conduct is affected").

The rule of lenity is a principle of statutory construction: it comes into play only if and when there is ambiguity. United States v. Litchfield, 986 F.2d 21, 22 (2d Cir. 1993). It should not be viewed as a general principle requiring that clear statutes be applied in a lenient manner. Callanan v. United States, 364 U.S. 587, 596 (1961) (explaining that the rule of lenity, "as is true of any guide to statutory construction, only serves as an aid for resolving an ambiguity; it is not to be used to beget one").

In Skilling v. United States, 561 U.S. 358 (2010), the Court addressed the type of conduct encompassed by the ambiguous term "honest services." The Court reiterated the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," and refused to agree with the Government's broad interpretation of the statute. Id. at 410. Instead, the Court limited its coverage to bribery and kickback schemes. Id. at 412. The Court noted that if "Congress desires to go further . . . it must speak more clearly than it has." Id. at 411.

Here, with regard to Counts One and Two, the defendant does not allege that a word or phrase in a statute requires construction or is susceptible to more than

one interpretation.[15] Instead, he argues that even if the elements of, for instance, a narcotics conspiracy are well known, his particular conduct in designing and operating the website does not clearly fall within what the statute is intended to cover. The Court disagrees.

Sections 841 and 846 are intended to cover conduct in which two or more people conspire to distribute or possess with the intent to distribute narcotics. If the Government can prove at trial that Ulbricht has the requisite intent, then these statutory provisions clearly prohibit his conduct. These statutory provisions do not, for instance, require that only one type of communication method be used between coconspirators (for instance, cellular telephone versus the Internet); they do not prescribe what the various roles of coconspirators must be or are limited to; and they have been applied in the past to individuals alleged to be middlemen in drug transactions. See generally Pitre, 960 F.2d at 1121-23. Here, there is no statutory ambiguity and thus no basis for application of the rule of lenity.

The doctrine of constitutional avoidance provides that when a "statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to accept the latter." United States ex rel. Attorney General v. Del. & Hudson Co., 213 U.S. 366, 408 (1909); see also Jones v. United States, 526 U.S. 227, 239-40 (1999); Triestman v. United States, 124 F.3d 361, 377 (2d Cir. 1997).

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[15] As discussed supra, the defendant does argue ambiguity with regard to aspects of § 1030; as the Court has stated, whether that alleged ambiguity (or really, breadth) plays any role here is a question for trial.

This doctrine is inapplicable for the same reason as the rule of lenity: there is no ambiguity; the Court is not struggling with dueling interpretations as to whether the alleged conduct, if proven, would be covered. Thus, there are no grave constitutional issues on either side of this question.

B. Void-for-Vagueness and Constitutional Overbreadth

The defendant also argues that the statutes, as applied to his conduct in particular, are void on the basis that they are either unconstitutionally vague or overbroad. (Def.'s Mem. at 32-38.) The Court disagrees.

The void-for-vagueness doctrine is inapplicable. It addresses concerns regarding (1) fair notice and (2) arbitrary and discriminatory prosecutions. Skilling, 561 U.S. at 412 (citation omitted). To avoid a vagueness challenge, a statute must define a criminal offense in a manner that ordinary people must understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Id. at 402-03. The question, in short, is whether an ordinary person would know that engaging in the challenged conduct could give rise to the type of criminal liability charged.

The Government argues that this prosecution is not particularly novel. "[B]oth the narcotics conspiracy statute and continuing criminal enterprise statute have specifically been applied in a previous prosecution of defendants involved in operating online marketplaces for illegal drugs." (Gov't Opp'n at 30.) "[T]he computer hacking statute has previously been applied to persons involved in providing online services used by others to distribute malicious software." (Id.) The

citations by the Government in support of these assertions are, however, merely to indictments. (Id.) And neither case has yet resulted in a published decision which could reasonably have provided notice to the defendant, or which demonstrates an ineffectual legal challenge.

As the Supreme Court has recognized, however, "due process requirements are not designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." United States v. Lanier, 520 U.S. 259, 271 (1997) (internal quotation marks and citations omitted). Here, the charged conduct is not merely designing some benign marketplace for bath towels. The conduct is alleged to be specific and intentional conduct to join with narcotics traffickers or computer hackers to help them sell illegal drugs or hack into computers, and to be involved in enforcing rules (including using murder-for-hire) regarding such sales and taking commissions. No person of ordinary intelligence could believe that such conduct is somehow legal. Indeed, no reasonable person could assume that such conduct is in any way equivalent to designing and running eBay, for example. There is nothing vague about the application of the statute to the conduct charged.

Ulbricht also argues that his alleged conduct also constitutes protected free speech and that the imposition of criminal liability would be overbroad as applied. (Def.'s Mem. at 35-38.) This argument stems from an incorrect premise as to the nature of the criminal charges here.

The defendant does not explain how such conduct could amount to protected speech; even if this Court were to agree that such conduct has a speech element, the law is clear that speech which is part of a crime is not somehow immunized. See United States v. Rahman, 189 F.3d 88, 116-17 (2d Cir. 1999). For instance, no one would doubt that a bank robber's statement to a teller – "This is a stick up" – is not protected speech.

The thrust of the defendant's overbreadth argument appears to be similar to his vagueness, constitutional avoidance, and rule of lenity claims. All are premised in part on the incorrect view that the challenged conduct occurs on a regular basis by many people, that therefore enforcing these criminal statutes as to Ulbricht amounts to arbitrary enforcement and that the umbrella or tent of the statutes would be stretched beyond reason in order to encompass the alleged conduct.

For all of the reasons set forth above, this is incorrect.

C. Civil Immunity for Online Service Providers

The defendant argues that the existence of a civil statute for certain types of immunity for online service providers expresses a congressional intent to immunize conduct akin to that in which Ulbricht is alleged to have engaged. This Court disagrees. Even a quick reading of the statute makes it clear that it is not intended to apply to the type of intentional and criminal acts alleged to have occurred here. See 47 U.S.C. § 230. It is inapplicable.

VIII. COUNT FOUR

Count Four charges the defendant with participation in a money laundering conspiracy in violation of 18 U.S.C. § 1956(h). (Ind. ¶¶ 17-21.) The Government has alleged the requisite statutory elements. (See Ind. ¶ 19.) First, the Government has alleged that a conspiracy existed between the defendant and one or more others, the object of which was to engage in money laundering. In paragraph 20, the Indictment recites the specific elements required for money laundering:

> It was a part and an object of the conspiracy that . . . the defendant, and others known and unknown, . . . knowing that the property involved in certain financial transactions represented proceeds of some form of unlawful activity, would and did conduct and attempt to conduct such financial transactions, which in fact involved the proceeds of specified unlawful activity, to wit, narcotics trafficking and computer hacking . . . with the intent to promote the carrying on of such unspecified unlawful activity . . . .

(Ind. ¶ 20.) The defendant argues that the factual allegation that Bitcoins constituted the exclusive "payment system that served to facilitate [] illegal commerce" on Silk Road cannot constitute the requisite "financial transaction." (Def.'s Mem. at 3, 45.) The Court disagrees.

As an initial matter, an allegation that Bitcoins are used as a payment system is insufficient in and of itself to state a claim for money laundering. The fact that Bitcoins allow for anonymous transactions does not ipso facto mean that those transactions relate to unlawful activities. The anonymity by itself is not a crime. Rather, Bitcoins are alleged here to be the medium of exchange – just as dollars or Euros could be – in financial transactions relating to the unlawful activities of

narcotics trafficking and computer hacking. It is the system of payment designed specifically to shield the proceeds from third party discovery of their unlawful origin that forms the unlawful basis of the money laundering charge.

The money laundering statute defines a "financial transaction" as involving, inter alia, "the movement of funds by wire or other means, or [ ] involving one or more monetary instruments, [ ] or involving the transfer of title to any real property, vehicle, vessel, or aircraft." 18 U.S.C. § 1956(c)(4). The term "monetary instrument" is defined as the coin or currency of a country, personal checks, bank checks, and money orders, or investment securities or negotiable instruments. 18 U.S.C. § 1956(c)(5).

The defendant argues that because Bitcoins are not monetary instruments, transactions involving Bitcoins cannot form the basis for a money laundering conspiracy. He notes that the IRS has announced that it treats virtual currency as property and not as currency. (Def.'s Mem. at 46-47 (citing I.R.S. Notice 2014-21, http://www.irs.gov/pub/irs-drop/n-14-21.pdf, and U.S. Dep't of Treasury, Fin. Crimes Enforcement Network ("FinCEN"), "Guidance, Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies," March 18, 2013, http://www.fincen.gov/statutes_regs/ guidance/html/FIN-2013-G001.html).) The defendant argues that virtual currencies have some but not all of the attributes of currencies of national governments and that virtual currencies do not have legal tender status. (See id. at 45-46.) In fact, neither the IRS nor FinCEN purport to amend the money laundering statute (nor could they). In any event, neither the

IRS nor FinCEN has addressed the question of whether a "financial transaction" can occur with Bitcoins. This Court refers back to the money laundering statute itself and case law interpreting the statute.

It is clear from a plain reading of the statute that "financial transaction" is broadly defined. See United States v. Blackman, 904 F.2d 1250, 1257 (8th Cir. 1950) (citation omitted). It captures all movements of "funds" by any means, or monetary instruments. "Funds" is not defined in the statute and is therefore given its ordinary meaning. See Taniguchi v. Kan Pacific Saipan, Ltd., – U.S. – , 132 S.Ct. 1997, 2002 (2012) (citation omitted). "Funds" are defined as "money, often money for a specific purpose." See Cambridge Dictionaries Online, http://dictionary.cambridge.org/us/dictionary/american-english/funds?q=funds (last visited July 3, 2014). "Money" is an object used to buy things.

Put simply, "funds" can be used to pay for things in the colloquial sense. Bitcoins can be either used directly to pay for certain things or can act as a medium of exchange and be converted into a currency which can pay for things. See Bitcoin, https://bitcoin.org/en (last visited July 3, 2014); 8 Things You Can Buy With Bitcoins Right Now, CNN Money, http://money.cnn.com/gallery/technology/2013/11/25/buy-with-bitcoin/ (last visited July 3, 2014). Indeed, the only value for Bitcoin lies in its ability to pay for things – it is digital and has no earthly form; it cannot be put on a shelf and looked at or collected in a nice display case. Its form is digital – bits and bytes that together constitute something of value. And they may be bought and sold using legal tender. See How to Use Bitcoin, https://bitcoin.org/en/getting-

started (last visited July 3, 2014). Sellers using Silk Road are not alleged to have given their narcotics and malicious software away for free – they are alleged to have sold them.[16]

The money laundering statute is broad enough to encompass use of Bitcoins in financial transactions. Any other reading would – in light of Bitcoins' sole raison d'etre – be nonsensical. Congress intended to prevent criminals from finding ways to wash the proceeds of criminal activity by transferring proceeds to other similar or different items that store significant value. With respect to this case, the Government has alleged that Bitcoins have a value which may be expressed in dollars. (Ind. ¶ 3 (alleging that Ulbricht "reaped commissions worth tens of millions of dollars, generated from the illicit sales conducted through the site").)

There is no doubt that if a narcotics transaction was paid for in cash, which was later exchanged for gold, and then converted back to cash, that would constitute a money laundering transaction. See, e.g., United States v. Day, 700 F.3d 713, 718 (4th Cir. 2012).

One can money launder using Bitcoin. The defendant's motion as to Count Four is therefore denied.

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[16] Recently, the U.S. Government auctioned off nearly 30,000 Bitcoins as part of a civil forfeiture proceeding related to Silk Road. See Sydney Ember, After Bitcoin Auction, Winning Bidders Remain Elusive, N.Y. Times Dealbook (June 30, 2014 6:59 P.M.), http://dealbook.nytimes.com/2014/06/30/after-bitcoin-auction-winning-bidders-remain-elusive/?_php=true&_type=blogs&_r=0.

IX. CONCLUSION

For the reasons set forth above, the defendant's motion to dismiss is DENIED in its entirety. The clerk of the Court is directed to terminate the motion at ECF No. 19.

SO ORDERED.

Dated: New York, New York
July 9, 2014

K B. Forrest

KATHERINE B. FORREST
United States District Judge

No. 14-940

IN THE
Supreme Court of the United States

SUE EVENWEL, *et al*, Appellants,

v.

GREG ABBOTT, GOVERNOR OF TEXAS, *et al.*, Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a coalition of more than 200 organizations committed to the protection of civil and human rights in the United States.[1] It is the nation's oldest, largest, and most diverse civil and human rights coalition. The Leadership Conference was founded in 1950 by three legendary leaders of the civil rights movement—A. Philip Randolph of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson of the National Jewish Community Relations Advisory Council. Its member organizations represent people of all races, ethnicities, and sexual orientations. The Leadership Conference works to build an America that is inclusive and as good as its ideals, and it believes that every person in the United States deserves to be free from discrimination based on race, ethnicity, gender, or sexual orientation.

The Leadership Conference Education Fund ("The Education Fund") is the research, education, and communications arm of The Leadership Conference. It focuses on documenting discrimination in American society, monitoring efforts to enforce civil rights legislation, and fostering better understanding of issues of prejudice.

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[1] The parties' blanket consents to the filing of *amici curiae* briefs are on file with the Clerk. No counsel for a party authored any part of this brief; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amici curiae* or their counsel made a monetary contribution to the brief's preparation or submission.

A list of The Leadership Conference's members is set forth in Appendix A. Several organizations also join as individual signatories to this brief. Those organizations are identified and their interests are set forth in Appendix B.

SUMMARY OF ARGUMENT

The State of Texas complied with the Equal Protection Clause of the Fourteenth Amendment when it drew state legislative districts that were approximately equal in total population. In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court held that "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people." *Id.* at 560-61. Based on that principle, *Reynolds* held that the Equal Protection Clause requires a state to make a good faith effort to draw districts "as nearly of equal population as is practicable." *Id.* at 577. In keeping with the principle of equal representation for equal numbers of people, *Reynolds* focused on disparities in total population as measured by the most recent decennial census. Subsequent cases from this Court have continued to focus on total population as the touchstone for assessing compliance with *Reynolds*, and for more than fifty years, state and local governments have overwhelmingly attempted to draw district lines so as to equalize total population.

Largely ignoring this history, appellants now argue that *Reynolds* should be reinterpreted to require states to equalize some other metric, such as registered voters, "non-suspense" registered voters, or citizen voting age population ("CVAP"). The Court should reject these arguments and reaffirm that a redistricting plan satisfies the Equal Protection

Clause's "one person, one vote" requirement if districts are approximately equal in total population.

In Part I below, we show that, absent extraordinary circumstances, total population is the proper basis to use for redistricting because it ensures that all people—not merely those who are eligible to vote or who actually cast ballots—are represented in the political process. At any given point in time, there are significant groups of people residing in the United States who are not legally eligible to vote. The largest groups are children under the age of 18 and noncitizen immigrants, including many who are not yet eligible for naturalization but will eventually become eligible, others who do not seek naturalization, and many others who desire to become citizens but are deterred from doing so by the complexities and cost of the naturalization process. These populations are fluid; between decennial census counts, many people under the age of 18 will attain voting age, and many noncitizens will be naturalized. Many other people are legally eligible to vote, but face significant legal and practical barriers to registration and exercise of the franchise. Yet all of these individuals have a deep stake in the workings of government; elected officials create laws and policies that govern the total population within their jurisdictions. Indeed, government actions and policies will affect their most basic and fundamental rights. The fact that people cannot or do not actually vote does not mean that they are not entitled to representation in the political process in accordance with their numbers.

Contrary to appellants' assertions, a total population standard for redistricting is consistent with the Fourteenth Amendment, which explicitly incorporates the principle of equal representation for equal

numbers of people. It is also consistent with longstanding practice and legal precedent in the United States, including *Reynolds* and numerous subsequent decisions of this Court that have continued to focus solely on whether there are unacceptable disparities in total population. The Court has never suggested that a districting plan that substantially equalizes the total number of persons from one district to the next—like the Texas plan at issue here—is constitutionally infirm if it fails to equalize the number of registered voters, CVAP, or any metric other than total population. Even if states are permitted, under some circumstances, to utilize other metrics, they certainly are not required to do so.

In Part II, we show that registered voters and actual voters are not a reliable or appropriate basis for redistricting, whether for purposes of drawing Congressional districts, state legislative districts, or districts for local government bodies. As this Court recognized in *Burns v. Richardson*, 384 U.S. 73 (1966), registered and actual voters may vary wildly from one election to the next, are subject to political manipulation, and use of these numbers as a basis for redistricting may perpetuate the effects of existing discriminatory practices. *See id.* at 91-93. Although these are all valid concerns, we focus primarily on the discriminatory impact of a registered or actual voter standard.

There are many legal and practical barriers to registration and voting in the United States, and these barriers tend to have a disproportionate impact on racial and ethnic minorities, younger voters, the poor, and people with disabilities. As a result, registration and voting rates are consistently lower for these groups than for the population at large. Chang-

ing from a total population standard to a registered voter or actual voter standard would reinforce and exacerbate existing exclusionary and potentially discriminatory barriers to registration and voting and shift political participation and power away from groups that are already disadvantaged in the political process.

In Part III, we show why using CVAP as the basis for redistricting is also deeply problematic. In particular, switching from a total population standard to a CVAP standard would disproportionately exclude racial and ethnic minorities from the population base. Thus on balance, use of CVAP as a basis for redistricting would have a discriminatory impact on historically disenfranchised minority and immigrant communities, depriving them of the right to be adequately represented and the political power to which they would be entitled if fully counted as whole persons in the population base.

There are two reasons for the disparities between total population and CVAP. First, minority communities are on average significantly younger than the population at large, meaning that a higher percentage of these communities are under the age of 18. The overwhelming majority of people under 18 are citizens who will eventually be able to vote, and states can legitimately decide that they should be included in the population base. Second, some minority groups, such as Latinos and Asian Americans, contain relatively large numbers of noncitizens. Notably, many of these people are eligible to become U.S. citizens, and many more will become eligible upon satisfying the five-year residency requirement. In many cases, however, individuals seeking to naturalize are deterred by institutional barriers which include the

cost and complexity of the naturalization process. In any case, whether or not noncitizens plan to seek naturalization or are eligible to do so, they are an integral part of American society and equally subject to the laws that apply to citizens. States may reasonably conclude that they should be represented in the political process.

ARGUMENT

I. Total Population Is the Most Appropriate Basis for Redistricting, and Is Consistent With the Constitution, Longstanding Practice, and Decisions of This Court.

Absent extraordinary circumstances, total population is the proper basis to use for redistricting because it assures that all people in a given community are represented in its government.[2] Many people are legally ineligible to vote, including children, immigrants who have not yet been naturalized, and in some states, people who have been convicted of a felony or deemed mentally incompetent. Many others are theoretically eligible to vote, but face legal and

[2] In this brief, we focus solely on the proper metric to use for ensuring compliance with the equal population requirement set forth in *Reynolds*. Other metrics, such as CVAP, may be appropriate for other purposes, such as whether a particular districting scheme dilutes minority voting strength in violation of section 2 of the Voting Rights Act, 52 U.S.C. § 10301. That is because the § 2 inquiry does not address population equality, but rather turns in part on whether minority voters are sufficiently numerous to enable them to elect candidates of their choice. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 50 n.17 (1986). Thus, the inquiry into CVAP data in potential districts under section 2 of the Voting Rights Act relates to predictions of remediability—whether electoral outcomes might change as to ameliorate the harms of vote dilution.

practical barriers to the exercise of that right. But the fact that certain people cannot or do not vote should not mean that they and their families forfeit all rights to representation in the political system.

In our democracy, elected officials do not simply represent the people who voted for them, or the people who are eligible to vote. They are expected to, and do, represent the interests of all of the people who live in their respective districts. After all, those who cannot or do not vote are still impacted by government in a wide variety of ways. They attend public schools and universities, walk or drive along public streets, and utilize a wide variety of other government services and benefits. They pay taxes and are required to comply with the same laws that apply to voters. In short, they are important members of society, and should be entitled to representation in government according to their numbers.

Appellants argue that the Fourteenth Amendment somehow precludes states from using total population as the basis for redistricting and requires states instead to equalize some other metric (such as registered voters or CVAP). This assertion is, at the very least, contrary in spirit to section 2 of the Fourteenth Amendment, which provides that Representatives in Congress "shall be apportioned among the states according to their respective numbers, counting the ***whole number of persons*** in each State." U.S. Const. amend XIV, § 2 (emphasis added).[3] This con-

[3] Section 2 of the Fourteenth Amendment superseded the portion of Article I, Section 2, which based apportionment on the "whole Number of free Persons" in each state, plus "three fifths of all other Persons," *i.e.*, slaves. U.S. Const. art. I, § 2. But even though slaves were not counted as full people under this stand-

stitutional provision reflects the principle that all "persons" in a State—whether or not they can or do vote—are entitled to representation in Congress. It cannot be that the same Fourteenth Amendment that requires Representatives to be apportioned among the States based on total population somehow forbids use of total population for redistricting within the States.

Appellants' contorted reading of the Fourteenth Amendment finds no support either in historical practice or the decisions of this Court. This Court recognized in *Wesberry v. Sanders*, 376 U.S. 1 (1964), that the requirement that Representatives be apportioned among the states "according to their respective numbers" also mandated that Congressional districts have equal numbers of people. *Reynolds* extended that principle to state and local government bodies, holding that "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people." 377 U.S. at 560-61.[4] Based on that principle, *Reynolds* held that the Equal Protection Clause requires a state to make a good faith effort to draw districts "as nearly of equal population as is practicable." *Id.* at 577. The Court expressly focused on disparities in total population. *See id.* at 545, 547, 549-50, 569.

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ard, the apportionment was based on a count of all persons resident within a state, including those not eligible to vote.

[4] *See also Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (concluding after review of Constitutional Convention proceedings that "our Constitution's plain objective" was to "mak[e] equal representation for equal numbers of people the fundamental goal for the House of Representatives").

Since *Reynolds,* the Court has developed and consistently applied a framework for deciding "one person, one vote" cases, which likewise focuses on disparities in total population. The framework focuses on the maximum deviation from "ideal" district size—*i.e.*, the total population divided by the number of seats. For state and local government bodies, a maximum population deviation of up to 10% is generally acceptable; larger deviations create a *prima facie* case of discrimination that must be justified by the state.[5] Congressional districts are held to a stricter standard, which requires states to achieve population equality "as nearly as is practicable."[6] Under either standard, however, the touchstone is equality of total population.

The one case in which the Court has seemed to countenance a departure from a total population standard is *Burns v. Richardson*, 384 U.S. 73 (1966). That case, however, involved special and unusual circumstances. In the immediate wake of *Reynolds*, Hawaii was required to reapportion its state senate to comply with the equal population requirement, and adopted an interim redistricting plan for the 1966 election. Hawaii had "special population problems" *id.* at 94, due to the fact that there was a large

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[5] *See, e.g.*, *Brown v. Thompson*, 462 U.S. 835, 842-43 (1983). For other cases applying these standards based on total population see *Bd. of Estimate of City of N.Y. v. Morris*, 489 U.S. 688, 700-01 & n.7 (1989); *Connor v. Finch*, 431 U.S. 407, 416-18 & n.13 (1977); *Chapman v. Meier*, 420 U.S. 1, 21-26 (1975); *Mahan v. Howell*, 410 U.S. 315, 319-30 (1973); *Gaffney v. Cummings*, 412 U.S. 735, 750-51 (1973); *White v. Regester*, 412 U.S. 755, 761 (1973); *Swann v. Adams*, 385 U.S. 440, 442-46 (1967).

[6] *See Karcher v. Daggett,* 462 U.S. 725, 730 (1983); *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969).

and fluctuating population of military personnel and tourists concentrated on the island of Oahu, such that total population as reported by the census may have presented a distorted picture of the state's population. *Id.* at 94-95. Accordingly, the state attempted to equalize the number of registered voters. The Court held that states are not required to use total population as measured by the census as the basis for redistricting, and that they may exclude "aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime" from the population base. *Id.* at 91-92. It held that the use of registered or actual voters as the population base was generally problematic, *id.* but nonetheless affirmed the state's plan only because it "substantially approximated" the results that would have been achieved using state citizen population as the base. *Id.* at 96. The Court was careful to note that its holding was limited to the specific facts before it and that it was not a blanket endorsement of using registered voters as an apportionment base. *Id.* ("We are not to be understood as deciding that the validity of the registered voters basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere.").

In *amici*'s view, notwithstanding *Burns,* there remains a substantial question whether states may utilize a metric other than total population for redistricting purposes.[7] But the Court need not decide that question for purposes of this case. Even if states are not required to rely on total population as measured by the census, the plain language of the Four-

[7] *Cf. Kirkpatrick,* 394 U.S. at 534 ("There may be a question whether distribution of congressional seats except according to total population can ever be permissible under Art. I, § 2.").

teenth Amendment and the consistent practice of this Court make it clear that they are permitted to do so. The Court should reaffirm that total population is an appropriate basis for redistricting.

II. Registered Voters and Actual Voters Are Not a Reliable or Appropriate Basis for Redistricting Because of Barriers to Registration and Voting That Disproportionately Affect People of Color, Youth, the Poor, and People With Disabilities.

Appellants suggest that states should be required to redistrict so as to equalize registered voters (or "non-suspense" registered voters). For all of the reasons set forth in *Burns*, registered voters and actual voters are not a reliable or appropriate basis for redistricting. As *Burns* explains:

> "Such a basis depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a ghost of prior malapportionment. Moreover, fluctuations in the number of registered voters in a given election may be sudden and substantial, caused by such fortuitous factors as a peculiarly controversial election issue, a particularly popular candidate, or even weather conditions." 384 U.S. at 92-93 (internal quotation marks omitted).

All of these concerns are as valid today as they were in 1966 when *Burns* was decided. For example,

voting and registration rates still fluctuate significantly from one election to the next, with rates being significantly higher in presidential election years.[8] We focus below, however, on the discriminatory impact of using registered voters or actual voters as the basis for redistricting decisions. This impact stems from the many legal and practical barriers to registration and voting that continue to exist in American society, and that disproportionately affect racial and ethnic minorities, younger and poorer Americans, and people with disabilities.

Both registration and voter turnout rates vary significantly by race and ethnicity. For example, in the 2014 congressional elections, 68.1% of non-Hispanic white citizens of voting age (*i.e.*, 18 years of age or older) were registered to vote. The comparable registration rate was 63.4% for African Americans, 51.3% for Latinos, and 48.8% for Asian Americans.[9] The voting rate (*i.e.*, voters as a percentage of CVAP) was 45.8%, for non-Hispanic whites, 39.7% for African Americans, and only 27.0% for Latinos and

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[8] *See* Thom File, U.S. Census Bureau, *The Diversifying Electorate—Voting Rates by Race and Hispanic Origin in 2012 (and Other Recent Elections* 2 (May 2013) (hereinafter, "2012 Census Election Report"); Thom File, U.S. Census Bureau, *Who Votes? Congressional Elections and the American Electorate: 1978-2014*, at 1 (July 2014) (hereinafter "2014 Census Election Report").

[9] *See* U.S. Census Bureau, Voting and Registration in the Election of November 2014—Detailed Tables, Table 2, *available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2014/tables.html. We use the terms "African American" to refer to the group designated by the Census Bureau as "Black Alone," "Asian American" to refer to the group designated as "Asian Alone," and "Latino" and "Hispanic" interchangeably to refer to the group designated by the Census as "Hispanic."

27.1% for Asian Americans.[10] These disparities have remained relatively consistent for many years. Although registration and voting rates are higher in presidential election years, the same types of disparities occur in both presidential election and non-presidential election years.[11]

Registration and voting rates also vary significantly by age and income. For example, in the 2014 election, the registration rate for citizens in the 18 to 24 age bracket was 43.0%, and the voting rate was 18.5%. Both registration and voting rates climb steadily as voters age. For the 65 to 74 age bracket, the registration rate was 77.2% and the voting rate was 63.2%.[12] Similarly, voting and registration rates climb steadily as family income increases. For persons with family incomes under $10,000, the registration rate in 2014 was 51.7% and the voting rate 24.5%. For persons with family incomes of $150,000 and over, the registration rate was 79.5% and the voting rate was 56.6%.[13]

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[10] *Id.*; *see also* 2014 Census Election Report, *supra* note 8, at 4. Looking at the data another way, in 2014, the percentage of non-Hispanic white voters exceeded their share of the voting-eligible population by 6.4%, whereas the percentage of Hispanic voters lagged their share of the voting-eligible population by 4.1%. *Id.* at 9.

[11] *See* 2014 Census Election Report, *supra* note 8, at 4, 9; 2012 Census Election Report, *supra* note 8, at 3.

[12] U.S. Census Bureau, Voting and Registration in the Election of November 2014—Detailed Tables, Table 7, *available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2014/tables.html.

[13] *Id.*

These factors are all closely linked, since racial and ethnic minority groups are, on average, younger and poorer than non-Hispanic whites. Notably, the confluence of these factors is likely to have a special impact on members of the lesbian, gay, bisexual or transgender ("LGBT") community. A 2012 Gallup survey found that nonwhites and younger Americans are more likely to identify as LGBT, and that LGBT Americans tend to have lower incomes than non-LGBT individuals.[14]

Finally, there are also disparities in registration and voting rates based on disability status. These disparities tend to be more pronounced in presidential election years. One recent study found that in the 2012 election, among people with disabilities, 69.2% reported being registered to vote, compared to 71.5% for people without disabilities. Among those who were registered, 82.1% voted, as compared to the 87.5% of registered citizens without disabilities who voted.[15] From 2008 to 2012, when other demographic characteristics (such as age, gender, race and ethnicity, and marital status) are held constant, the turnout gap between persons with disabilities and those without disabilities is about 12 percentage points.[16]

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[14] Gary J. Gates & Frank Newport, *Special Report*: *3.4% of U.S. Adults Identify as LGBT*, Gallup (Oct. 18, 2012), *available at* http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx.

[15] *See* Lisa Schur, *Reducing Obstacles to Voting for People With Disabilities*, White Paper for Presidential Commission on Election Administration, at 1-2 (June 22, 2013), *available at* http://vote.caltech.edu/content/reducing-obstacles-voting-people-disabilities.

[16] *Id.* at 2.

Although there are doubtless many reasons for these persistent disparities, they result in large part from the cumulative effect of various legal and practical barriers to registration and voting that exist in American society.

As a starting point, voter registration records in the United States are notoriously unreliable. The Presidential Commission on Election Administration recently noted that most statewide voter registration lists aggregate county and local records that exist on paper, and "[w]ith so many jurisdictions responsible for the registration lists, their quality is uneven and too many records are inaccurate, obsolete or never entered into the system."[17] Errors in voter registration records are widespread. The Commission reported that as many as 8% of registration records, representing 16 million people, are invalid or significantly inaccurate, and that in some states, more than 15% of records on registration lists have been inaccurate.[18] Thus, for example, "[v]oters who think they registered or updated their address at the DMV show up at polling locations only to find out they are not registered or are in the wrong polling location."[19]

Adding to the problem, election officials regularly conduct purges of voter registration records. Properly done, voter list maintenance is a way to improve the accuracy of registration records, but in practice, purges are often conducted through processes that are "shrouded in secrecy, prone to error, and vulner-

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[17] *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* 15 (Jan. 2014) (hereinafter "*American Voting Experience*").

[18] *Id.* at 23.

[19] *Id.*

able to manipulation."[20] For example, in advance of the primary and general elections in 2012, Florida conducted two purges to remove suspected non-citizens from the voter rolls, with the result that some naturalized citizens were improperly purged.[21] Regardless of intention, purges of this nature are likely to have a discriminatory impact on minority registration. A related problem is the phenomenon of "voter caging," in which a group sends non-forwardable mail to a list of voters at their registration address, and then requests that election officials cancel the registration of voters whose mailing is returned as undeliverable.[22] This method of identifying ineligible voters is highly unreliable and can be used to selectively target particular groups, including racial and ethnic minorities.

Another problem is simply the difficulty of the registration process. Although the National Voter Registration Act, 52 U.S.C. §§ 20501 *et seq*. requires state motor vehicle departments and public assistance agencies to provide registration materials and ensure

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[20] *See generally* Myrna Perez, Brennan Center for Justice, *Voter Purges* (2008), *available at* https://www.brennancenter.org/publication/voter-purges.

[21] *See Arcia v. Fla. Sec'y of State*, 772 F.3d 1335 (11th Cir. 2014) (holding that purges violated NVRA because they were conducted less than 90 days before elections).

[22] Perez, *supra* note 20, at 32; *see also Mont. Democratic Party v. Eaton*, 581 F. Supp. 2d 1077 (D. Mont. 2008) (challenges filed to 6,000 voters in counties with high concentration of Democratic voters based on comparison of registration records to Postal Service change of address registry); *Miller v. Blackwell*, 348 F. Supp. 2d 916 (S.D. Ohio 2004) (challenges filed to 35,000 newly registered Ohio voters based on allegations that mailings had been returned).

that the communities they serve have the opportunity to vote, the Presidential Commission on Election Administration found widespread noncompliance with these laws.[23] The Commission found that increased use of online voter registration would make it easier for voters to register, but as of August 2013, only 19 states had authorized or implemented a complete online voter registration system.[24] Moreover, many of the states that do offer online voting registration require significant improvements. For example, many online registration systems are not fully accessible to voters with disabilities.[25]

Felon disenfranchisement laws also have a significant impact on minority voter registration in some jurisdictions. Many of these laws date to the Jim Crow era, and were enacted for the purpose of keeping minorities from voting.[26] Regardless of their intent, felon disenfranchisement laws continue to have

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[23] *American Voting Experience*, *supra* note 17, at 17.

[24] *Id.* at 23-24.

[25] Susan Mizner & Eric Smith, American Civil Liberties Union, *Access Denied* (Jan. 2015), *available at* https://www.aclu.org/feature/access-denied.

[26] *See Hunter v. Underwood*, 471 U.S. 222 (1985) (Alabama felon disenfranchisement law adopted in 1901 was "motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect"); Alexander Keysser, *The Right to Vote: The Contested History of Democracy in the United States* 111-12 (2000) (discussing felon disenfranchisement laws as one of several techniques adopted in Jim Crow Era, and noting that "[t]he overarching aim of such restrictions, usually undisguised, was to keep poor and illiterate blacks—and in Texas, Mexican Americans—from the polls"); *id.* at 162 (noting that felon disenfranchisement laws in the South often "target[ed] minor violations of the law that could be invoked to disenfranchise African Americans").

a negative and disproportionate effect on minority voting rights. A study by the Sentencing Project concluded that, as of 2010, roughly 7.7% of the African American voting age population—roughly one in thirteen—was disenfranchised, as compared to 1.8% of the non-African American population. In three states—Florida, Virginia, and Kentucky—more than one in five African Americans is disenfranchised.[27]

There are also numerous legal and practical barriers to voting that tend to disproportionately affect racial and ethnic minorities and people with disabilities. In recent years, many states have enacted changes to their registration and voting procedures that make it more difficult and burdensome to vote. For example, several states have enacted new voter identification laws. These laws may have both the purpose and effect of discriminating against minority voters. Texas, for example, enacted one of the nation's strictest voter identification laws in 2011. A District Court concluded that both that the law would have a discriminatory impact against Latinos and African Americans and that it was imposed with an unconstitutional discriminatory purpose.[28] The Fifth Circuit recently affirmed the finding of discriminatory effect, though it vacated the discriminatory purpose claim and remanded for further considera-

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[27] *See* Christopher Uggen et al., The Sentencing Project, *State-Level Estimates of Felon Disenfranchisement in the United States, 2010*, at 1-2 (July 2012), *available at* http://www.sentencingproject.org/detail/publication.cfm?publication_id=400.

[28] *Veasey v. Perry*, 71 F. Supp.3d 627, 633 (S.D. Tex. 2014), *aff'd in part, rev'd in part sub nom. Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015).

tion.[29] As this case illustrates, regardless of the motive behind such laws, they still may have a discriminatory impact on minority voters.[30] Other types of laws that may have a disparate impact on minority voters include laws eliminating or restricting such practices as same-day registration or early voting, which are frequently used by minority voters.[31]

Many minority voters also face discrimination at polling places. For example, the language minority population in the United States grew from 23 million in 1980 to 59.5 million in 2010—a 158% increase.[32] Some 20% of the population speaks a language other than English at home, and 42% of these people report being limited-English proficient—*i.e.*, having

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[29] *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015).

[30] Such laws are also likely to have an impact on transgender voters, who face unique challenges to obtaining accurate government identification. *See* Jody L. Herman, *The Potential Impact of Voter Identification Laws on Transgender Voters in the 2014 General Election* (Sept. 2014), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/voter-id-laws-september-2014.pdf.

[31] *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014) (affirming preliminary injunction against law eliminating same-day registration and prohibiting counting of out-of-precinct ballots); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524 (6th Cir.) (affirming preliminary injunction against law reducing number of early voting days, where evidence showed that African American and indigent voters used early voting more frequently that white and affluent voters), *vacated*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

[32] Camille Ryan, U.S. Census Bureau, *Language Use in the United States: 2011,* at 7, *available at* https://www.census.gov/prod/2013pubs/acs-22.pdf.

some difficulty with the English language.[33] Many eligible voters within this considerable segment of the American population encounter significant difficulty in exercising their right to vote.[34] One study suggests that turnout for language-minority voters was 9% lower than turnout by those who do not have language barriers.[35] And it is not hard to see why. Translated election materials and bilingual election workers are too frequently unavailable to those who need them.[36] The Presidential Commission also found that many jurisdictions fail to comply with Sections 203 and 208 of the Voting Rights Act, which require poll workers to provide language assistance in communities with large non-English speaking populations and allow voters who are unable to read

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[33] *Id.* at 2, 4. The current definition of limited English proficiency ("LEP") is persons who speak English less than "very well." The Census Bureau has determined that most respondents overestimate their English proficiency and therefore, those who answer other than "very well" are deemed LEP. See H.R. Rep. No. 102-655 (1992), at 8, *reprinted* in 1992 U.S.C.C.A.N. 772.

[34] *See, e.g.*, Asian American Legal Defense and Education Fund, *Asian American Access to Democracy in the 2014 Elections*, at 14-28 (August 6, 2015), *available at* http://aaldef.org/Access%20to%20Democracy%20Report%202012.pdf.

[35] Asian American Justice Center, *Behind the Numbers: Post-Election Survey of Asian American and Pacific Islander Voters in 2012*, at 9 (Apr. 2013), *available at* http://www.advancingequality.org/news-media/publications/behind-numbers-post-election-survey-asian-americans-and-pacific-islander.

[36] *Id.* at 10; Asian Americans Advancing Justice, *Voices of Democracy: Asian Americans and Language Access During the 2012 Elections,* at 10-13 (Aug. 2013), *available at* http://dww.advancingjustice-aajc.org/sites/aajc/files/Full-layout-singlesv1-072313.pdf.

ballots to gain assistance from a person of their choice.[37] It further noted that:

> "Language difficulties can affect voter participation throughout the electoral process. If ballot materials and election agency websites are only in English, then voters with limited English will be less able to navigate the registration process. Inadequate supplies of bilingual poll workers or ballots in other languages will make it more difficult for them to vote. These problems are then compounded for certain groups, such as Alaskan Native voters, who face additional logistical problems due to other forms of geographic and social isolation from election authorities."[38]

In some cases, minority voters face not only lack of adequate assistance but outright hostility from poll workers. For example, in Berks County, Pennsylvania, a federal District Court concluded that there was substantial evidence of hostile and unequal treatment of Hispanic voters. These included situations where poll workers turned away or refused to deal with Hispanic voters, made "rude, hostile and racist comments" in their presence, and required Hispanic voters to prove their residency while not requiring other voters to do so.[39] While this may be an extreme example, it is not unique, and it is illustrative of the kinds of barriers many minority voters continue to face today that may have a significant impact on voter turnout.

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[37] *American Voting Experience*, *supra* note 17, at 16.

[38] *Id.* (footnotes omitted).

[39] *United States v. Berks Cnty.*, 250 F. Supp. 2d 525, 529, 539 (E.D. Pa. 2003)

Discriminatory treatment at polling places is also a problem for voters with disabilities. The Presidential Commission also noted "the continued inaccessibility of many polling places and voting machines, as well as more direct impediments such as statutory bans on voting faced by those with cognitive impairments," as well as concerns about the training of poll workers and election officials.[40] A nationally representative survey following the 2012 elections found that 30% of voters with disabilities reported difficulty in voting at a polling place in 2012, as compared with 8% of voters without disabilities.[41] The most common problems included reading or seeing the ballot, understanding how to vote or use the voting equipment, waiting in line, and finding or getting to the polling place.[42] A recent decision from the Second Circuit illustrates some of the most serious problems, affirming a District Court decision that the New York City Board of Elections had violated the Americans with Disabilities Act and the Rehabilitation Act by failing to provide persons with disabilities meaningful access to polling places.[43] The court found "pervasive and recurring barriers" at poll sites, including "dangerous ramps at entrances deemed 'accessible,' inadequate signage directing voters with disabilities to accessible entrances or voting areas, blocked entryways or pathways, and inaccessible interior spaces inside voting areas."[44]

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[40] *American Voting Experience*, *supra* note 17, at 16-17.

[41] *Schur*, *supra* note 15, at 4.

[42] *Id.*

[43] *Disabled in Action v. Bd. of Elections*, 752 F.3d 189 (2d Cir. 2014)

[44] *Id.* at 191, 199.

Minority communities also bear the burden of inadequate resources being allocated to election administration. Long wait times at polling places are the most visible indication of this problem. The Presidential Commission found that in the 2012 election, over five million voters experienced wait times of over an hour, and an additional five million experienced wait times between half an hour and an hour.[45] This problem does not affect all jurisdictions equally. Another study has found that voters in precincts with higher percentages of more minorities experienced longer waits and that those precincts tended to have fewer machines.[46] For example, in South Carolina, the 10 precincts with the longest waits had, on average, more than twice the percentage of African American registered voters (64%) than the statewide average (27%), and in Maryland, the ten precincts with the lowest number of machines per voter had, on average, more than double the percentage of Latino voting age citizens (19%) as the statewide average (7%).[47] Furthermore, long lines may deter voter participation.[48]

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[45] *American Voting Experience*, *supra* note 17, at 13.

[46] Christopher Famighetti et al., Brennan Center for Justice, *Election Day Long Lines: Resource Allocation* 1 (2014), *available at* https://www.brennancenter.org/publication/election-day-long-lines-resource-allocation.

[47] *Id.*

[48] *See, e.g.*, Michael C. Herron & Daniel A. Smith, Advancement Project, *Congestion at the Polls: A Study of Florida Precincts in the 2012 General Election* 1 n.5 (June 24, 2013) ("There seems to be little doubt that many prospective voters who endured long lines ended up leaving the queue; others, upon seeing a long line, decided not to join the queue in the first place."),

In short, a wide variety of both legal and practical barriers impact people's ability to register and vote, and these barriers tend to have a disparate impact on racial and ethnic minorities and people with disabilities. The foregoing examples are merely intended as illustrations, not as a comprehensive list. The same problems do not necessarily exist to the same degree in all jurisdictions, even within the same state. These problems help to illustrate that the American voting system is far from perfect and that these imperfections disproportionately affect some groups more than others. Using registered voters or actual voters as the basis for redistricting would reinforce and exacerbate these discriminatory effects.

For all of these reasons, the Court should hold that registered voters and actual voters are not a reliable or appropriate basis for redistricting.

III. Assuming That CVAP Is a Constitutionally Permissible Basis for Redistricting, States Can Reasonably Find That Total Population Is Fairer and More Appropriate.

The other metric identified by plaintiffs as a possible basis for redistricting is CVAP.. In the view of *amici*, use of CVAP is questionable, since the Equal Protection Clause by its terms applies to all persons within a State's jurisdiction, including both children and noncitizens.[49] But regardless of whether use of

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available at http://b.3cdn.net/advancement/f5d1203189ce2aabfc_14m6vzttt.pdf.

[49] *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 210-16 (1982) (finding that noncitizen "aliens" unlawfully present in United States are still "persons" entitled to equal protection under the Fourteenth Amendment and that it would be unconstitutional for states to deny noncitizen children equal access to public education).

CVAP is permissible, it certainly should not be ***required***. States may reasonably conclude that total population is a fairer and more appropriate basis for redistricting than CVAP for a number of reasons. In particular, using CVAP rather than total population would disproportionately affect minority communities and unfairly deprive them of full representation in their government.

Using CVAP rather than total population as the basis for redistricting would have a significant disparate impact on racial and ethnic minority groups. If such a standard were applied uniformly across the nation, it would exclude only 21% of non-Hispanic whites from the population base. In contrast, it would exclude approximately 55% of the Latino population, 45% of the Asian American population, 30% of the African American population, 30% of the Native Hawaiian/Pacific Islander population, and 31% of the American Indian/Alaskan Native population.[50] Thus switching to CVAP would result in a disproportionate exclusion of racial and ethnic minorities from the population base. This would amount to a massive shift in political power away from groups that are already disadvantaged in the political process and further concentrate power in the hands of a white plurality that does not adequately represent the full diversity of the total population.

There are two reasons for these disparities between total population and CVAP. First, minority communities are significantly younger, on average, than the general population, with the result that the percentage of people under the age of 18 is higher in these communities than in the population at large.

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[50] See calculations and data in Appendix C.

As of 2014, the median age for the U.S. population as a whole was 37.2 years, and the median age for non-Hispanic whites was 42.0 years. In contrast, Latinos, the nation's youngest ethnic group, had a median age of 27.3 years. Other minority groups are also younger than the general population. The median age was 32.7 for African Americans, 31.7 for American Indians and Alaska Native, 35.4 for Asian Americans, and 29.7 for Native Hawaiians and Other Pacific Islanders.[51]

Notably, the overwhelming majority of those under 18 who would be excluded from the population base under a CVAP standard are U.S. citizens. For example, 95% of Latinos, 87% of Asian Americans, and 98% of African Americans under the age of 18 are citizens.[52] Over the course of the ten years that a redistricting plan is typically in effect, a substantial portion of the underage population will turn 18 and become eligible to vote. Moreover, citizens under the age of 18 are deeply affected by a variety of government actions, including among other things actions relating to public education. This Court and the States can reasonably conclude that citizens should not be excluded from the population base for redistricting purposes simply because they have not yet reached voting age.

The second reason for the disparity between CVAP and total population is that some minority groups

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[51] U.S. Census Bureau, *Annual Estimates of the Resident Population by Sex, Age, Race, and Hispanic Origin for the United States and the States: April 1, 2010 to July 1, 2014, available at* http://www.census.gov/popest/data/national/asrh/2014/index.html.

[52] See calculations and data in Appendix C.

include significant numbers of immigrants who have not been naturalized. For example, about 24% of Latinos and 27% of Asian Americans are noncitizens.[53] A substantial number of these people, however, are eligible to become citizens. As of January 2013, approximately 13.1 million lawful permanent residents ("LPRs") lived in the United States, and 8.8 million—roughly two thirds—were eligible for naturalization.[54] The largest numbers come from Mexico (25.0% of the total), China (5.0%), the Philippines (4.4%), India (4.1%), the Dominican Republic (3.7%) and Cuba (3.1%).[55]

Many of these people will eventually complete the naturalization process and become U.S. citizens. Others, of course, will not. The naturalization process is complicated and requires applicants to clear a series of hurdles before they can become U.S. citizens. In general, to be eligible for naturalization, an immigrant must have continuously resided in the United States for at least five years after being admitted for permanent residence.[56] Applicants must also demonstrate "good moral character"[57] and an ability to read, write and speak basic English,[58] and pass a civic test to demonstrate "a knowledge and

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[53] *Id.*

[54] Bryan Baker & Nancy Rytina, Office of Immigration Statistics, Dep't of Homeland Sec., *Estimates of the Lawful Permanent Resident Population in the United States: January 2013*, at 1 (Sept. 2014).

[55] *Id.* at 4.

[56] 8 U.S.C. § 1427(a)(1).

[57] *Id.* § 1427(a)(3).

[58] *Id.* § 1423(a).

understanding of the fundamentals of the history, and of the principles and form of government, of the United States."[59] Applicants are also subject to a personal investigation by immigration authorities.[60] There is also a $595 filing fee and an $85 biometrics fee.[61] Many applicants may pay additional amounts or a lawyer or other advocate to assist them with the process, especially if complications arise.

Taken together, these requirements amount to substantial barriers that deter many otherwise eligible people from seeking to become citizens. A recent study of Latino immigrants found that 93% of those who had not yet naturalized said they would become citizens if they could.[62] When asked about their main reasons for not naturalizing, 26% cited personal reasons such as inability to speak English or the difficulty of the citizenship test.[63] Another 18% cited administrative barriers, chief among them the cost of the naturalization process.[64]

Regardless of whether they are eligible to naturalize or choose to do so, noncitizens who live in the

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[59] 8 C.F.R. § 312.2.

[60] 8 U.S.C. § 1446(a).

[61] *See* U.S. Citizen and Immigration Servs., Dep't of Homeland Sec., Form G-1055 (Dec. 18, 2014), *available at* http://www.uscis.gov/fees.

[62] Paul Taylor et al., Pew Hispanic Center, *An Awakened Giant*: *The Hispanic Electorate is Likely to Double by 2030*, at 21 (Nov. 14, 2012), *available at* http://www.pewhispanic.org/2012/11/14/an-awakened-giant-the-hispanic-electorate-is-likely-to-double-by-2030.

[63] *Id.*

[64] *Id.*

United States have a deep stake in their communities' government, just as citizens do. For example, immigrants have a vital interest in public education, and are deeply integrated into our educational systems. In 2009, 7.3 million children had a parent who was a noncitizen,[65] and children with at least one unauthorized immigrant parent made up 6.9% of students enrolled in kindergarten through 12th grade in 2012. Most of these (5.5% of all students) are U.S.-born children who are U.S. citizens at birth.[66] Immigrants also represent a key component of the American economy. In 2014, there were 25.7 million foreign-born persons, in the U.S. labor force, comprising 16.5 percent of the total.[67] Even undocumented immigrants significantly contribute to state and local taxes, collectively paying an estimated $11.84 billion in 2012.[68] In short, noncitizen immigrants are deeply enmeshed in American society, and

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[65] Immigration Policy Center, American Immigration Council, *Strength In Diversity: The Economic and Political Clout of Immigrants, Latinos, and Asians in the United States* 1 (Jan. 2012), *available at* http://immigrationpolicy.org/sites/default/files/docs/Strength_in_Diversity_updated_2012_0.pdf.

[66] Jeffrey S. Passel et al., *Unauthorized Immigrant Totals Rise in 7 States, Fall in 14*, at 16 (Pew Research Center 2014), *available at* http://www.pewhispanic.org/files/2014/11/2014-11-18_unauthorized-immigration.pdf. In Texas the share of students with unauthorized immigrant parents—at 13.1%—was significantly higher. *Id.* at 17.

[67] U.S. Bureau of Labor Statistics, *Foreign-Born Workers: Labor Force Characteristics—2014* (May 21, 2015). *available at* http://www.bls.gov/news.release/pdf/forbrn.pdf.

[68] Matthew Gardner et. al., Institute on Taxation and Economic Policy, *Undocumented Immigrants' State and Local Tax Contributions* 1 (Apr. 2015), *available at* http://www.itep.org/pdf/undocumentedtaxes2015.pdf.

states may reasonably conclude that they should not be excluded from representation in the political process.

CONCLUSION

The Court should reaffirm that the Fourteenth Amendment's "one-person, one vote" requirement is satisfied when districts are drawn so as to be approximately equal in total population. The decision of the District Court should be affirmed on that basis.

Respectfully submitted,

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APPENDIX A

The Leadership Conference on Civil and Human Rights Participating Member Organizations

(Bold names denote Executive Committee member organizations)

9 to 5 National Association of Working Women

A. Philip Randolph Institute

AARP

Advancement Project

Alaska Federation of Natives

Alpha Kappa Alpha Sorority, Inc.

Alpha Phi Alpha Fraternity, Inc.

American-Arab Anti-Discrimination Committee

American Association for Access Equity and Diversity (AAAED)

American Association of Colleges for Teacher Education

American Association of People with Disabilities

AAUW

American Civil Liberties Union

American Council of the Blind

American Ethical Union

American Federation of Government Employees

American Federation of Labor-Congress of Industrial Organizations

American Federation of State, County & Municipal Employees, AFL-CIO

American Federation of Teachers, AFL-CIO

American Islamic Congress (AIC)

American Jewish Committee

American Postal Workers Union, AFL-CIO

American Society for Public Administration

American Speech-Language-Hearing Association

Americans for Democratic Action

Americans United for Separation of Church and State

Amnesty International USA

Anti-Defamation League

Appleseed

Asian Americans Advancing Justice | AAJC

Asian Pacific American Labor Alliance

B'nai B'rith International

Bend the Arc

Brennan Center for Justice at New York University School of Law

Center for Community Change

Center for Law and Social Policy (CLASP)

Center for Responsible Lending

Center for Social Inclusion

Children's Defense Fund

Church of the Brethren-World Ministries Commission

Coalition of Black Trade Unionists

Coalition on Human Needs

Common Cause

Communications Workers of America

Community Action Partnership

Community Transportation Association of America

Compassion & Choices

Consortium for Citizens with Disabilities (CCD)

DC Vote

Delta Sigma Theta Sorority

Dēmos

Disability Rights Education and Defense Fund

Disability Rights Legal Center

Division of Homeland Ministries-Christian Church (Disciples of Christ)

Epilepsy Foundation of America

Equal Justice Society

FairVote: The Center for Voting and Democracy

Families USA

Federally Employed Women

Feminist Majority

Friends Committee on National Legislation

Gay, Lesbian and Straight Education Network (GLSEN)

General Board of Church & Society of the United Methodist Church

Global Rights: Partners for Justice

GMP International Union

Hip Hop Caucus

Human Rights Campaign

Human Rights First

Immigration Equality

International Association of Machinists and Aerospace Workers

International Association of Official Human Rights Agencies

International Brotherhood of Teamsters

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)

Iota Phi Lambda Sorority, Inc.

Japanese American Citizens League

Jewish Council for Public Affairs

Jewish Labor Committee

Judge David L. Bazelon Center for Mental Health Law

Kappa Alpha Psi Fraternity

Labor Council for Latin American Advancement

Laborers' International Union of North America

Lambda Legal

LatinoJustice PRLDEF

Lawyers' Committee for Civil Rights Under Law

League of United Latin American Citizens

League of Women Voters of the United States

Legal Aid Society – Employment Law Center

Legal Momentum

Matthew Shepard Foundation

Mexican American Legal Defense and Educational Fund

Muslim Advocates

NAACP

NAACP Legal Defense and Educational Fund, Inc.

NALEO Educational Fund

National Alliance of Postal & Federal Employees

National Association for Equal Opportunity in Higher Education

National Association of Community Health Centers

National Association of Consumer Advocates (NACA)

National Association of Human Rights Workers

National Association of Neighborhoods

National Association of Social Workers

National Bar Association

National Black Caucus of State Legislators

National Black Justice Coalition

National CAPACD

National Center for Lesbian Rights

National Center for Transgender Equality

National Center on Time & Learning

National Coalition for the Homeless

National Coalition on Black Civic Participation

National Coalition to Abolish the Death Penalty

National Committee on Pay Equity

National Committee to Preserve Social Security & Medicare

National Community Reinvestment Coalition

National Congress of American Indians

National Consumer Law Center

National Council of Churches of Christ in the U.S.

National Council of Jewish Women

National Council of La Raza

National Council of Negro Women

National Council on Independent Living

National Disability Rights Network

National Education Association

National Employment Lawyers Association

National Fair Housing Alliance

National Farmers Union

National Federation of Filipino American Associations

National LGBTQ Task Force

National Health Law Program

National Hispanic Media Coalition

National Immigration Forum

National Immigration Law Center

National Korean American Service and Education Consortium, Inc. (NAKASEC)

National Latina Institute for Reproductive Health

National Lawyers Guild

National Legal Aid & Defender Association

National Low Income Housing Coalition

National Network for Arab American Communities (NNAAC)

National Organization for Women

National Partnership for Women & Families

National Senior Citizens Law Center

National Sorority of Phi Delta Kappa, Inc.

National Urban League

National Women's Law Center

Native American Rights Fund

Newspaper Guild

OCA

Office of Communications of the United Church of Christ, Inc.

Omega Psi Phi Fraternity, Inc.

Open Society Policy Center

Paralyzed Veterans of America

Parents, Families, Friends of Lesbians and Gays

People for the American Way

Phi Beta Sigma Fraternity, Inc.

Planned Parenthood Federation of America, Inc.

PolicyLink

Poverty & Race Research Action Council (PRRAC)

Presbyterian Church (USA)

Pride at Work

Prison Policy Initiative

Project Vote

Public Advocates

Religious Action Center of Reform Judaism

Retail Wholesale & Department Store Union, AFL-CIO

SAALT (South Asian Americans Leading Together)

Secular Coalition for America

Service Employees International Union

Sierra Club

Sigma Gamma Rho Sorority, Inc.

Sikh American Legal Defense and Education Fund

Sikh Coalition

Southeast Asia Resource Action Center (SEARAC)

Southern Christian Leadership Conference

Southern Poverty Law Center

TASH

Teach For America

The Andrew Goodman Foundation

The Arc

The Association of Junior Leagues International, Inc.

The Association of University Centers on Disabilities

The Center for Media Justice

The Council of Parent Attorneys and Advocates Inc. (COPAA)

The National Conference for Community and Justice

The National PTA

The Voter Participation Center

TransAfrica Forum

Transportation Learning Center

Union for Reform Judaism

Unitarian Universalist Association

UNITE HERE!

United Brotherhood of Carpenters and Joiners of America

United Church of Christ-Justice and Witness Ministries

United Farm Workers of America (UFW)

United Food and Commercial Workers International Union

United Mine Workers of America

United States International Council on Disabilities

United States Students Association

United Steelworkers of America

Wider Opportunities for Women

Workers Defense League

YWCA USA

APPENDIX B

Amici Curiae Joining as Signatories

The following organizations join as individual signatories to this Brief:

AALDEF

AALDEF is a 41-year-old national civil rights organization based in New York City that promotes and protects the civil rights of Asian Americans through litigation, legal advocacy, and community education. AALDEF has monitored elections through annual multilingual exit poll surveys since 1988. Consequently, AALDEF has collected valuable data that documents both the use of, and the continued need for, protection under the Voting Rights Act of 1965 and the Fourteenth Amendment. In 2012, AALDEF dispatched over 800 attorneys, law students, and community volunteers to 127 poll sites in 14 states to document voter problems on Election Day. The survey polled 9,096 Asian American voters. In 2014, AALDEF dispatched over 580 volunteers in 11 states to document problems and survey 4,102 Asian American voters.

Advancement Project

Advancement Project is a next generation, multiracial civil rights organization founded by veteran voting rights lawyers. Rooted in human rights struggles for equality and justice, we seek to fulfill America's promise of a caring, inclusive and just democracy. In partnership with grassroots communities of color, Advancement Project combines policy advocacy, organizing, communications, and litigation to dismantle racial discrimination and achieve systemic change. Our immigrant justice project supports grassroots organizations that serve and advocate on

behalf of immigrants, and our educational equities program fights discrimination against youth of color. Since 2000, Advancement Project has had an active, nonpartisan voter protection program that utilizes litigation, policy, coalition-building, voter education and community empowerment, to break down barriers to equal representation for people of color. We and our community partners are combatting ongoing discriminatory barriers to the ballot. These include: felony disenfranchisement laws, strict and unnecessary voter ID laws, retrogressions in early voting and same-day registration, lack of training of poll workers to prevent racial profiling of voters, the high cost of naturalization and state requirements for documentary proof of citizenship, as well as racially discriminatory redistricting schemes. We are concerned that Plaintiff's proposed metric of "voting population" for redistricting would thereby result in limiting equal opportunity to participate in our nation's democracy for millions of citizens of color. Also, Plaintiff's proposals would further exacerbate the challenges and intimidation that African American, Latino, Asian and Native American citizens face in various jurisdictions, and this would likely enable politicians to manipulate elections and be less accountable to communities of color. In addition, we are deeply concerned about the proposal before the Court in this case as it would not count children as part of legislative districts. Because the growing majority of persons under 18 are children of color, Advancement Project is concerned that Plaintiff's arguments would lead to severe lack of representation for millions of children of color and their communities, jeopardizing the promise of equal opportunity and racial justice for generations to come.

American-Arab Anti-Discrimination Committee

The American-Arab Anti-Discrimination Committee ("ADC") is the country's largest Arab American civil rights organization. Founded in 1980 by United States ("U.S.") Senator James Abourezk, ADC consists of members from all 50 states and has multiple chapters nationwide, including Texas. ADC has been at the forefront of protecting the Arab-American community for over thirty-five years against discrimination, racism, and stereotyping. ADC seeks to preserve and defend the rights of those whose Constitutional rights are violated in the U.S.

ADC's interest in this case arises from serious concerns of exclusion of large segments of the Arab American community by permitting redistricting based on voter registration. As one of the largest growing immigrant populations in the U.S., and a predominately Arabic native language speaking community, there are significant voting barriers at the polls and to voter registration in the Arab American community. Financial barriers to naturalization, and lack of and/or inefficient language access throughout the voting process, effectively prevent voter participation from our community. Total population as the basis for redistricting will help to ensure that Arab Americans are counted and represented in the political system. ADC has a duty to voice the concerns on behalf of our constituents and the Arab-American community, whom rights will be fundamentally affected by the Court's determination in this Case.

American Federation of Labor and Congress of Industrial Organizations

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 56 national and international unions with a total membership of approximately 12.5 million working men and women employed across this country in all sectors of our economy. Union members are registered, active voters committed to the prosperity of this country. Voting is the bedrock our democracy and every community of working families deserves to be counted and represented. As a nation that has pledged to pursue political equality, the fundamental principle of "one person, one vote," must be upheld.

American Jewish Committee

American Jewish Committee, founded in 1906, has a long record of support for the one person one vote principle and the full accountability of the political system to all persons.

Anti-Defamation League

The Anti-Defamation League ("ADL") was founded in 1913—at a time when anti-Semitism was rampant in the United States—to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL is vitally interested in protecting the civil rights of all persons, whether they are members of the minority or the majority, and in ensuring that each individual receives equal treatment under the law regardless of race, sex, sexual orientation, gender identity, ethnicity, or religion. Consistent with its mission, ADL opposes laws and practices that have the effect of shifting political power away from already disadvantaged groups.

Asian Americans Advancing Justice | Asian American Justice Center

Asian Americans Advancing Justice | Asian American Justice Center ("Advancing Justice | AAJC") is a nonprofit, nonpartisan organization that seeks to promote a fair and equitable society for all by working for civil and human rights and empowering Asian American, Native Hawaiian, and Pacific Islander ("AANHPI") communities. Advancing Justice | AAJC advances its mission through advocacy, public policy, public education, and litigation. Advancing Justice | AAJC has maintained a strong interest in the voting rights of AANHPIs and strives to protect AANHPI's access to the polls. Advancing Justice | AAJC was a key player in collaborating with other civil rights groups to reauthorize the Voting Rights Act in 2006, and, in past elections, has conducted poll monitoring and voter protection efforts across the country. Advancing Justice | AAJC has a longstanding history of serving the interests of immigrant and language minority communities, and is very concerned with issues of discrimination that might face them. This history has resulted in Advancing Justice | AAJC's participation in a number of amicus briefs before the courts regarding voting rights. Any hint of an action that raises the possibility of disenfranchisement of AANHPI communities is of grave concern to Advancing Justice | AAJC and its ongoing efforts to promote greater civil rights, protections, justice, and equality.

Farmworker Justice

Farmworker Justice is a non-profit organization that seeks to empower migrant and seasonal farmworkers to improve their living and working conditions, immigration status, health, occupational safe-

ty, and access to justice. Farmworker Justice accomplishes these aims through policy advocacy, litigation, training and technical assistance, coalition-building, public education and support for union organization.

Hispanic Federation, Inc.

Hispanic Federation, Inc. is a nonprofit membership organization that works to empower and advance the Hispanic community through public policy advocacy, leadership development and community revitalization projects. Established in 1990, Hispanic Federation ("HF") has grown to become one of the premier Latino organizations in the nation. Through its network of nearly 100 affiliated community-based organizations, HF reaches thousands of Hispanics each year. HF and its affiliates will be adversely affected in numerous ways if the CVAP standard is upheld. The Hispanic Federation believes the court should reaffirm that total population is an appropriate basis for redistricting because it ensures that all people including children and immigrants —not merely those who are eligible to vote or those who actually cast ballots—are represented in the political process.

Lambda Legal Defense and Education Fund, Inc.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization committed to achieving the recognition of the civil rights of lesbian, gay, bisexual and transgender ("LGBT") people and those living with HIV through impact litigation, education and public policy work. Lambda Legal has designated racial justice and low-income advocacy as a program priority and is concerned

about the negative impacts a ruling forbidding use of total population for redistricting purposes would have on the communities it represents.

LatinoJustice PRLDEF

LatinoJustice PRLDEF (formerly known as the Puerto Rican Legal Defense and Education Fund) was founded in New York City in 1972. Its continuing mission is to protect the civil rights of all Latinos and to promote justice for the pan-Latino Community, especially across the Eastern United States. It has worked to secure the voting rights and political participation of Latino voters since 1972, when it initiated a series of suits to create bilingual voting systems throughout the United States.

League of Women Voters of the United States

The League of Women Voters of the United States is a nonpartisan, community-based organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in close to 800 communities and in every state, with more than 150,000 members and supporters nationwide. The League promotes an open governmental system that is representative, accountable, and responsive. To further this goal, the League has been a leader in protecting the right to vote for 95 years and seeking reform of the redistricting process at the state, local, and federal levels for more than three decades.

NALEO Educational Fund

The NALEO Educational Fund is the leading non-profit organization that facilitates full Latino participation in the American political process, from citizenship to public service.

National Association for the Advancement of Colored People

The National Association for the Advancement of Colored People ("NAACP"), founded in 1909, is the nation's oldest and largest civil rights organization. The Association is composed of member units across the United States. The principal objectives of the NAACP are to ensure the political, educational, social and economic equality of all citizens; to achieve equality of rights and eliminate race prejudice among the citizens of the United States; to remove all barriers of racial discrimination through democratic processes; to seek enactment and enforcement of federal, state and local laws securing civil rights; to inform the public of the adverse effects of racial discrimination and to seek its elimination; to educate persons as to their constitutional rights and to take all lawful action to secure the exercise thereof. The NAACP has a long history of advocating to protect minority voting rights and to ensure effective legislative representation for African-Americans and other racial minorities. The Association works in multiple arenas to achieve its objectives: state and federal courts; state legislatures and Congress; municipal, county and state election authorities, as well as state and federal agencies.

National Association of Social Workers

The National Association of Social Workers ("NASW") is the largest association of professional

social workers in the United States with over 130,000 members in 55 chapters. The Texas Chapter has 5875 members. NASW develops policy statements on issues of importance to the social work profession. Consistent with those statements, NASW reaffirms that participation in electoral politics is consistent with fundamental social work values, such as self-determination, empowerment, democratic decision making, equal opportunity, inclusion, and the promotion of social justice.

National Immigration Law Center

The National Immigration Law Center ("NILC") is the primary national organization in the United States exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families, many of which are mixed-status. A "mixed-status family" is a family whose members include people with different citizenship or immigration statuses. One example of a mixed-status family is one in which the parents are undocumented and the children are U.S.-born citizens. Over the past 35 years, NILC has won landmark legal decisions protecting fundamental rights, and advanced policies that reinforce our nation's values of equality, opportunity, and justice. NILC's interest in the outcome of this case arises out of a concern that, if adopted, Plaintiffs' interpretation of the United States Constitution would have an adverse impact on low-income immigrants and their families, including mixed status families, who would be disempowered by the loss of representation in the political process.

National Urban League

The National Urban League is an historic civil rights and urban advocacy organization dedicated to economic empowerment in historically underserved urban communities. Founded in 1910 and headquartered in New York City, the National Urban League improves the lives of more than two million people annually through direct service programs that are implemented locally by more than 90 Urban League affiliates in 300 communities across 36 states and the District of Columbia. The organization also conducts public policy research and advocacy activities from its D.C.-based Washington bureau. The National Urban League, a BBB-accredited organization, has a 4-star rating from Charity Navigator, placing it in the top 10 percent of all U.S. charities for adhering to good governance, fiscal responsibility and other best practices. Given our 105-plus years of experience in direct education, employment, housing, health and other community based services to primarily African American children, youth, adults and older adults, youth and adults involved with the criminal justice system, out-of-school and in-school youth, individuals who are registered and non-registered to vote, voters and non-voters, and others, we can directly attest that total population is the only appropriate basis for redistricting. Total population vitally ensures that the interests and needs of all people – not merely those who are eligible to vote or those who actually cast ballots – are represented in the political process and by our system of government. Racial discrimination continues to permeate all aspects of life in this country, and in light of the devastating blow to the Voting Rights Act of 1965 by the Supreme Court's decision in *Shelby County v. Holder*, being a registered voter is no guarantee of the right to vote, par-

ticularly if an individual is a racial or ethnic minority, young, elderly, or disabled. In the aftermath of Shelby, we have seen states across the nation move aggressively to enact new voter suppression laws aimed at making registration and voting more difficult for people of color, the young, the elderly and the disabled. The National Urban League believes that the Court's decision in this matter will directly affect the ability of African-Americans to fully participate in our nation's political and economic life and therefore we urge the Court to reaffirm that total population is an appropriate basis for redistricting.

People For the American Way Foundation

People For the American Way Foundation ("PFAWF") is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including the right to vote and equal protection of the laws. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values and to help overcome barriers to voting and political participation. PFAWF is very concerned that if petitioners prevail, such barriers to voting and political participation will be reinforced and further entrenched and that efforts to overcome them will be impeded, and accordingly joins this brief.

Service Employees International Union

The Service Employees International Union ("SEIU") represents nearly 2 million men and women who work in the service industries throughout the United States. Directly and through its affiliated lo-

cal unions, SEIU members and their families have participated in federal, state and local elections, and have historically promoted efforts to ensure full participation in the political process to all citizens. SEIU has a substantial interest in the outcome of this litigation for two principal reasons. SEIU members represents a diverse cross-section of the United States, in terms of race and ethnicity. Many SEIU members face historical barriers to voter registration, and voting itself, and would therefore be negatively affected were the Court to permit jurisdictions to use citizenage voting population ("CVAP") as an appropriate metric for redistricting. Likewise, SEIU has a significant percentage of its members who reside in jurisdictions that would be dramatically affected by a shift in the longstanding practice of drawing district lines based on total population.

Voting Rights Forward

Voting Rights Forward (VRF) is a nonpartisan, civil rights organization committed to protecting the rights of all voters. VRF supports fair, honest, impartial and competitive redistricting plans.

APPENDIX C

Racial and Ethnic Demographic Data Relating to Voting Age And Citizenship Based On U.S. Census American Community Survey Estimates*

UNITED STATES			
	Citizen	Noncitizen	Total
Over 18	222,363,928	20,178,299	242,542,227
Under 18	71,711,555	1,875,057	73,586,612
Total	294,075,483	22,053,356	316,128,839
Citizens as a Percentage of Total Population			93.0%
Noncitizens as a Percentage of Total Population			7.0%
CVAP as a Percentage of Total Population			70.3%
Non-CVAP as a Percentage of Total Population			29.7%
Percentage of Persons Under 18 Who Are Citizens			97.5%

* LatinoJustice PRLDEF ("LJP") calculations based on U.S. Census American FactFinder 2013 1-Year American Community Survey Data; source data and charts from the U.S. Census American Factfinder 2013 1-Year American Community Survey Data on File with LJP. Race/ethnicity categories based on U.S. Census categories guided by the 1997 OMB Office of Management and Budget (OMB) Standards on race and ethnicity. *See* U.S. Census, http://www.census.gov/topics/population/race/about.html.

NON-HISPANIC WHITE			
	Citizen	Noncitizen	Total
Over 18	156,231,274	2,764,714	158,995,988
Under 18	38,145,588	250,835	38,396,423
Total	194,376,862	3,015,549	197,392,411
Citizens as a Percentage of Total Group Population			98.5%
Noncitizens as a Percentage of Total Group Population			1.5%
CVAP as Percent of Total Group Population			79.1%
Non-CVAP as a Percentage of Total Group Population			20.9%
Percentage of Persons in Group Under 18 Who Are Citizens			99.3%

LATINO/HISPANIC†			
	Citizen	Noncitizen	Total
Over 18	24,406,626	11,858,210	36,264,836
Under 18	16,758,222	963,354	17,721,576
Total	41,164,848	12,821,564	53,986,412
Citizens as a Percentage of Total Group Population			76.3%
Noncitizens as a Percentage of Total Group Population			23.7%
CVAP as a Percentage of Total Group Population			45.2%
Non-CVAP as a Percentage of Total Group Population			54.8%
Percentage of Persons in Group Under 18 Who Are Citizens			94.6%

† The terms "Hispanic" or "Latino" are used interchangeably as defined by the U.S. Census Bureau and "refer to a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race." Karen R. Humes, Nicholas A. Jones & Roberto R. Ramirez, *Overview of Race and Hispanic Origin: 2010,* 2010 Census Briefs, 1, 2 (March, 2011), http://www.census.gov/prod/cen2010/briefs/c2010br 02.pdf.

ASIAN AMERICAN			
	Citizen	Noncitizen	Total
Over 18	8,730,439	3,909,498	12,639,937
Under 18	2,931,372	440,811	3,372,183
Total	11,661,811	4,350,309	16,012,120
Citizens as a Percentage of Total Group Population			72.8%
Noncitizens as a Percentage of Total Group Population			27.2%
CVAP as a Percentage of Total Group Population			54.5%
Non-CVAP as a Percentage of Total Group Population			45.5%
Percentage of Persons in Group Under 18 Who Are Citizens			86.9%

BLACK/AFRICAN AMERICAN			
	Citizen	Noncitizen	Total
Over 18	28,020,290	1,437,484	29,457,774
Under 18	10,278,511	183,086	10,461,597
Total	38,298,801	1,620,570	39,919,371
Citizens as a Percentage of Total Group Population			95.9%
Noncitizens as a Percentage of Total Group Population			4.1%
CVAP as a Percentage of Total Group Population			70.2%
Non-CVAP as a Percentage of Total Group Population			29.8%
Percentage of Persons in Group Under 18 Who Are Citizens			98.2%

AMERICAN INDIAN/ALASKAN NATIVE			
	Citizen	Noncitizen	Total
Over 18	1,737,385	83,140	1,820,525
Under 18	694,272	6,334	700,606
Total	2,431,657	89,474	2,521,131
Citizens as a Percentage of Total Group Population			96.5%
Noncitizens as a Percentage of Total Group Population			3.5%
CVAP as a Percentage of Total Group Population			68.9%
Non-CVAP as a Percentage of Total Group Population			31.1%
Percentage of Persons in Group Under 18 Who Are Citizens			99.1%

NATIVE HAWAIIAN AND OTHER PACIFIC ISLANDER			
	Citizen	Noncitizen	Total
Over 18	317,950	61,337	379,287
Under 18	138,389	8,074	146,463
Total	456,339	69,411	525,750
Citizens as a Percentage of Total Group Population			86.8%
Noncitizens as a Percentage of Total Group Population			13.2%
CVAP as a Percentage of Total Group Population			60.5%
Non-CVAP as a Percentage of Total Group Population			39.5%
Percentage of Persons in Group Under 18 Who Are Citizens			94.5%

Jay Kramer

Supervisory Special Agent Jay Kramer entered on duty with the FBI in March 1996, and for several years conducted organized crime investigations in the New York City area. In 2005, he was selected to join the Office of the Chief Division Counsel, where as an Agent/Attorney, he worked on issues of law and policy affecting both criminal and national security investigations. In 2010, he served in the FBI's Office of Congressional Affairs (OCA) in Washington, D.C., and in 2013, he helped establish the FBI's Cyber Law Unit in Chantilly, VA. He currently serves as the supervisor of the New York Office's primary criminal cyber intrusion squad in the FBI's New York Field Office. He holds a Bachelor of Arts degree from the Pennsylvania State University and a Juris Doctorate from Brooklyn Law School.

Alyra Liriano

Alyra Liriano is a third-year law student at Seton Hall University School of Law with an interest in Privacy and Cybersecurity. She received her Bachelor of Arts in Jurisprudence and Political Science from Montclair State University, graduating cum laude. She is a member of the Seton Hall Legislative Journal. In the Summer of 2015, she served as a corporate legal intern for Wyndham Worldwide's Litigation and Privacy and Information Management groups. She is deeply committed to the advancement of the Latino community and, last year, spearheaded MetroLALSA's Pipeline Initiative – a program that provides students with the information, tools and mentoring necessary to succeed in law school. She was recently elected as the Hispanic National Bar Association's Region III President for the Law Student Division. She has been an active member of MetroLALSA since her first year in law school and is the current MetroLALSA Delegate for Seton Hall. Looking ahead, she has lined up a summer law clerk position with LeClairRyan, an entrepreneurial law firm that provides business counsel and client representation in matters of corporate law and high-stakes litigation, and a judicial internship working with the Honorable Esther Salas of the United States District Court for the District of New Jersey.

Fernando Pinguelo

Fernando M. Pinguelo, a Partner and Chair of Scarinci Hollenbeck, LLC's Cyber Security & Data Protection and Crisis Management groups, is a trial lawyer who devotes his practice to complex business disputes with an emphasis on cyber, media, intellectual property, and employment matters in U.S. federal and state courts; and is admitted to practice in New Jersey, New York, Washington, D.C. and Pennsylvania. He serves on state and federal committees, including appointments by the Chief Judge of the District of New Jersey to serve on the Merit Selection Panel for federal magistrate judgeship selection and Chief Justice of the Supreme Court of New Jersey to serve on the Evidence Rules Committee. He is also an Adjunct Professor at Seton Hall Law School and he received a Fulbright Specialist appointment from which he served as a visiting faculty member at Universidade Presbiteriana Mackenzie, São Paulo in September 2015. He earned accreditation as an information privacy professional (CIPP/US) from the International Association of Privacy Professionals. Fernando earned his B.A., magna cum laude, from Boston College and his J.D. from Boston College Law School.

Amanda Sexton

Amanda Sexton is the Director of Corporate Development at On The Lookout Investigations and DGR – The Source for Legal Support, winners for the past three years of the New Jersey Law Journal's annual 'Best Of' survey. She is currently President of the New Jersey Professional Process Servers Association, a board member of the Legal Vendors Network and attends local and national conferences and training sessions to stay on top of the latest techniques and regulations for both process service and private investigations, including online investigations and social media surveillance.