

Ms. Jennifer Jessup
Departmental Paperwork Clearance Officer
Department of Commerce
Room 6616, 14th and Constitution Ave. NW
Washington, DC 20230

RE: Comment on Proposed Information Collection, 2020 Census
83 Fed. Reg. 26643 (June 8, 2018)

Dear Ms. Jessup:

I am a Professor of Law at Loyola Law School, Los Angeles.¹ I teach constitutional law and the law of democracy — which means that I have the privilege of studying, analyzing, and teaching the Constitution from start to finish. From the first words of the Preamble to the final words of the 27th Amendment, our founding document is concerned with how We the People are represented: what we authorize our representatives to do, what we do not permit our representatives to do, and how we structure authority to allow our representatives to check and balance each other in the interest of ensuring that the republic serves us all.

My examination of the Constitution and the law of democracy is not merely theoretical. I have had the privilege to practice in this arena as well, including work in the public and private sector with institutions and organizations attempting to foster meaningful representation of the American public. My work has included the publication of studies and reports; the provision of testimony and informal assistance to federal and state legislative and administrative bodies and officials with responsibility for apportionment, districting, and the electoral process; and, when necessary, participation in litigation to compel jurisdictions to comply with their obligations under state and federal law.

Much of my work, including my research and scholarship, confronts the structure of representation and the factual predicates of that structure. I have analyzed, in detail, the effect of different voting systems and districting plans that purport to further meaningful representation, the manner in which the Census count impacts that representation, and various jurisdictions' efforts to modify and adapt the Census default. I believe that it is no coincidence that an accurate enumeration of the People is the very first substantive duty that our founding charter gives to the newly established federal government, for it is this enumeration that drives the representation at the core of our constitutional order.

¹ My comments represent my personal views and are not necessarily those of Loyola Law School or any other organization with which I am now or have previously been affiliated.

It is therefore a privilege to respond to your call for comment on the Proposed Information Collection detailed in the Federal Register for the 2020 Census. Specifically, that notice explains that, pursuant to the Paperwork Reduction Act, comments are invited on: “(a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.”

As explained in much greater detail in the attached written testimony that I delivered to the U.S. House of Representatives Committee on Oversight and Government Reform on May 8, 2018, and in associated oral testimony I delivered that day, the Census Bureau’s proposed collection of information about citizenship in the decennial enumeration:

1. is unnecessary for the ostensible purpose of facilitating enforcement by the Department of Justice of the Voting Rights Act,
2. will affirmatively impair the ability of the Census Bureau to fulfill its constitutional mandate and accurately enumerate the whole number of persons in each state, and
3. will substantially increase the cost of data collection due to nonresponse and the associated “nonresponse follow-up” (NRFU) operations.

My May testimony reflected not only the consensus view of both public and private stakeholders, but also career staff at the Census Bureau. In that May testimony, I cited to the Census Bureau’s consistent view, over the course of decades, that “[a]ny effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count.”²

Since my May testimony, documents released in the context of litigation reveal even greater reason for concern. Emails among political appointees at the Department of Commerce strongly suggest that the Department of Justice’s request to collect citizenship data in the decennial enumeration was merely pretext. As just one example, more than seven months before the DOJ requested decennial collection of citizenship information,³ Secretary of Commerce Wilbur Ross

² *Progress Report on the 2020 Census: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 115th Cong. (May 8, 2018) (written testimony of Professor Justin Levitt) at 5-6, <https://oversight.house.gov/wp-content/uploads/2018/05/Levitt-Testimony-2020-Census-Hearing-05082018.pdf>.

³ Letter from Arthur E. Gary, Gen. Counsel, Justice Mgmt. Div., U.S. Dep’t of Justice, to Dr. Ron Jarmin, Performing the Non-Exclusive Functions and Duties of the Director, U.S. Census Bureau, U.S. Dep’t of Commerce (Dec. 12, 2017), Bates no. 0001525-0001527 in <http://www.osec.doc.gov/opog/FOIA/Documents/CensusProd001.zip>, produced with Notice of Filing Supplemental Materials Pursuant to the Court’s July 3, 2018 Order, *New York v. U.S. Dep’t of Commerce*, Case No. 1:18-cv-02921 (July 23, 2018) (Doc. 212) [Census Litigation Supp. Production 1].

on May 2, 2017, discussed in an email his “months old request that we include the citizenship question.”⁴ Earl Comstock, his Director of the Office of Policy and Strategic Planning at Commerce, responded that “we will get that in place. . . . It is next March — in 2018 — when the final 2020 decennial Census questions are submitted to Congress. We need to work with Justice to get them to request that citizenship be added back as a census question I will arrange a meeting with DOJ staff this week to discuss.”⁵

This exchange strongly suggests that the DOJ’s request was designed to accommodate the Secretary’s pre-existing desire to include the citizenship question in the decennial enumeration, formulated several months before May 2017 and at least nine months before DOJ ever made a request. In addition to the substantive critique of the DOJ’s position in my May 2018 testimony, the above exchange and others revealed in litigation documents further undermine the ostensible necessity of collecting citizenship information on the decennial.

Documents released in the context of litigation also reveal greater reason for concern about the impact of this collection on the cost and accuracy of the decennial enumeration, including concerns articulated by the Census Bureau’s own career staff. For example, a draft memorandum dated January 19, 2018, details the substantial concerns of John M. Abowd, Chief Scientist and Associate Director for Research and Methodology at the Census Bureau, about the impact of the attempt to collect citizenship information on the decennial.⁶ It notes that adding a citizenship question to the decennial “is very costly” and “harms the quality of the census count,”⁷ and that it risks “[m]ajor potential quality and cost disruptions.”⁸

The potential impact of adding a citizenship question to the decennial includes hundreds of thousands of incorrect enumerations, even after millions of dollars of extra follow-up. And Dr. Abowd stressed that this represents a “lower bound” and a “conservative estimate.”⁹ In particular, as Dr. Abowd himself understands, his impact estimates assume 1) that rates of nonresponse for a citizenship question on the decennial enumeration would be no larger than nonresponse rates for the American Community Survey, despite the dramatically increased prominence of the question on the decennial; 2) that nonresponse driven by the question should be expected only of households containing at least one noncitizen; and 3) that the rates of

⁴ Census Litigation Supp. Production 1, *supra* note 3, Bates no. 0003710, <http://www.osec.doc.gov/opog/FOIA/Documents/CensusProd001.zip>.

⁵ *Id.* (emphasis added).

⁶ Memorandum from John M. Abowd, Chief Scientist and Associate Director for Research and Methodology, U.S. Census Bureau, U.S. Dep’t of Commerce, for Wilbur L. Ross, Jr., Sec’y of Commerce, (Jan. 19, 2018), Bates no. 001277-001285 in [http://www.oscc.doc.gov/opog/FOIA/Documents/AR%20-%20FINAL%20FILED%20-%20ALL%20DOCS%20\[CERTIFICATION-INDEX-DOCUMENTS\]%206.8.18.pdf](http://www.oscc.doc.gov/opog/FOIA/Documents/AR%20-%20FINAL%20FILED%20-%20ALL%20DOCS%20[CERTIFICATION-INDEX-DOCUMENTS]%206.8.18.pdf), produced with Notice of Filing Administrative Record Certification and Annex, *New York v. U.S. Dep’t of Commerce*, Case No. 1:18-cv-02921 (June 8, 2018) (Doc. 173) [Census Litigation Production].

⁷ *Id.* at Bates no. 001277.

⁸ *Id.* at Bates no. 001278.

⁹ *Id.* at Bates no. 001282.

nonresponse for a 2020 Census would be no larger than nonresponse rates in the 2010 Census, despite the substantial difference in overall political climate. There is substantial reason to doubt the validity of each of those three assumptions. If any are inaccurate, the disruption in cost and quality will only rise. If more than one of these assumptions is inaccurate, the disruption compounds further.

Even with a set of self-described “conservative” assumptions, given the recognized problems with asking each individual about their citizenship in the household-by-household enumeration, Dr. Abowd recommended an alternative method for producing the data DOJ purportedly needed. If DOJ truly needed the information, he wrote, obtaining citizenship information from administrative records would better serve the purpose without — his words — “response burden,” and without harming the quality of the count.¹⁰

In a sharp departure from prior practice, the Census Bureau has conducted no test of a decennial enumeration involving a question about citizenship in this contemporary climate. Indeed, with the close of the 2018 End-to-End Census Test — what is commonly known as the “dress rehearsal” — there is no more time for testing before the 2020 Census is run. As a result, the Census Bureau does not have, and will not have, any data to contest the evident extent of the increased burden of collecting citizenship information on the decennial, or the resulting decrease in the quality of the information that the Census Bureau is constitutionally required to collect.

The information disclosed in litigation, and the information summarized in my attached testimony, reveals that not only is there an absence of significant incremental utility in the collection of citizenship information on the decennial enumeration, but that collection of this information will likely impair the utility of the information that the Census Bureau seeks to collect in the remainder of decennial operations. Anticipated nonresponse due to the citizenship question results in additional burden on the Census Bureau, and on individuals and households, in the form of increasingly intrusive collection efforts contemplated by Non-Response Follow-Up operations. The likelihood of significant errors in the count due to the attempted collection of citizenship information on the decennial also results in additional burden on state and local government entities with respect to the loss of federal funding and representation, and burdens on government entities, nonprofits, and private businesses both in the funds they must expend to mitigate the inaccuracy through pre-Census outreach, and in the funds they must expend to compensate when the basic Census count that drives policymaking, public opinion research, and business decisions is inaccurate.

The Paperwork Reduction Act obligates each federal agency to review the proposed collection of information and certify that the collection is necessary and increases utility; the Act also obligates the Director of OMB to minimize the burden and maximize the utility of federal efforts to collect information.¹¹ The Department of Commerce should recognize that the proposed collection of information concerning citizenship in the decennial enumeration is unnecessary and

¹⁰ *Id.* at Bates no. 001277.

¹¹ *See, e.g.*, 44 U.S.C. §§ 3504(c)(3)-(4); 3506(b)-(c); 3508.

decreases utility. Particularly given the cost and accuracy assessments of Dr. Abowd, the increased burden of collecting citizenship information in the decennial enumeration — rather than using administrative records, with less burden on individuals supplying information — has not been justified. Pursuant to the statutory mandate to enhance the quality and utility of the information it does collect, and in furthering its fiscal obligation to limit the risk of substantial cost overruns, the Department of Commerce should determine that the proposed collection of information concerning citizenship in the decennial enumeration is inconsistent with the Paperwork Reduction Act, and should forego collection of this incremental information at least until such time as testing in the context of a decennial enumeration proves that it will not have an adverse impact on the utility of the information the Census Bureau is constitutionally obligated to collect.

The comments above relate to the assessment, under the Paperwork Reduction Act and otherwise, of the Department of Commerce’s proposal to collect citizenship information in the decennial enumeration. The same Federal Register notice seeking feedback on PRA standards also mentions the Census Bureau’s intent to solicit feedback with respect to the potential tabulation and distribution of citizenship data, but it is unclear from the notice when there will be the opportunity for public comment on that distribution.¹² Therefore, in an abundance of caution, I also offer brief comments pertaining specifically to the distribution of citizenship information if it is indeed collected.

As explained above, there is significant and thus far unrebutted concern, including from the Census Bureau’s own career staff, that adding a citizenship question to the decennial enumeration will jeopardize the basic count of all persons in the country. But even beyond the impact on the overall enumeration, the Census Bureau itself acknowledges that there may well be individuals who respond to the enumeration but refuse to answer a question on citizenship (along with, for naturalized citizens, the specific year of naturalization), or who answer the question falsely. That is, over and above the impact on the accuracy of the basic enumeration, in this climate, there is a substantial risk that the data collected on citizenship itself will be inaccurate.

Again, Dr. Abowd highlighted the concern in his memo of January 19, 2018, acknowledging that on the American Community Survey — a survey far less prominent than the decennial enumeration — item non-response for the specific questions on citizenship ranged from 6.2% to 15.5%.¹³ The range reflects a differential impact on minorities; moreover, that differential impact has increased in recent years along with tensions in the overall political climate.¹⁴ Dr. Abowd also observed that “item nonresponse rates for the citizenship question are much greater than the comparable rates for other demographic variables”¹⁵ And Secretary Ross himself

¹² See, e.g., Census Bureau, Dep’t of Commerce, *Proposed Information Collection, Comment Request, 2020 Census*, 83 Fed. Reg. 26643, 26644 (June 8, 2018).

¹³ Memorandum from John M. Abowd, at Bates no. 001280, in Census Litigation Production, *supra* note 6.

¹⁴ *Id.*

¹⁵ *Id.*

appeared to recognize the likelihood of nonresponse to the citizenship question, explaining that in order to “minimize any impact on decennial census response rates, I am directing the Census Bureau to place the citizenship question last on the decennial census form.”¹⁶ Such a precaution is only necessary if people might not answer that question.

When individuals did answer the citizenship question on the American Community Survey, their answers were apparently not always accurate. In comparing self-responses from ACS data against administrative data, the Census Bureau found that “nearly one third of [individuals listed as] noncitizens in the administrative data respond to the questionnaire indicating they are citizens.”¹⁷ And again, there is reason to believe that the error rate triggered by citizenship questions on the ACS will only be more pronounced in the more prominent context of the decennial enumeration.

The above information shows that even if the Census Bureau discounts the likelihood that the citizenship question will cause serious errors in the accuracy of the overall enumeration, it is harder still to discount the likelihood that due to both nonresponse and response error, the citizenship question will yield seriously inaccurate information regarding citizenship itself. The Census Bureau regularly conducts post-enumeration surveys in order to determine the accuracy of the enumeration. Given the absence of pre-decennial testing, and the high likelihood that information about citizenship will be significantly less accurate than other information collected in the decennial enumeration, even if the Census Bureau collects citizenship information in the enumeration, it should withhold publication of that information until the Bureau is able to assess its comparative accuracy.

Specifically, the Census Bureau should decline to include citizenship data in its reporting of information required by P.L. 94-171, or in data released contemporaneous to the release of P.L. 94-171 information, unless the Bureau has been adequately able to assess the accuracy of citizenship information at the time of that release. The Census Bureau should not taint total population and voting-age population counts with citizenship data that, due to high rates of nonresponse and response error, may be significantly less accurate. Forgoing publication of inaccurate citizenship data in or alongside the P.L. 94-171 release will not interfere with the only ostensible rationale for collecting citizenship data in the enumeration in the first place, at least as reflected in the administrative record of the decision. The lone rationale for collecting citizenship data in the decennial enumeration is the desire to increase the Department of Justice’s capacity to enforce section 2 of the Voting Rights Act. That use does not require publication of citizenship data in the P.L. 94-171 dataset itself; any enforcement use by the DOJ will not be prejudiced by a delayed release of the data (to assess its accuracy) at least until districts are actually drawn — until new districts are drawn, the DOJ has nothing to enforce.


¹⁶ Letter from Wilbur Ross, Sec’y of Commerce, to Karen Dunn Kelley, Under Secretary for Economic Affairs (Mar. 26, 2018), Bates no. 001313, 001320, in Census Litigation Production, *supra* note 6.

¹⁷ Summary Analysis of the Key Differences Between Alternative C and Alternative D, Bates no. 001304, 001305, in Census Litigation Production, *supra* note 6.

If the Census Bureau is nevertheless determined to make citizenship information available either in the P.L. 94-171 data or contemporaneous with the P.L. 94-171 data, it should also ensure the contemporaneous release of block-level voting-age population (VAP) counts, and of citizen voting-age population (CVAP) estimates drawn from the American Community Survey, as it has previously done in a special redistricting tabulation. That ACS data should, if at all possible, correspond to the 2020 census geography, to the extent that the 2020 geography differs from its 2010 predecessor. If the Census Bureau is determined to release enumeration-collected citizenship data that may be strikingly inaccurate, these additional releases of VAP counts and CVAP estimates drawn from the ACS may permit analysts to assess the approximate magnitude of the inaccuracy in decennial enumeration data. For example, analysts might compare the 2020 decennial citizenship data to reasonably current ACS citizenship data; they might also compare the ratios of 2020 CVAP-to-VAP data with ratios of CVAP-to-VAP data of recent past aggregations. While neither technique would permit the precise assessment of inaccuracies in the decennial citizenship data, it might permit the detection of extreme anomalies that suggest substantial inaccuracy in the 2020 citizenship numbers, should those inaccuracies arise.

I thank the Department of Commerce for this opportunity to comment on these important matters related to data collection and distribution for the 2020 decennial enumeration. If you have any further questions, please feel free to contact me at your convenience. I can best be reached by email, at justin.levitt@lls.edu, or by phone at 213-736-7417.

Sincerely,



Justin Levitt

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Testimony of
Professor Justin Levitt,
Loyola Law School, Los Angeles

Before the
United States House of Representatives
Committee on Oversight and Government Reform

Progress Report on the 2020 Census

May 8, 2018

Chairman Gowdy, Ranking Member Cummings, and distinguished Members of the Committee, thank you for inviting me to testify before you today.

My name is Justin Levitt. I am a tenured Professor of Law and the Associate Dean for Research at Loyola Law School, in Los Angeles.¹ I teach constitutional law, and I focus particularly on the law of democracy, including election law and voting rights — which means that I have the privilege of studying, analyzing, and teaching the Constitution from start to finish, the election statutes that implement the democratic structures it establishes, and the history of the enforcement of those statutes. My examination of the law of democracy is based on extensive study, including dozens of published scholarly works, and many more short commentaries, on election law generally and the Voting Rights Act in particular. Much of this work examines redistricting, which is where Census data are perhaps most salient in the voting rights context.

My work in this area is also not merely theoretical. I recently returned to Loyola from serving as a Deputy Assistant Attorney General helping to lead the Civil Rights Division of the U.S. Department of Justice. There, I had the privilege to supervise and support much of the federal government's work on voting rights, including the federal government's enforcement of the Voting Rights Act. Before joining the Civil Rights Division, I had the chance to practice election law in other contexts as well, including work with civil rights institutions and with voter mobilization organizations, ensuring that those who are eligible to vote and wish to vote are readily able to vote, and have their votes counted in a manner furthering meaningful representation. My work has included the publication of studies and reports; assistance to federal and state administrative and legislative bodies with responsibility over elections; and, when necessary, participation in litigation to compel jurisdictions to comply with their obligations under state and federal law.

¹ My comments represent my personal views and are not necessarily those of Loyola Law School or any other organization with which I am now or have previously been affiliated. I appear today at the invitation of the Committee, and on behalf of no person other than myself.

I have had the privilege to seek voting rights for clients and constituents, and I have had the privilege to teach others how to do the same. I have had the privilege to pursue research cited by the courts, and to testify as an expert to them — and to Congress and other august federal institutions. And I have had the privilege to advise, and occasionally represent, elected officials and election officials of both major parties and neither major party, and those whose partisan affiliation I simply do not know. And throughout, the vigorous enforcement of the Voting Rights Act has been a vital part of my experience and expertise.

I am grateful to you for holding this exceedingly important hearing, initiating what I hope will be action to ensure that the Census Bureau is able to fulfill its constitutional mandate in conducting the 2020 Census.

As I explain in more detail below, this mandate is under threat. In a radical departure from the usual careful practice of the Census Bureau, Secretary of Commerce Wilbur Ross has made an eleventh-hour determination to slap a question about citizenship on the basic decennial questionnaire delivered to every individual in the country. The addition is counterproductive and potentially pretextual — and in the current political climate, likely explosive. We currently ask about citizenship only as one item in a detailed survey sent to a sample of the population. In this context, questions about citizenship are of limited salience to individuals but suffice for law enforcement needs. Secretary Ross’s decision to place the question on the decennial enumeration significantly elevates its prominence, and given sweeping distrust in government, risks disrupting the accuracy of the underlying and constitutionally required enumeration, on which all other federal data collection efforts depend. Aside from the derogation of legal duty, a distorted enumeration will have enormous fiscal and political consequences for the duration of a decade, including effects that may seem counterintuitive, and which are quite likely to affect the constituents of Members of this Committee.

The Census and the Enumeration

It is impossible to overstate the constitutional significance of the decennial Census. The requirement that has become a mandate to count each and every individual in the country² — the “actual Enumeration” of the population in every decade — is embedded in the sixth sentence of the Constitution. It is the very first act that the Constitution prescribes as an express responsibility of the new federal Government. The Census Bureau engages in an enormous amount of exceedingly valuable activity above and beyond conducting the decennial Enumeration; policymakers, researchers, analysts, and entrepreneurs nationwide are indebted to the agency for the data it provides. But I take as an underlying point of common agreement that whatever other goals the Census Bureau may pursue, its single most important and infeasible obligation is to ensure the absolute and inviolate integrity of the constitutionally mandated decennial count, to the best of its ability.

² See U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2; Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (1924).

I am here in part because I am concerned that this fundamental priority may be in jeopardy. On March 26, 2018, Secretary of Commerce Wilbur Ross determined that the Census Bureau would add a question to the ten basic questions of the decennial Census, asking every person in the country about their citizenship status and the citizenship status of those in their household.³ In the current political climate, asking a question about citizenship status of every individual in the country is no mere request for information. Those who work in and with communities skeptical about the role of the federal executive branch fear that the question will prove explosive. Secretary Ross made the determination to ask this question despite his own admission that the career staff of “the Census Bureau and many stakeholders expressed concern [that doing so] would negatively impact the response rate,”⁴ and despite the absence of any opportunity to test that impact before implementing the change. He did so despite the direct warning of six former Directors of the Census Bureau, whose collective 25 years of service as Director spanned eight Presidential Administrations (of both major political parties), that adding the question at this late point in the process would put the accuracy of the enumeration “at grave risk.”⁵ The Titanic was launched with less hubris and more preparation.

It is true that the Census Bureau has collected information on the citizenship of the American public for many years, but the context for this collection is vitally important. The last time that a question about citizenship was asked on the basic decennial Census was 1950, when both the demographic composition of the country and the political climate were very different.

Citizenship Data in the Context of a Survey

From 1960 on, questions about citizenship were asked only in the context of surveys sent to a much smaller representative sample of the population, and amidst a battery of other detailed and personal questions. In 1960, the survey contained at least 33 questions in addition to the basic questions on the decennial census, many with subparts. These included questions about the nationality of the respondent’s parents; the date a married respondent was married, and if female, “how many babies” she had ever had; whether the respondent went to public, private, or parochial school; total earnings; whether the respondent received any form of public assistance; the means of a commute to work; the number of hours the respondent worked last week; the type of work the respondent was doing; the date the respondent moved into the present home; the date that the home was originally built; the likely market value of the home; whether the home had a washing machine, connections to a public sewer system, or an elevator; the average cost and type of fuel; and the number of television sets, radios, and air conditioning units in the home.⁶ In

³ Letter from Wilbur Ross, Sec’y of Commerce, U.S. Dep’t of Commerce, to Karen Dunn Kelley, Under Sec’y for Econ. Affairs, U.S. Dep’t. of Commerce (Mar. 26, 2018), https://www.commerce.gov/sites/commerce.gov/files/2018-03-26_2.pdf.

⁴ *Id.* at 3.

⁵ Letter from Vincent P. Barabba et al., Directors of the U.S. Census Bureau, to Wilbur L. Ross, Sec’y of Commerce, U.S. Dep’t of Commerce (Jan. 26, 2018), https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2018/03/27/Editorial-Opinion/Graphics/DOJ_census_ques_request_Former_Directors_ltr_to_Ross.pdf.

⁶ Bureau of the Census, U.S. Dep’t of Commerce, Notice of Required Information for the 1960 Census of Population and Housing, <https://www.census.gov/history/pdf/1960censusquestionnaire-2.pdf>.

1970, the survey contained at least 58 different additional questions, many with subparts, adding questions including information about disabilities; the street address where the respondent worked last week; the respondent's most important activities or duties at work; the respondent's job title; whether the respondent had any vocational training; the mode of entry into the home; whether the home is a condominium; the extent of kitchen facilities in the home; the presence of a television set with the ability to connect to particular channels; and the presence of a dishwasher or a flush toilet.⁷ In 1980, the survey contained at least 54 different additional questions, many with subparts, adding questions including information about where the respondent lived five years ago; not only whether the respondent speaks another language but how well the respondent speaks English; the length of the respondent's commute; whether the respondent shared a ride to work, and with how many people; the number of vans or trucks in the household; the annual premium for fire and hazard insurance; the property's annual real estate tax assessment; and the presence of a second mortgage.⁸ In 1990, the survey contained at least 59 different additional questions, many with subparts, adding questions including information about whether a respondent's disability limited their ability to bathe without difficulty; not just military service but the number of total years of military service; not just the existence of a second mortgage but the monthly payment amount on that mortgage; the amount of a monthly condominium fee; whether monthly rent includes meals; and not just the extent of a commute but the specific time the respondent went to work.⁹ In 2000, the survey contained at least 46 different additional questions, many with subparts, adding questions including information about whether the respondent's grandchildren are living in the home, and if so, whether the respondent has been the primary caretaker and for how long; and whether the respondent has an installment loan on a mobile home.¹⁰ In 2010, the survey contained at least 69 additional questions, many with subparts, adding questions including information about the specific major of a respondent with a bachelor's degree; the nature of the respondent's health insurance; the specific nature of a respondent's disability; whether the respondent got married or divorced in the last twelve months; and the extent of a respondent's service-connected disability rating.¹¹ The current version of the survey adds questions about whether the respondent owns a desktop or laptop, smartphone, or tablet; and the nature of access to the Internet, including the type of access plan.¹²

⁷ Bureau of the Census, U.S. Dep't of Commerce, 1970 Census Questionnaire, https://www.census.gov/history/pdf/1970_questionnaire.pdf.

⁸ Bureau of the Census, U.S. Dep't of Commerce, 1980 Census Long Form, https://www.census.gov/history/pdf/1980_long_questionnaire.pdf.

⁹ Bureau of the Census, U.S. Dep't of Commerce, Official 1990 U.S. Census Form, https://www.census.gov/history/pdf/1990_questionnaire.pdf.

¹⁰ Bureau of the Census, U.S. Dep't of Commerce, 2000 Census Long Form, https://www.census.gov/history/pdf/2000_long_form.pdf.

¹¹ U.S. Census Bureau, U.S. Dep't of Commerce, 2010 American Community Survey Questionnaire, <http://www2.census.gov/programs-surveys/acs/methodology/questionnaires/2010/quest10.pdf>.

¹² U.S. Census Bureau, U.S. Dep't of Commerce, 2018 American Community Survey Questionnaire, <https://www2.census.gov/programs-surveys/acs/methodology/questionnaires/2018/quest18.pdf>. Of course, along the way, some of the questions asked in earlier decades were dropped as well. The surveys reflect a continuously evolving effort to understand and measure some of the important characteristics of our local, regional, and national communities that seem relevant given the contemporary context.

I mention all of this not because the information is excessive — to the contrary, understanding who and where Americans are, what we do, and how we live is essential for the effectiveness and efficiency of public policy and private enterprise alike. The American Community Survey is the present home for questions at this level of detail, and until weeks ago, it was the primary means by which the Census Bureau collected information about individuals' citizenship. The Census Bureau estimates that the ACS, a 28-page instrument, will take the average household 40 minutes to complete.¹³ In the context of a lengthy and detailed survey like this, with questions that many view as quite personal (and hence asked only of a sample of the population at any one time), a question about citizenship does not tend to stand out overmuch.¹⁴ It does not carry the same appearance as a government effort to go door-to-door inquiring about citizenship.

The contemporary decennial Census instrument is much different. It contains ten short questions, total, for the head of household, and seven short questions for everyone else.¹⁵ It is designed to be short, simple, and minimally intrusive, to maximize response rates. Even this crisp instrument does not yield perfect results, but it is designed in an attempt to achieve a complete “actual Enumeration,” to the extent humanly possible.¹⁶

The Decennial Enumeration in the Current Climate

Adding any question to the simple ten-question decennial Census instrument, and asking that question of every individual in the country, amounts to a substantial design change with the potential to generate a substantial change in response behavior, even if the question has repeatedly been asked in the ACS.¹⁷ The change substantially elevates the prominence and salience of the question, magnifying its impact on the process of collecting data. And the Census Bureau has recognized (and argued in federal court) that adding a question specifically about citizenship to the decennial enumeration would impair the enumeration itself:

Any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count. Obtaining the cooperation of a suspicious and fearful population would be impossible if the group being counted perceived any possibility of the information being used against them. Questions as to citizenship

¹³ *Id.* at 28.

¹⁴ Even in the event that the question did raise an individual alarm, statistical techniques can compensate for nonresponse on a survey like the ACS. That is not the case for the decennial enumeration. *See infra* note 23.

¹⁵ U.S. Census Bureau, U.S. Dep't of Commerce, 2010 Census Questionnaire, <https://www.census.gov/history/pdf/2010questionnaire.pdf>.

¹⁶ The Census Bureau conducts a decennial analysis of its own performance after each decennial Census. In 2010, the Census estimated a net overcount of 0.01% total, but that total includes an estimated 16 million individuals who were omitted from the Census. *See* U.S. Census Bureau, U.S. Dep't of Commerce, DSSD 2010 Census Coverage Measurement Memorandum Series #2010-G-01, Census Coverage Measurement Estimation Report, May 22, 2012, https://www.census.gov/coverage_measurement/pdfs/g01.pdf.

¹⁷ *See* Letter from Vincent P. Barabba et al., *supra* note 5, at 2.

are particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate.¹⁸

That quote was from 1980. The current political climate is no less volatile. And it is in part because of this climate that there is so much concern over the impact of adding a question on citizenship to the ten-question decennial Census instrument. The last time the Census asked every person in the country about their citizenship was 1950, when Americans had a very different relationship to the federal government. When the National Election Study first regularly began asking Americans about their trust in the federal government — in the late 1950s — 73% of the public trusted the government to do what is right.¹⁹ By December 2017, that rate had plummeted to 18%.²⁰

Moreover, the way that the federal government is currently perceived with respect to asking questions about citizenship is particularly fraught. Immigration was one of the most salient issues in the 2016 election, and due to recent bitterly and prominently contested fights over immigration policy and enforcement, has grown even more salient since.²¹ This is emphatically not merely an issue for individuals who are unlawfully present. Enormous numbers of legal permanent residents and citizens have family or cultural connections to those perceived to be at risk, or are uncertain about who is at risk. And in this climate, many others will not find reason to distinguish between personal experiences of discrimination at the hands of private actors or local public officials, or the experiences of others that they have learned about through news or social media, and the federal government’s Census enumerator at the door. Americans are afraid, and unlikely to trust the government.

This fear was clear to Census officials in recent attempts to administer surveys with far less prominence than the decennial enumeration, well before the Census Bureau announced that it would add a citizenship question to the decennial instrument. Both nationally and within most states, the rates at which individuals refused to respond to the American Community Survey were higher in 2015 and 2016 than ever before in the survey’s history.²² Crucially, on a survey like the ACS, analysts can partially compensate for known nonresponse rates with advanced

¹⁸ Federation for American Immigration Reform v. Klutznick, 486 F. Supp. 564, 568 (D.D.C. 1980).

¹⁹ Pew Research Center, Public Trust in Government: 1958-2017, <http://www.people-press.org/2017/12/14/public-trust-in-government-1958-2017/>.

²⁰ *Id.* Similarly, 74.5% of Americans in 2017 reported being “afraid” or “very afraid” of corrupt government officials, making it the single largest source of fear among the population. See Chapman University, America’s Top Fears 2017, Oct. 11, 2017, <https://blogs.chapman.edu/wilkinson/2017/10/11/americas-top-fears-2017/>.

²¹ See, e.g., Trump v. Hawaii, No. 17-965 (U.S. argued Apr. 25, 2018); City of Chicago v. Sessions, ___ F.3d ___, 2018 WL 1868327 (7th Cir. Apr. 19, 2018); Texas v. United States, 809 F.3d 134 (5th Cir. 2015); NAACP v. Trump, ___ F. Supp. 3d ___, 2018 WL 1920079 (D.D.C. Apr. 24, 2018); Complaint, Texas v. United States, No. 1:18-cv-00068 (S.D. Tex. May 1, 2018); Complaint, United States v. California, No. 2:18-at-00264 (E.D. Cal. Mar. 6, 2018); Complaint, California v. Sessions, No. 3:17-cv-04701 (N.D. Cal. Aug. 14, 2017).

²² See U.S. Census Bureau, U.S. Dep’t of Commerce, American Community Survey: Response Rates, <https://www.census.gov/acs/www/methodology/sample-size-and-data-quality/response-rates/>. This effect was broadly distributed: in 29 different states, the rate at which individuals refused to respond to the ACS was higher in 2016 than ever before; in 44 different states, the rate at which individuals refused to respond to the ACS was higher in either 2015 or 2016 than ever before. *Id.*

statistical techniques, to preserve the accuracy of the instrument. But the Census Bureau is largely restricted from doing so with respect to the decennial enumeration.²³ And the increasing rate at which individuals were refusing to respond to the ACS indicated trouble ahead for the enumeration to come.

By November 2015, nonpartisan career staff at the Census Bureau had already identified some of the significant challenges ahead. An operational report noted “[d]istrust in government,” “[d]eclining response rates,” and an “[i]ncreasingly diverse population . . . who may have varying levels of comfort with government involvement” as important hurdles for the decennial enumeration.²⁴

By November 2017 — months before Secretary Ross announced that he would add a citizenship question to the decennial instrument — the alarm bells had grown significantly louder. Nonpartisan career staff at the Census Bureau cited a “recent increase in respondents . . . spontaneously expressing concerns to researchers and field staff about confidentiality and data access related to immigration,” including the “perception that certain immigrant groups are unwelcome.”²⁵ They observed “increased rates of unusual behaviors during pretesting and producing surveys,” including “data falsification, item non-response, [and] break-offs.”²⁶ The flags were not merely raised by those responding to the surveys, but also by those giving the surveys. As one interviewer put it:

Three years ago was so much easier to get respondents compared to now because of the government changes . . . and trust factors....Three years ago I didn’t have problems with the immigration questions.²⁷

And so a team at the Census Bureau conducted a brief qualitative study about the attitudes of respondents. The study reported that “[f]indings across languages [and] regions of the country, from both pretesting respondents and field staff[,] point to an unprecedented ground swell in confidentiality and data sharing concerns, particularly among immigrants or those who live with

²³ See 13 U.S.C. § 195; *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 334-44 (1999); *cf.* *Utah v. Evans*, 536 U.S. 452 (2002). For a description of the limits more generally, see Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 *Cardozo L. Rev.* 755, 758, 764 (2011).

²⁴ U.S. Census Bureau, U.S. Dep’t of Commerce, *2020 Census Operational Plan: A New Design for the 21st Century* 1.1, at 6-7 (Nov. 2015), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan.pdf>.

²⁵ Mikelyn Meyers, Center for Survey Management, U.S. Census Bureau, U.S. Dep’t of Commerce, *Respondent Confidentiality Concerns and Possible Effects on Response Rates and Data Quality for the 2020 Census* (Nov. 2, 2017), <https://www2.census.gov/cac/nac/meetings/2017-11/Meyers-NAC-ConfidentialityPresentation.pdf>.

²⁶ *Id.* at 3, 7-8.

²⁷ *Id.* at 13.

immigrants.”²⁸ The study noted that this “[m]ay present a barrier to participation in the 2020 Census,” and that it “[c]ould impact data quality and coverage for the 2020 Census.”²⁹

Even in 2017, there were signs of a serious brush fire jeopardizing the accuracy of the enumeration. Many public and private actors were attempting to combat the fear as best they could. But that was all before the Commerce Secretary’s decision to add a question on citizenship to the decennial enumeration. This decision, profoundly magnifying the prominence of the citizenship question, pours gasoline on that fire.

Sprinting Forward Without Testing

It would be one thing if Secretary Ross, having tested deployment of an additional potentially explosive topic on the decennial enumeration, had solid evidence that adding the question would cause no actual damage despite the widespread concern of those most active in the communities most affected. It is standard operating procedure for the Census Bureau to relentlessly and rigorously test every change to the decennial enumeration, iteratively and over years — much less those as controversial as this question. But Secretary Ross has offered no such assurance to the public. Instead, he flipped the standard burden of proof, citing the absence of reliable data about the question’s potential negative impact as an element in favor of making the change.³⁰ It is impossible to overstate how much of a departure this represents from the way that the Census Bureau conducts business. “We don’t know how much damage the bomb will do, but we’ll be able to figure it out after we drop it” is not how the Census Bureau normally executes its constitutional responsibility.

It is now May 2018, just under two years before the Census will be conducted, and there has been no public testing of the citizenship question in an environment approximating the decennial enumeration. For comparison, preparation for the 2010 Census began thirteen years in advance.³¹ Specific attention was devoted to careful testing, under the real conditions of the

²⁸ *Id.* at 15.

²⁹ *Id.* See also Center for Survey Management, U.S. Census Bureau, U.S. Dep’t of Commerce, Memorandum for Associate Directorate for Research and Methodology (ADRM), Sept. 20, 2017, <https://www2.census.gov/cac/nac/meetings/2017-11/Memo-Regarding-Respondent-Confidentiality-Concerns.pdf> (delineating similar concerns).

³⁰ Letter from Wilbur Ross, *supra* note 3, at 3. The data that Secretary Ross did canvass is difficult to credit as a serious statistical comparison, and even he did not suggest that they indicated that response rates would remain stable. His letter cited the rate of non-response to individual questions on the much longer ACS, but there is little reason to believe that those rates would also reflect non-response rates on the shorter and more prominent decennial enumeration; nor is it reasonable to infer that individuals would only determine not to respond to a single question of 11, rather than foregoing the enumeration entirely. *Id.* at 3. His letter also cited the rate of non-response to survey questions in 2000, and 2013-2016, but there is little reason to believe that those rates would also reflect non-response rates on the shorter and more prominent decennial enumeration undertaken in a very different political climate. *Id.* And his letter cited the rate of non-response to private survey questions by Nielsen, but there is little reason to believe that those rates would also reflect the degree of non-response to government officials sent to every household in America. *Id.* at 6.

³¹ See U.S. Census Bureau, U.S. Dep’t of Commerce, The Census 2000 Testing, Experimentation, and Evaluation Program pt. A (May 2002), <https://www.census.gov/pred/www/PartA.htm>; see *id.* at pt. B,

2000 enumeration, changes contemplated for the 2010 iteration.³² That is, when the Census Bureau undertook to evaluate the impact of “different questionnaire design and content on coverage and data quality,” it did so ten years ahead of time, to ensure that it could assess the changes under real-world conditions.³³

Similarly, testing for the 2020 enumeration began thirteen years earlier, in 2007.³⁴ This is when the Census Bureau began prepping tests and experiments to run during real-world conditions in 2010, well before implementation in 2020.³⁵ It is worth quoting the national expert panel convened to design these tests, just to put the present controversy’s calendar in stark perspective:

The panel is charged with evaluating the 2010 census research program, primarily in setting the stage for the 2020 census. As the first task, the panel was asked to review an initial list of research topics compiled by the Census Bureau, with an eye toward identifying priorities for specific experiments and evaluations in 2010. . . . To some observers, a two-year time span between now and the fielding of the 2010 census may seem like a long time; in the context of planning an effort as complex as the decennial census, however, it is actually quite fleeting. Experimental treatments must be specified, questionnaires must be tested and approved, and systems must be developed and integrated with standard census processes—all at the same time that the Bureau is engaged in an extensive dress rehearsal and final preparations for what has long been the federal government’s largest and most complex non-military operation. Accordingly, the Census Bureau plans to identify topics for census experiments to be finalized by winter 2007 and to have more detailed plans in place in summer 2008; this report is an early step in that effort.³⁶

To be clear, that is a Census advisory panel discussing in 2007 that it planned to finish detailed plans in 2008 for limited experimentation in 2010, for potential implementation in 2020. At that point, two years was a “fleeting” time to design a limited experiment, to be evaluated and retested over the course of a decade before final liftoff. In contrast, Secretary Ross in 2018 simply determined to skip all of the preliminary steps, and throw the citizenship question directly into the decennial enumeration. It is now less than two years from exploding on the launchpad.

Testing for 2020 did not stop in 2010. Even after individual pieces of the 2020 Census were tested under real-world decennial conditions, the Census Bureau conducted relentless

<https://www.census.gov/pred/www/PartB.htm> (“A successful decennial census, one that is responsive to the nation’s changing needs, cannot be achieved without early planning.”).

³² *Id.*

³³ *Id.*

³⁴ See NAT’L RESEARCH COUNCIL, EXPERIMENTATION AND EVALUATION PLANS FOR THE 2010 CENSUS: INTERIM REPORT 8 (Lawrence D. Brown et al. eds., 2008).

³⁵ *Id.*

³⁶ *Id.*

evaluations of different design and delivery options. An extensive series of rigorous tests was planned through the 2018 “End-to-End Census Test,” also known as the “dress rehearsal.”³⁷ The Census Bureau itself described the 2018 test as the “culmination” of its decade-long research and testing to inform the census design, “providing a rich environment to test all major components of the 2020 Census.”³⁸ This dress rehearsal is being conducted as we speak; Census takers are due to begin personal follow-up starting tomorrow, with households that have not yet responded to other modes of contact.³⁹ The dress rehearsal, meant to be the final full test before execution, was planned, prepared, and actually begun before Secretary Ross made his decision. And as a result, it does not contain any questions about citizenship in a decennial enumeration setting.⁴⁰

Several years ago, the Census Bureau articulated as a “lesson learned” from the 2010 Census that it was necessary to “[e]nsure sufficient time for testing the questionnaire content.”⁴¹ Secretary Ross does not appear to have learned that lesson. The “dress rehearsal” for the decennial enumeration is already underway, and it does not include any valid assessment of the impact of a question on citizenship for the real performance just around the corner.⁴² On this issue, the Bureau is effectively well out of time, and flying blind.

If adding the citizenship question significantly decreases the self-response rate, the Census Bureau is also flying into a dramatic budget gap. A lower initial response rate requires extended personal follow-up, adding exponentially to the cost of the Census and effectively negating the efficiencies sought by new digital delivery mechanisms.⁴³ The Bureau has faced well-documented struggles to overcome significant underfunding in advance of the 2020 Census,

³⁷ See U.S. Census Bureau, U.S. Dep’t of Commerce, 2020 Census Operational Plan: A New Design for the 21st Century 3.0, at 34-49 (Sept. 2017), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan3.pdf>; Patrick R. Potyondy, Nat’l Conference of State Leg., *The One and Only End-to-End 2020 Census Test*, Nov. 28, 2017, <http://www.ncsl.org/blog/2017/11/28/the-one-and-only-end-to-end-2020-census-test.aspx>.

³⁸ See U.S. Census Bureau, U.S. Dep’t of Commerce, 2018 Census Test: Frequently Asked Questions for the 2018 Census Test, <https://www.census.gov/programs-surveys/decennial-census/2018-census-test/faqs.html> (emphasis added).

³⁹ See Press Release, U.S. Census Bureau, U.S. Dep’t of Commerce, One Week Before Next Milestone in 2018 Census Test, May 2, 2018, <https://www.census.gov/newsroom/press-releases/2018/2018-test.html>.

⁴⁰ See U.S. Census Bureau, U.S. Dep’t of Commerce, 2018 Census Test Questionnaire, https://www2.census.gov/programs-surveys/decennial/2020/program-management/memo-series/2020-memo-2018_02_questionnaire.pdf. Even without the ability to conduct valid tests on the enumeration instrument containing the citizenship question, locals in Providence, Rhode Island — where the “dress rehearsal” is being conducted — have expressed concern about depressed participation based on the controversy. See Jon Kamp & Janet Adamy, *Citizenship Question Rankles in a Trial Run of 2020 Census*, WALL ST. J., Apr. 13, 2018, <https://www.wsj.com/articles/census-citizenship-question-rankles-rhode-island-site-of-only-count-trial-run-1523620801>.

⁴¹ 2020 Census Operational Plan, *supra* note 37, at 70.

⁴² See Letter from Vincent P. Barabba et al., *supra* note 5, at 2 (“Adding a citizenship question without a testing opportunity in a contemporary, census-like environment will invalidate the results and lessons learned from the End-to-End test.”).

⁴³ This is a budgetary issue, but not merely a budgetary issue: given the level of controversy around the question and the degree of fear in some vulnerable communities, there is no guarantee that even repeated personal follow-up will successfully generate adequate response.

and has labored mightily to compensate, cutting back on crucial testing necessary even without the addition of a citizenship question.⁴⁴ The recent spending bill is an exceedingly welcome development in that respect, and though more is still necessary, I commend you for increasing the resources available to, and so desperately needed by, the Bureau.⁴⁵ Still, the Secretary's decision to add a last-minute question on citizenship to the enumeration threatens to undo all of your hard-won budgetary work, through a catastrophic self-inflicted wound.

The Consequences of an Inadequate Enumeration

If the Census Bureau proceeds with its proposed change to the decennial enumeration, and fear continues to metastasize among vulnerable populations, the consequences could be severe. If burdening the decennial enumeration with an extra question on citizenship drives down the response rate or distorts the count in this political climate, the decision to include the question amounts to a dereliction of constitutional duty: the Census Bureau has no lawful authority to prioritize any goal over ensuring an “actual Enumeration” of every person in the country. Moreover, with no supplemental process able to match the resources invested in a decennial enumeration, the damage to the complete count is likely to linger for a decade, skewing policy and business decisions until 2030. We are less able to confront real challenges and seize real opportunities when the basic facts and figures at the core of our shared understanding just aren't right.

The damage is also not likely to be borne equally. The populations most likely to refuse to answer a decennial enumeration with a citizenship question are the populations least likely to trust the government. In the current climate, this includes noncitizens, but is hardly limited to noncitizens: stoked by each incremental headline, fear runs like contagion, and infects friends and neighbors as well. Citizen householders concerned for family and nonfamily members at home or in the broader community, or who are simply concerned that they may be profiled more generally, may resolve to avoid the enumeration; citizen children living with parents or caregivers are also at risk of being left out. And even minorities unconnected to any immigration controversy may feel unease in the present climate. Populations that are already among the most vulnerable generally are more likely to feel like they have more to lose when a government official shows up at their door asking for information. And aggrieved citizens who believe that the government is going door-to-door asking about explosive issues may believe that the safest course is to keep their own door shut as well.

But the most crucial point is that when vulnerable populations do not respond to the Census, it is not just the vulnerable populations who suffer. Census results drive both political

⁴⁴ See The Census Project, February 2018 Census Project Update, <https://thecensusproject.org/february-2018-census-project-update/>.

⁴⁵ Tara Bahrapour, *The 2020 Census Received Much More Funding in the House Spending Bill than Advocates Had Anticipated*, WASH. POST, Mar. 22, 2018, https://www.washingtonpost.com/local/social-issues/the-2020-census-received-much-more-funding-in-the-fiscal-2018-budget-than-advocates-had-anticipated/2018/03/22/8e9597ce-2df9-11e8-8688-e053ba58f1e4_story.html; see Letter from The Census Project to Jerry Moran, Chairman, U.S. Senate Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies, et al., May 1, 2018, <https://censusproject.files.wordpress.com/2018/04/final-fy19-census-project-sign-on-letter-5-1-18.pdf>.

representation and funding, but they do so for large aggregations of people in broad geographies. Everyone in an area with an undercount loses clout and cash. Immigrant farmworkers lose — and so do the rural agricultural communities dependent on those farmworkers. Urban minorities lose — and so do the suburbs that depend on those cities' economic engines. Border communities lose — and so do those who live in or trade with those border communities, including members of the border patrol. We are lashed to each other by the enumeration.

Indeed, the most salient effects may well be statewide. Congressional representation and federal budget dollars are both finite resources; states compete with each other for these resources, and the enumeration resets the terms of the competition every ten years. But in this competition, it is not the absolute number of vulnerable people that matters most, nor the growth of the population, nor even the demographic distribution of that growth. All matter, yes. But among large, swiftly-growing states where the scale creates serious leverage, what matters most in the competition for resources is the comparative level of government distrust. If minorities in Texas feel less safe than minorities in California, and respond to the decennial Census at lesser rates, Texas loses power and funding to California. And vice versa.

This comparative impact is worth repeating, if only because it may appear to conflict with the conventional wisdom. Texas is booming: indeed, it is the most swiftly growing state in the country.⁴⁶ If the Census count is accurate, most projections suggest that Texas will accrue billions of dollars in additional federal cash driven by the Census count.⁴⁷ Similarly, if the Census count is accurate, most projections suggest that Texas will gain an extra three congressional seats — and given recent electoral patterns, those seats are likely to be drawn by Republican legislators.⁴⁸

But like most other growing states, Texas's population boom has been fueled by growth in historically vulnerable minority communities. Approximately 55% of Texans were racial and ethnic minorities in 2010, and projections from past growth patterns indicate that 61% of Texans are likely to be racial and ethnic minorities in 2020.⁴⁹ Based on the local climate, if those minorities are substantially less likely to complete the decennial enumeration than are residents of other states, those funds and those seats vanish. And they vanish for all Texans, to be picked up by states where the population is less afraid.

⁴⁶ See U.S. Census Bureau, U.S. Dep't of Commerce, State Population Totals and Components of Change: 2010-2017 tbl.1, <https://www.census.gov/data/tables/2017/demo/popest/state-total.html>.

⁴⁷ See, e.g., *id.*; Andrew D. Reamer, Counting for Dollars: The Role of the Decennial Census in the Geographic Distribution of Federal Funds (Mar. 2010), https://www.brookings.edu/wp-content/uploads/2016/06/0309_census_report.pdf.

⁴⁸ See, e.g., Press Release, Election Data Services, Some Change in Apportionment Allocations with New 2017 Census Estimates; But Greater Change Likely by 2020, Dec. 26, 2017, https://www.electiondataservices.com/wp-content/uploads/2017/12/NR_Appor17c3wTablesMapsC2.pdf.

⁴⁹ See Texas Demographic Center, Texas Population Projections Program, Population Projects for the State of Texas and Counties in One File, <http://demographics.texas.gov/Resources/TPEPP/Projections/2014/2014allcntymigtot.zip>.

The most swiftly growing big states are, in order, Texas, Florida, Washington, Arizona, North Carolina, Georgia, California, and Virginia.⁵⁰ Some of these states were already feverishly working to bolster Census response before the Secretary's decision to include a question on citizenship.⁵¹ They will likely redouble their outreach now. Some states may be less proactive. If adding a citizenship question to the decennial enumeration is likely to depress participation, the jurisdictions least responsive to their minority communities may have the most to lose.

The Questionable Justification to Move the Citizenship Question

None of this anticipated tumult is necessary. Secretary Ross claims that the decision was motivated by the request of the Department of Justice; the Department of Justice claims that it needs a citizenship question on the decennial enumeration in order to better enforce the Voting Rights Act.⁵² But there is substantial reason to believe that the claim is pretext.

I had the privilege of serving in the Department of Justice, in the Civil Rights Division, with responsibility during my tenure for the Division's voting rights docket, among other areas. I am not free to disclose the details of particular deliberative discussions in that position. But it does not breach any privilege to note that I do not believe we were unduly shy about bringing Voting Rights Act cases when the facts and the law indicated a violation, and I do not believe that we were unduly shy about asking for additional legal or evidentiary authority when that additional authority would enhance our ability to enforce civil rights law. After *Shelby County v. Holder*,⁵³ for example, we repeatedly urged Congress to repair a damaged Voting Rights Act by restoring provisions providing for preclearance and observer authority.⁵⁴ It has also been reported that we requested additional data from the Census — for inclusion on the ACS, not the decennial enumeration questionnaire — when we thought it would enhance our enforcement

⁵⁰ See U.S. Census Bureau, U.S. Dep't of Commerce, State Population Totals and Components of Change: 2010-2017 tbl.1, <https://www.census.gov/data/tables/2017/demo/pepest/state-total.html>.

⁵¹ See Nat'l Conference of State Legislatures, *The Census Is Coming. States Are Preparing.*, MEDIUM (Apr. 27, 2017), <https://medium.com/@NCSLorg/the-census-is-coming-states-are-preparing-7afaa6eb6c03>.

⁵² Letter from Wilbur Ross, Sec'y of Commerce, *supra* note 3; Letter from Arthur E. Gary, General Counsel, Justice Mgmt. Div., U.S. Dep't of Justice, to Dr. Ron Jarmin, Performing the Non-Exclusive Functions and Duties of Director, U.S. Census Bureau, U.S. Dep't of Commerce (Dec. 12, 2017), <https://assets.documentcloud.org/documents/4340651/Text-of-Dec-2017-DOJ-letter-to-Census.pdf>. Neither Secretary Ross nor the Department of Justice offered any reason for the change beyond its purported utility in enforcement of the Voting Rights Act.

⁵³ 133 S. Ct. 2612 (2013).

⁵⁴ See, e.g., Press Release, U.S. Dep't of Justice, Remarks of Attorney General Loretta E. Lynch at White House Event Commemorating 50th Anniversary of the Voting Rights Act (Aug. 6, 2015), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-white-house-event-commemorating-50th>; Press Release, U.S. Dep't of Justice, Head of the Civil Rights Division Vanita Gupta Delivers Keynote Remarks at the 107th NAACP National Convention (July 18, 2016), <https://www.justice.gov/opa/speech/head-civil-rights-division-vanita-gupta-delivers-keynote-remarks-107th-naacp-national>. See also, e.g., U.S. Dep't of Justice, Draft Legislation, Tribal Equal Access to Voting Act of 2015, <https://www.justice.gov/file/440986/download>; S.1912, 114th Cong. (2015) ("Native American Voting Rights Act of 2015").

ability.⁵⁵ But despite a deep commitment to enforcing the Voting Rights Act — indeed, perhaps because of that commitment — we never requested that the decennial enumeration include a question relating to citizenship. Nor had the Civil Rights Division of any Justice Department, under any Administration, for the previous 53 years.

Similarly, consider the position of civil rights groups engaged in extensive private enforcement of the Voting Rights Act, and fiercely advocating for vigorous public enforcement of the Act. Groups like the NAACP Legal Defense Fund, MALDEF, Asian Americans Advancing Justice, LatinoJustice PRLDEF, the Lawyers' Committee for Civil Rights Under Law, the ACLU, and many other members of the Leadership Conference for Civil and Human Rights coalition have a long and proud history of deploying the Voting Rights Act to combat discriminatory laws and procedures and to ensure equitable electoral opportunity. Each and every one has expressed vigorous opposition to the Commerce Secretary's decision to include a question related to citizenship on the decennial enumeration in this political climate.⁵⁶ If the information were really necessary to enforce the Voting Rights Act, this unified opposition by the private organizations most frequently litigating cases enforcing the Voting Rights Act would be exceedingly odd.

There are two main reasons for the opposition. First, since the Voting Rights Act was enacted in 1965, existing survey data on citizenship — originally from the “long form” of the Census and now from the successor American Community Survey — has been largely sufficient to bring and win VRA cases. And second, for any additional data to be incrementally useful as an enforcement tool, it must be not only more precise, but more accurate. The Census Bureau's action is not likely to meet this basic standard.

⁵⁵ Hansi Lo Wang, *Census Bureau Caught in Political Mess Over LGBT Data*, NPR, July 18, 2017, <https://www.npr.org/2017/07/18/536484467/census-bureau-found-no-need-for-lgbt-data-despite-4-agencies-requesting-it>; Letter from Arthur E. Gary, General Counsel, Justice Mgmt. Div., U.S. Dep't of Justice, to John H. Thompson, Director, U.S. Census Bureau, U.S. Dep't of Commerce (Nov. 4, 2016), <https://assets.documentcloud.org/documents/3892167/DOJ-to-Census-Bureau-2016-11-04-Edit.pdf>.

⁵⁶ *See, e.g.*, Press Release, NAACP LDF, LDF Responds to Citizenship Status Question Inclusion on 2020 Census, Mar. 27, 2018, <http://www.naacpldf.org/files/about-us/LDF%20Responds%20to%20Citizenship%20Status%20Question%20Inclusion%20on%202020%20Census.pdf>; Press Release, MALDEF, MALDEF Statement on Commerce Department's Approval of a Politically Charged Question on Citizenship on the 2020 Census, Mar. 27, 2018, http://www.maldef.org/news/releases/2018_03_27_MALDEF_Statement_on_Commerce_Departments_Approval_of_a_Politically_Charged_Question_on_Citizenship_on_the_2020_US_Census/; Press Release, AAAJ, Asian-Americans Advancing Justice Will Fight Addition of Citizenship Question in 2020 Census, Mar. 27, 2018, <https://advancingjustice-la.org/media-and-publications/press-releases/asian-americans-advancing-justice-will-fight-addition#.Wu9JTaQvyUk>; Press Release, LatinoJustice PRLDEF, Mar. 27, 2018, LatinoJustice PRLDEF Statement on the Addition of Citizenship Question to the 2020 Census http://latinojustice.org/briefing_room/press_releases/latinojustice_prldf_statement_on_the_addition_of_citizenship_question_to_the_2020_census/; Lawyers' Committee for Civil Rights and Economic Justice, Opposition to Census Citizenship Question, <http://lawyerscom.org/opposition-to-census-citizenship-question/>; Press Release, ACLU, ACLU Comment on Trump Administration Plan to Include Citizenship Question in 2020 Census, Mar. 27, 2018, <https://www.aclu.org/news/aclu-comment-trump-administration-plan-include-citizenship-question-2020-census>; Press Release, Leadership Conference on Civil and Human Rights, Secretary Ross Approves Ill-Advised Census Citizenship Question, Mar. 26, 2018, <https://civilrights.org/secretary-ross-approves-ill-advised-census-citizenship-question/>.

ACS Data Has Been Largely Sufficient to Enforce the Voting Rights Act

There are three main ways in which citizenship data are relevant in enforcing the Voting Rights Act, primarily in the context of redistricting-based vote dilution claims.⁵⁷ First, before a redistricting plan or at-large structure can be said to dilute electoral opportunity on the basis of race or language minority status, the affected communities must prove that they could exercise effective electoral opportunity with districts drawn in a different fashion.⁵⁸ In the name of litigation efficiency and administrability, the Supreme Court has set a bright-line threshold for this standard: plaintiffs must show that they could constitute more than half of the electorate in a district-sized population.⁵⁹ This showing, in turn, requires information about the electorate in a given area, by race or language minority status — and the most readily available such data are Census data about the citizen voting-age population, often abbreviated as “CVAP.”

Second, before a redistricting plan or at-large structure can be said to dilute electoral opportunity on the basis of race or language minority status, the affected communities must prove that they are indeed a comparatively unified “they” based on race or language minority status, and that other racial or language groups in the area are also sufficiently cohesive to deny the affected groups equitable electoral opportunity most of the time.⁶⁰ That is, plaintiffs must show that voting in the area is racially polarized.⁶¹ Because individual cast ballots are not identified by race or language minority status, researchers must impute electoral preferences to racial and language minority groups using several well-established methods of inference from the ecological population characteristics of voters within each precinct.⁶² These assessments are more accurate when the population characteristics more closely mirror the active electorate — and in some states, the most readily available such data are often data, by race or language minority status, about the precinct’s CVAP.⁶³

⁵⁷ In some circumstances, Census-based citizenship data might also be relevant in Voting Rights Act cases concerning particular barriers to casting and counting a ballot. For example, VRA disputes over the discriminatory placement of polling places or other election offices may turn in part (though only in part) on the demographic composition of the jurisdiction in question. *Cf. Sanchez v. Cegavske*, 214 F. Supp. 3d 961 (D. Nev. 2016) (addressing the discriminatory siting of in-person registration and early voting sites in areas with substantial Native American populations). And analysts will occasionally assess the impact of claims based on procedures of election administration by evaluating the demographic composition of precincts, in a manner similar to the ecological inference described below, *see infra* text accompanying notes 61-63. For these sorts of claims, Census-based data will generally be useful on similar terms as for the redistricting claims discussed in the text: the claims will turn on approximate ranges rather than particularly precise point estimates.

⁵⁸ *See* Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U. L. REV. 573, 586 (2016).

⁵⁹ *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986); *Bartlett v. Strickland*, 556 U.S. 1, 14-15, 18-20 (2009) (plurality opinion).

⁶⁰ *See* Levitt, *supra* note 58, at 586.

⁶¹ *Gingles*, 478 U.S. at 51.

⁶² *Gingles*, 478 U.S. at 52-53; J. GERALD HEBERT ET AL., *THE REALIST’S GUIDE TO REDISTRICTING: AVOIDING THE LEGAL PITFALLS* 45-48 (2d ed. 2010).

⁶³ Census-based CVAP data may be the most readily available in some states, but there are alternatives, including data based on actual registrants or actual voters, that may in certain circumstances be even more useful for estimating cohesion and polarization in the active electorate. One such data source is an assessment of predicted race and ethnicity based on name and surname, *see infra* text accompanying notes 82-86.

Finally, if plaintiffs can establish a violation of the Voting Rights Act based on vote dilution, that violation must be remedied, by implementing a system in which race or language minority groups have an equitable opportunity to elect candidates of their choice. That may involve replacing a multi-member election won by plurality vote with an alternative voting system, like limited voting or cumulative voting,⁶⁴ or it may involve drawing or redrawing district lines. In any event, testing whether the remedy will actually provide an equitable electoral opportunity based on race or language minority status requires an assessment of the local electorate — and again, in many states, the most readily available such data is usually data, by race or language minority status, about the CVAP of the precinct.⁶⁵

In each of these three areas, Census-based information about citizenship rates has — for the entire history of the Voting Rights Act — come from a survey of a representative American sample.⁶⁶ First, it came from the Census “long form”: a survey sent to a portion of the population (in 2000, approximately 17% of households) at the same time that the Census Bureau used the “short form” in its effort to enumerate every individual in the country.⁶⁷ After 2005, it came from the American Community Survey, a rolling monthly survey now capturing about 2.2 million responses per year; this information is available for the nation and all governmental units, down to aggregated block groups covering either one-year or five-year slices of the country.⁶⁸

Like any information from a survey, these data are not perfectly precise: the survey data are released at the block group rather than the block level,⁶⁹ and with the sample size comes an associated margin of error.⁷⁰ The margin of error is larger in smaller geographies and for shorter

⁶⁴ See, e.g., *United States v. Village of Port Chester*, 704 F. Supp. 2d 411, 448-53 (S.D.N.Y. 2010); *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 755-70 (N.D. Ohio 2009).

⁶⁵ See *supra* note 63.

⁶⁶ See, e.g., U.S. Census Bureau, U.S. Dep’t of Commerce, *Redistricting Data: Voting Age Population by Citizenship and Race (CVAP)*, https://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html.

⁶⁷ Bureau of the Census, U.S. Dep’t of Commerce, *DSSD Census 2000 Procedures and Operations Memorandum Series #LL-5*, Nov. 17, 1999, <https://www.census.gov/dmd/www/pdf/LL-5.pdf>. The overall percentage of households targeted by long-form surveys fluctuated from approximately 16% to approximately 25% in prior iterations. See NAT’L RESEARCH COUNCIL, *MODERNIZING THE U.S. CENSUS* app. A, at 188 (Barry Edmondson & Charles Schultze eds., 1995).

⁶⁸ U.S. Census Bureau, U.S. Dep’t of Commerce, *American Community Survey: Sample Size*, <https://www.census.gov/acs/www/methodology/sample-size-and-data-quality/sample-size/>. Occasionally, when Census geography boundaries change, it can be challenging to ensure that ACS responses from old Census geography are equivalent to ACS responses from new Census geography in multi-year compilations. See Persily, *supra* note 23, at 777.

⁶⁹ See U.S. Census Bureau, U.S. Dep’t of Commerce, *Citizen Voting Age Population (CVAP) Special Tabulation From the 2012-2016 5-Year American Community Survey (ACS)*, https://www2.census.gov/programs-surveys/decennial/rdo/technical-documentation/special-tabulation/CVAP_2012-2016_ACS_documentation.pdf. Citizenship rates may occasionally be translated to the census block level, where necessary, by imputation.

⁷⁰ Of course, the decennial enumeration data are also not perfect. Because they are not drawn from a survey, they do not have a similar statistical “margin of error,” but there are known lapses and imperfections. And while the Census

time periods, and smaller in larger geographies and for longer time compilations.⁷¹ But for the last 53 years, when Census-based data on citizenship have been necessary at all, the survey estimates have been largely sufficient for enforcing the Voting Rights Act.⁷²

Estimates of the citizen voting-age population are usually sufficient because each of the calculations using these data are themselves estimates. For example, VRA plaintiffs must show that the relevant racial or language minority communities could constitute more than half of the electorate in a district-sized population. But “district-sized” is a range, rather than a point: the Supreme Court has repeatedly held that district sizes may vary — for state and local districts, up to a presumptively valid 10% population disparity, and in some instances beyond.⁷³ Given the permissible range of district size, the fact that information concerning the relevant size of the minority population may also represent a range — a point estimate along with a margin of error — is rarely of concern.

Similarly, both the extent of racially polarized voting and the effectiveness of any particular remedy involve assessments of the electoral strength and cohesion of relevant racial or language minorities. But these evaluations involve patterns and trends, not points. The goal is not to definitively predict the precise vote count in a future election based on ironclad certainty about an individual’s voting preferences based on her race or ethnicity, and her propensity to register or turn out to vote for a particular candidate. Instead, the purpose of the analysis is to determine whether past voting behaviors generally indicate that racial or language minority communities would vote similarly most of the time, and whether they would be likely presented with effective equitable electoral opportunity more often than not.⁷⁴ There is no question that

enumeration generally has become more accurate over time, it continues to miss — to disproportionate degrees — members of racial and ethnic minority groups, young children, and poorer populations living in rental housing or homeless. *See, e.g.*, U.S. Census Bureau, Census Coverage Measurement Estimation Report, *supra* note 16, at 1-3, 15-17; U.S. Census Bureau, U.S. Dep’t of Commerce, Investigating the 2010 Undercount of Young Children – Analysis of Census Coverage Measurement Results (Jan. 2017), https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2020-2017_04-undercount-children-analysis-coverage.pdf.

⁷¹ The longer time compilations may introduce complications at the margins, as younger citizens become voting age and older citizens pass away, but the extent of this error is likely small in most jurisdictions. *See Persily, supra* note 23, at 777.

⁷² *See, e.g., Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1393 (E.D. Wash. 2014) (“Although U.S. Census data may not be perfectly accurate, it is routinely relied upon in § 2 cases.”).

Indeed, for some purposes, the survey estimates of citizenship are superior to any decennial tally, even in a counterfactual world in which the decennial solved more problems than it created. Recall that the ACS is a rolling monthly survey, updating information constantly throughout the decade; the enumeration, in contrast, is fixed at April of a decennial year. For swiftly growing populations, the rolling ACS estimates may be the only means to establish when racial or language minority communities reach threshold size in the middle of the decade. Voting Rights Act litigation is not only pursued in a decennial year.

⁷³ The Constitution generally grants more latitude in district size to state and local districts, and less to congressional districts, but in both cases, a modest level of deviation is permissible if that deviation is the result of legitimate redistricting purposes. *See Tennant v. Jefferson County Comm’n*, 567 U.S. 758, 759-60, 765 (2012); *Harris v. Ariz. Ind. Redistricting Comm’n*, 136 S. Ct. 1301, 1306-07 (2016).

⁷⁴ *See Joseph Fishkin, The Administration is Lying About the Census*, BALKINIZATION, Mar. 27, 2018, <https://balkin.blogspot.com/2018/03/the-administration-is-lying-about-census.html>.

these qualitative legal assessments must rely on rigorous analysis,⁷⁵ but to the extent they are informed by quantitative data, they tolerate a degree of imprecision.⁷⁶ Where citizenship data from the ACS have been used, they have largely been sufficient.

I have reviewed recent cases brought by the Department of Justice to enforce the Voting Rights Act against claimed vote dilution, where citizenship data have been most relevant. My review includes each case in the last eighteen years, across both Republican and Democratic Administrations, spanning two decades' worth of "long form" and ACS data.⁷⁷ To the best of my knowledge, there is not one of these cases in which a decennial enumeration would have enabled enforcement that the existing survey data on citizenship did not permit. Indeed, not one of these cases has realistically been close to the line.

Adding private litigation expands the sample set, but even in that context, it is exceedingly rare for plaintiffs enforcing the Voting Rights Act to run into trouble based on the adequacy of the Census's survey data, in any way that asking a citizenship question on the decennial enumeration might possibly cure.⁷⁸ I am familiar with only one such case.⁷⁹ And rather than demonstrating a need for a citizenship question on the decennial enumeration, it instead demonstrates that such a step is unnecessary.

⁷⁵ See Levitt, *supra* note 58, at 587-89.

⁷⁶ See Fishkin, *supra* note 74.

⁷⁷ These cases included: United States v. City of Eastpointe, Mich., No. 4:17-cv-10079 (E.D. Mich.); United States v. Texas, No. 5:11-cv-00360 (W.D. Tex.); United States v. Town of Lake Park, Fla., No. 9:09-cv-80507 (S.D. Fla.); United States v. Euclid City Sch. Bd., Ohio, No. 1:08-cv-02832 (N.D. Ohio); United States v. Sch. Bd. of Osceola Cty., Fla., No. 6:08-cv-00582 (M.D. Fla.); United States v. Georgetown Cnty. Sch. Dist., S.C., No. 2:08-cv-00889 (D.S.C.); United States v. Village of Port Chester, N.Y., No. 7:06-cv-15173 (S.D.N.Y.); United States v. City of Euclid, Ohio, No. 1:06-cv-001652 (N.D. Ohio); United States v. Osceola Cty., Fla., No. 6:05-cv-01053 (M.D. Fla.); United States v. Alamosa Cty., Colo., No. 01-cv-02275 (D. Colo.); United States v. Crockett Cty., Tenn., No. 1-01-1129 (W.D. Tenn.); United States v. Charleston County, S.C., Nos. 2:01-0155-11 (D.S.C.); United States v. Upper San Gabriel Valley Mun. Water Dist., No. 00-cv-07903 (C.D. Cal.); United States v. City of Morgan City, La., No. 00-cv-1541 (W.D. La.); United States v. City of Santa Paula, Cal., No. 00-03691 (C.D. Cal.); United States v. South Dakota (D.S.D.); United States v. Roosevelt Cty., Mont., No. 00-50 (D. Mont.); and United States v. Benson Cty., N.D., No. A2-00-30 (D.N.D.).

⁷⁸ There have been some cases brought on behalf of minority populations that had been growing quite rapidly; though the decennial enumeration did not show that the minority population was sizable enough to be the majority of a district-sized population, plaintiffs hoped that multiple ACS surveys from the middle of the decade would show that they were on the cusp of meeting this litigation threshold. In these cases, the power of the particular mid-decade survey evidence that plaintiffs produced was not up to the task for the geographies in question. See, e.g., *Benavidez v. Irving Ind. Sch. Dist.*, 690 F. Supp. 2d 451, 456-57, 458-61, 464 n.18. But these cases would not have been remedied by a more precise decennial enumeration of citizenship: at the start of the decade, existing data was sufficiently precise to show that the plaintiffs had not yet reached the appropriate threshold. Nothing in Secretary Ross's proposal would have given these plaintiffs any comfort.

⁷⁹ It is conceivable, of course, that plaintiffs have refrained from bringing cases on the margins — and more precise data that was also more accurate could further such cases. However, as explained below, adding a citizenship question to the decennial enumeration in this environment is likely to detract from the accuracy of the instrument, impeding rather than facilitating further enforcement of the VRA. See *infra* text accompanying notes 88-89.

The case in question is *Fabela v. City of Farmers Branch, Tex.*⁸⁰ In 2010, Ms. Fabela and several other Latino plaintiffs brought a Voting Rights Act lawsuit against the city of Farmers Branch, claiming that the city's at-large election system unlawfully diluted their right to vote. They presented evidence that Latino citizens could constitute a majority of the citizens of voting age in four different illustrative districts. Some of the evidence supporting this conclusion came from Census surveys: specifically, citizenship data from five years of ACS surveys, aggregated and tabulated at the block group level.⁸¹ The Department of Justice requested this tabulation in 2010, in association with decennial redistricting, and the Census Bureau provided the tabulation as requested; there is no indication that the Bureau would be unable to do the same in the future.

Judge Fitzwater, who was nominated by President Reagan and was then Chief Judge of the Northern District of Texas, heard the case. In a thorough opinion, Judge Fitzwater reviewed some of the distinctions between the ACS surveys and the decennial enumeration, and recognized that ACS data offered some challenges in a jurisdiction the size of Farmers Branch.⁸² But he also recognized that Supreme Court and Fifth Circuit precedent permitted flexibility in the data available to prove a Voting Rights Act violation.⁸³ And he specifically noted that plaintiffs had also presented evidence directly from the voter files, tallying registered voters with surnames separately identified by the Census as of Latino or Hispanic origin (also known as "SSRV" data), in order to help establish the size of the Latino electorate.⁸⁴ In that case, he found, "the SSRV data strongly corroborate the accuracy of the Hispanic CVAP estimates [from the ACS]."⁸⁵

Indeed, in many smaller jurisdictions (and in some larger ones like California and Texas), litigators regularly deploy similar analysis based on the likely racial or ethnic identity of a name or surname — sometimes on its own, and sometimes in concert with Census-based survey data — in order to help enforce the VRA. The Department of Justice has used this sort of information in its own VRA litigation.⁸⁶ It is a practice directly endorsed in the legislative history of the Voting Rights Act itself.⁸⁷ It is not exact, but particularly in concert with ACS survey data, it has been sufficient.

⁸⁰ 2012 WL 3135545 (N.D. Tex. Aug. 2, 2012).

⁸¹ *Id.* at *5.

⁸² *Id.* at *5-7.

⁸³ *Id.* at *7 (citing, inter alia, *Thornburg v. Gingles*, 478 U.S. 30, 46, 73 (1986), *Westwego Citizens for Better Gov't v. City of Westwego*, 906 F.2d 1042, 1046-47 (5th Cir. 1990), and *Citizens for a Better Gretna v. City of Gretna, La.*, 834 F.2d 496, 502 (5th Cir. 1987)).

⁸⁴ *Id.* at *6-7. "SSRV" stands for "Spanish-surname registered voters." *Id.*

⁸⁵ *Id.* at *8. Include *Cisneros v. Pasadena ISD*, 2014 WL 1668500 (S.D. Tex. Apr. 25, 2014).

⁸⁶ *See, e.g.*, *United States v. Alamosa County, Colo.*, 306 F. Supp. 2d 1016, 1022 (D. Colo. 2004); *see also* *United States' Brief in Opposition to Defendants' Motion to Exclude Bayesian Improved Surname Geocoding (BISG) Evidence*, *United States v. City of Eastpointe*, No. 4:17-cv-10079 (E.D. Mich. Apr. 26, 2018).

⁸⁷ Congress explained, when it expanded Voting Rights Act coverage in 1975 to include language minorities, that "persons of Spanish heritage" under the statute, *see* 52 U.S.C. § 10310(c)(3), included "'persons of Spanish language' as well as 'persons of Spanish surname' in Arizona, California, Colorado, New Mexico, and Texas." S. REP. NO. 94-295, 94th Cong., 1st Sess. 24 n.14, *reprinted in* 1975 U.S. Code Cong. & Admin. News 774, 790 n.14.

“Precision” at the Expense of Accuracy Does Not Help Enforce the VRA

The testimony above demonstrates that existing data have been largely sufficient to enforce the Voting Rights Act. But — contrary to what we know from past practice — even if there were many marginal cases, and even if ACS survey data were not up to the task, and even if other means of establishing the electorate like SSRV data were unable to compensate, it is still extremely unlikely that adding a question on citizenship to the decennial enumeration in this climate would improve any entity’s ability to enforce the Voting Rights Act.

Adding a question to the decennial enumeration may give the illusion of increased precision and greater statistical power. But in this climate, that illusion likely arrives with a far greater cost. There are known statistical means of compensating for the low response rates in a survey like the ACS, to account for those who refuse to participate. In contrast, there are few permissible means to compensate for low response rates in the enumeration.⁸⁸ If a question on citizenship in the enumeration causes response rates to drop, that loss cannot be repaired. And in addition to the impact on overall census enumeration mentioned above — that is, in addition to the impact on the Census Bureau’s one inviolate constitutional duty — the inaccuracy produced by refusal to participate directly impacts the ability to enforce the Voting Rights Act.

At the moment, the ACS data arrive with a minor margin of error. In the ostensible name of reducing that margin of error, adding a citizen question to the decennial enumeration may create a far larger one, by driving an even greater nonresponse rate. As explained above, vulnerable communities — including minority communities who might otherwise be seeking protection from the Voting Rights Act — are already chronically undercounted, and with the addition of a citizenship question, will be that much more likely to go untallied.⁸⁹ Which means that the enumeration is likely to systematically undercount precisely the people who most need the VRA. If the problem with the ACS survey is that it occasionally leaves doubt whether a population is sufficiently sizable to merit VRA protection, asking the question on the decennial enumeration will likely drive down participation so that it appears certain that the population is not sufficiently sizable to merit VRA protection. And because of the undercount, that certainty will be false.

Adding the citizenship question to the decennial enumeration in this climate is likely to lead to an undercount of the true Latino citizen population of jurisdictions like Farmers Branch, and others on the cusp of VRA protection. And this predictable undercount means that, contrary to the Department of Justice’s assertions, adding the question in this climate is not likely to increase any entity’s real enforcement capacity. An ostensible performance-enhancing drug that cripples the patient does not enhance performance.

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⁸⁸ See *supra* note 23.

⁸⁹ See U.S. Census Bureau, Census Coverage Measurement Estimation Report, *supra* note 16, at 1-3, 15-17.

Much of my career has been spent not only studying the Voting Rights Act, but contributing to its effective enforcement. If I believed that setting out in 2018 to add a question on citizenship to the 2020 decennial enumeration would improve the ability of the Department of Justice and private litigants to enforce the VRA — if I believed that it would improve litigants' capacity to deploy federal law to combat the abridgment or dilution of the vote on the basis of race or language minority status — I would be wholeheartedly applauding the efforts of the Department of Justice and the Secretary of Commerce.

Unfortunately, the analysis above shows that the eleventh-hour decision to add a citizenship question to the decennial enumeration is both unnecessary and counterproductive. And as bipartisan former Census Bureau officials have explained, in this climate, the decision poses a substantial risk to the Bureau's ability to undertake its one constitutionally mandated duty. A distorted enumeration will have profound and lingering consequences for funding and political power, including consequences for the constituents of Members of this Committee.

Still, these consequences are not yet inevitable. Congress has the power to reject or delay Secretary Ross's decision. And I urge the Committee to promptly consider exercising this power, at least delaying implementation until proper testing under real decennial enumeration conditions — in keeping with the Census Bureau's standard protocol for adjustments to the Census instrument — can establish that the concerns about distorted nonresponse are unwarranted.

I thank you for the opportunity to testify before you today, and to assist the Committee in its deliberations. I look forward to answering any questions that you may have.

The New York Times

OP-ED CONTRIBUTOR

How Trump's Citizenship Question May Hurt the G.O.P.

By Justin Levitt

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April 3, 2018

Last week, the Trump administration decided that the next census would ask every person in the country about their citizenship. An uproar followed. Minority communities will bear the most immediate brunt; indeed, some believe that's the very reason for the change.

But the related assumption — that the decision benefits Republicans — may be strikingly myopic.

The Census Bureau collects a lot of information to inform public and private decision making. The most important is what is called the decennial enumeration: a head count, every 10 years, of each and every individual in the country. An accurate census is the Constitution's first specific job for the federal government, five sentences into our [founding charter](#). It's the thing that drives political representation and billions of dollars in funding.

To ensure the accuracy of the constitutionally required count, the decennial enumeration is designed to be minimally intrusive: 10 questions taking 10 minutes or less. For those who in this climate distrust the federal government, adding a question on citizenship makes the head count toxic.

Its intrusion into the census could well have unanticipated consequences for the long-term distribution of power and money. Census results drive both political representation and funding — for large groups of people in broad areas. This means the decision to roll loaded dice on enumeration does not merely impact undocumented individuals, or permanent residents or minority citizens. Everyone in an area that loses numbers also loses clout and cash.

Yes, an undercount affects urban minorities — but also conservative rural agricultural communities dependent on farmworkers, and plenty of areas in between.

Those in power may feel threatened by swiftly growing local populations contending for recognition. But they are lashed to one another by the population count. When fear and distrust impair the census response, the old locals feeling threatened and the local newcomers both lose, cutting off the nose of the national portrait to spite its face.

The effect grows particularly across state lines. In the competition for power and funding, the absolute number of noncitizens is less significant than the comparative level of government distrust. Less trust means less census response. The larger the state, the larger the population growth; and the more that growth depends on minorities, the larger the impact of that comparative distrust.

Consider Texas. As in other growing states, its [population boom](#) has been fueled by minorities. An accurate census count should deliver Texas billions of additional dollars in federal grants and perhaps an extra three or four congressional seats most likely drawn by Republican legislatures. If Texans are substantially less likely to fill out the census forms than residents of other states, those benefits vanish. For all Texans.

The other big states at the top of the growth charts? Florida, Washington, Arizona, North Carolina and Georgia: red states aplenty. California is next, but also feverishly working to bolster its census response. “Love thy neighbor” turns out to be good fiscal policy; jurisdictions comparatively less responsive to their minority communities may have more to lose.

The path to this decision was appalling. The census is our largest civilian mobilization; because tiny modifications can have giant effects with 10 years of lingering impact, the Census Bureau rigorously tests every change. Except this one. It was [simply announced](#), over the apparent objections of nonpartisan staff members, by Secretary of Commerce Wilbur Ross. Mr. Ross said he did not know whether the change would cause a big problem, and so they should forge ahead. The Titanic was launched with more preparation and less hubris.

The decision is also based on transparent pretext. The Justice Department claimed the change would help enforce the Voting Rights Act by generating more precise data. But that is a tiny nugget of rationale buried in a mound of manure, which explains why voting rights advocates are livid. In this climate, amping up the question's prominence will decrease response from anyone who distrusts the federal government. The end result will be more "precise" but substantially less accurate. Performance-enhancing drugs that cripple the patient don't actually enhance performance.

The combination of haste and pretext lacing into a vulnerable population has become a tragically familiar brew of late. On this issue, it is not yet too late to change course.

Adding the citizenship question to the decennial enumeration at this moment represents at best extreme recklessness, and at worst the weaponization of statistics, upending a basic constitutional command. Americans across the political spectrum should be alarmed. And those thinking they may benefit from the tumult may find themselves unexpectedly tied to the most vulnerable in their midst.

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