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VIA FEDERAL E-RULEMAKING PORTAL & EMAIL

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Department of Commerce
Room 6616
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Washington, D.C. 20230
<http://www.regulations.gov> (Docket # OMB-2018-0004)
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Re: Comments on 2020 Census, Including Information Collection as Proposed by the Department of Commerce to the Office of Management and Budget

The NAACP Legal Defense & Educational Fund, Inc. (“LDF”), our country’s first and foremost civil rights and racial justice organization, appreciates the opportunity to provide comments in response to the February 13, 2019 *Federal Register* notice (the “Notice”).¹ Since its founding in 1940, one of LDF’s core missions has been the achievement of the full, equal, and active participation of all Americans, particularly Black Americans, in the political process.² Consistent with this mission, LDF has engaged in public education campaigns to inform communities, particularly Black communities,³ about prior censuses and the upcoming 2020 Census, explaining the importance of the Census count and advocating for various changes to the Census, including reforming how incarcerated people are counted on Census Day and using a combined race and ethnicity question.⁴ Most recently, LDF has vigorously opposed and sought public records on

¹ On August 7, 2018, LDF also submitted comments on the 2020 Census to the Department of Commerce in response to the June 8, 2018 Federal Register notice. See Ltr. From Leah C. Aden, Sherrilyn Ifill, et al. to Ms. Jennifer Jessup, https://www.naacpldf.org/wp-content/uploads/2018.08.07_NAACP-LDF-Final-Draft-Public-Comment_-Census.-revd.pdf.

² LDF has been a separate entity from the NAACP, and its state and local branches, since 1957.

³ See NAACP Legal Def. & Educ. Fund, Inc., Count on Change 10-11 (2009), http://www.naacpldf.org/files/publications/Count-on-Change-2010_census_brochure.pdf.

⁴ See, e.g., Letter from Sherrilyn A. Ifill, President & Director Counsel, and Leah C. Aden, Assistant Counsel, NAACP Legal Def. & Educ. Fund, Inc. to Karen Humes, Chief, Population Division, U.S. Census Bureau (July 19, 2015), http://www.naacpldf.org/files/case_issue/NAACP%20LDF%20Re%20Residence%20Rule.pdf (urging the Census Bureau to count incarcerated people as residents of their last known pre-arrest home address, rather than of the particular prison facility where they happen to be located on Census day, discussed further in Section V(C), *infra*); Letter from Sherrilyn A. Ifill, President & Director Counsel,



the Census Bureau’s decision to add a citizenship status question to the decennial 2020 Census.⁵ The failure to provide responsive records and be transparent about the decision-making process for the proposed addition of the citizenship status question resulted in LDF filing a Freedom of Information Act lawsuit against the U.S. Department of Justice.⁶

LDF views a non-discriminatory, Census, and the collection of complete, accurate, and useful data about our nation’s diverse people, to be among the most important civil rights issues of our day, impacting, among other things, political representation and the achievement of racial justice. For this reason, we offer comments in this letter on various challenges facing this upcoming decennial Census as set forth in the Notice, including the proposed citizenship status question.

Introduction

Who counts in America is largely determined by who the government counts each decade in America. This has been true since the requirement of enumerating the national population was first enshrined in the U.S. Constitution in 1787 and since Thomas Jefferson conducted the first U.S. Census in 1790.⁷ And when it

and Leah C. Aden, Assistant Counsel, NAACP Legal Def. & Educ. Fund, Inc. to Karen Humes, Chief, Population Division, U.S. Census Bureau (Sept. 1, 2016) http://www.naacpldf.org/files/case_issue/NAACP%20LDF%20Letter%20to%20Chief%20Humes%20of%20the%20Census%20Bureau_0.pdf (same) [hereinafter, “Letters from Ifill to Humes,” collectively].

⁵ See Press Release, LDF Disappointed in the U.S. Census Bureau’s Proposed Residence Criteria for Incarcerated Persons for 2020 Census, NAACP Legal Def. & Educ. Fund., Inc., (July 7, 2016), <http://www.naacpldf.org/press-release/ldf-disappointed-us-census-bureau%E2%80%99s-proposed-residence-criteria-incarcerated-persons-2>; Letter from Leah C. Aden, Senior Counsel, NAACP Legal Def. & Educ. Fund, Inc., to Vernon E. Curry, Freedom of Information Act Officer, U.S. Census Bureau (Apr. 11, 2018) (on file with LDF) (seeking records from the Census Bureau pursuant to the Freedom of Information Act pertaining to the Trump administration’s attempt to add a citizenship status question to the 2020 decennial U.S. Census); Letter from Leah C. Aden, Senior Counsel, NAACP Legal Def. & Educ. Fund, Inc., to Laurie Day, Chief Initial Request Staff, Office of Legal Policy, et al. (Apr. 11, 2018) (on file with LDF) (seeking records from the Department of Justice regarding same); Letter from Leah C. Aden, Senior Counsel, NAACP Legal Def. & Educ. Fund, Inc., to Dr. Catrina Purvis, Chief Freedom of Information Act Officer, Office of Privacy and Open Government (Apr. 11, 2018) (on file with LDF) (seeking records from the Department of Commerce regarding same).

⁶ See Press Release, LDF and American Oversight File Lawsuit for DOJ Records of Census Citizenship Question, NAACP Legal Def. & Educ. Fund, Inc., Oct. 15, 2018, <https://www.naacpldf.org/press-release/ldf-american-oversight-file-lawsuit-doj-records-census-citizenship-question/>.

⁷U.S. Census Bureau, 1790 Overview,



comes to identifying the racial makeup of our country, the Census has never been neutral: the Framers at the Constitutional Convention specified that “free Persons” were to be counted in full, “Indians not taxed” were not to be counted, and “three fifths of all other Persons” were to be counted.⁸ “Indians” were excluded by name; enslaved Black people were excluded by implication. This fractional inclusion of enslaved people served only as a political bargaining chip and as a way to protect and prolong white supremacy and the institution of slavery. *Race has been and continues to be inextricably bound up in the decennial U.S. Census, and thus is a significant indicator of whether one is counted in America.*

“A census is a picture of a nation,” said Herman Habermann when he was the Director of Statistical Programs for the United Nations, before he became Deputy Director of the U.S. Census Bureau.⁹ He added, “A census lets each of us as individuals think about his or her place in the country.” A census might be a picture, but it is not the whole picture, and many see their place in the country as becoming more uncertain each day. Since the first attempt at enumeration in 1790, the U.S. Census was plagued by chronic undercounting. This undercounting has been particularly severe for Black people in America, who have been undercounted at far more substantial rates than white people since 1940, when undercount data was first recorded, as discussed in more detail *infra*. For the 2020 decennial Census, the Trump administration seeks to widen the gap between who is counted and who is not by adding a question about citizenship status, citing an implausible justification that doing so will help protect the voting rights of minority groups. As described below, there is overwhelming judicially-recognized and other evidence that the use of this question will harm communities of color and little, if any, evidence showing that it will have any benefit. This is a thinly veiled attack on the concept of equal political representation, and thus on the democratic process and foundational constitutional principles.

https://www.census.gov/history/www/through_the_decades/overview/1790.html (last visited Aug. 1, 2018); U.S. Const. art. I, § 2.

⁸ U.S. Const. art. I, § 2; see Leadership Conf. Educ. Fund, et al., *Race and Ethnicity in the 2020 Census: Improving Data to Capture a Multiethnic America* 1 (2014), <http://civilrightsdocs.info/pdf/reports/Census-Report-2014-WEB.pdf> [hereinafter “Race and Ethnicity”] (“For more than 150 years, civic leaders used [Census] information to advance discriminatory policies and maintain positions of privilege and power for the majority White population, even in the face of constitutional amendments abolishing slavery, establishing equal protection under the law, and guaranteeing voting rights for all Americans, regardless of race, ethnicity, and national origin.”).

⁹ Peter Skerry, *Counting on the Census?: Race, Group Identity, and the Evasion of Politics* 11 (2000), quoting Hermann Habermann, *The Census—A Cornerstone in the Construction of a Nation*, Address at the Central Statistical Service in Pretoria, South Africa (Nov. 17, 1995).



The Framers called for a decennial Census to achieve a fair representation in the House of Representatives, meaning that congressional districts would each contain approximately the same number of people. To not be counted is to be part of a community that is politically underrepresented. *The addition of the citizenship status question is an intentional and partisan attempt to decrease representation for people of color, including non-citizens and undocumented persons, while increasing representation in primarily white, conservative-leaning districts.* And the Trump administration’s rationale for adding the citizenship question—it is necessary for enforcement of Section 2 of the Voting Rights Act—is a cynical pretext without any basis in evidence, as courts have recognized, for advancing a policy that is intended to undermine the rights of communities of color.

Being undercounted in the decennial Census can affect representation at every level of government—Congress, state legislative districts, and local bodies like school boards and city councils. And when communities are undercounted, they also risk losing essential federal funding for programs like medical assistance, food stamps, education, and housing.¹⁰ *The historical trend of undercounting Black people and other people of color and denying them fair and accurate representation must end, and there have been many efforts to do this over the last several decades.* In a myriad of ways, the Trump administration, though, now endeavors to reverse any progress made to reduce the undercount and manipulate the Census to achieve partisan and anti-democratic ends. Two federal courts, however, have blocked one such attempt by the Trump administration, with both courts finding that the attempted addition of the citizenship status question violates administrative law and one court finding that it violates constitutional law. According to both Judge Furman of the Southern District of New York¹¹ and Judge Seeborg of the Northern District of California,¹² the Department of Commerce abused its discretion and acted arbitrarily and capriciously in adding the citizenship status question, thus violating the Administrative Procedure Act. And according to Judge Seeborg, the addition of the citizenship status question violates the Constitution’s Enumeration Clause, as it would interfere with the constitutional obligation to conduct an accurate Census and serves no reasonable governmental purpose.

¹⁰ Marisa Hotchkiss & Jessica Phelan, U.S. Census Bureau, Uses of Census Bureau Data in Federal Funds Distribution 3-4 (2017), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf>.

¹¹ *New York v. U.S. Dep’t of Commerce*, 18-cv-2921 (JMF), 18-cv-5025 (JMF), 351 F. Supp. 3d 502 (S.D.N.Y. 2019).

¹² *California v. Ross*, 18-cv-01865 (RS), 18-cv-02279 (RS), 2019 WL 1052434 (N.D. Cal. Mar. 6, 2019).



The baseless assault on people of color, including immigrant people, about 4.2 million of whom are Black,¹³ and on democratic principles themselves, must be stopped. As found by Judge Seeborg, “including the citizenship question on the 2020 Census is fundamentally counterproductive to the goal of obtaining accurate citizenship data about the public” and “threatens the very foundation of our democratic system.”¹⁴ LDF agrees. The citizenship status question must be rejected.

I. Counting, and Not Counting, a New Nation

The U.S. Census emerged from two political compromises during the Constitutional Convention of 1787 that would forever cause substantial reverberations on American life. *First* was the “Great Compromise,” in which the Convention, at Roger Sherman’s urging, agreed that each state would have an equal number of representatives in the Senate, but that there would be proportional representation based on total population in the House of Representatives.¹⁵ *Second* was the compromise in which the founders agreed that enslaved Black people would essentially be counted as three-fifths of a person. Disputes over how to count enslaved people began approximately a decade earlier in the context of how a state’s wealth was to be calculated for taxation purposes.¹⁶ Regarding the proposal that a state’s total population was an apt indicator of wealth, John Adams asserted that enslaved people should be counted in the total population because, as workers, they produced wealth. Benjamin Harrison of Virginia rebutted that “slave labor” was less productive, and “two slaves should be counted as one freeman,”¹⁷ thus originating the idea of fractional representation. While the three-fifths plan was never enacted as a way to apportion expenses, it was brought up again as a compromise on the question of slavery and proportional representation in the House of Representatives.¹⁸ This arbitrary ratio in the Census Clause of the Constitution, with its dehumanizing implications, would serve along with other constitutional

¹³ Monica Anderson & Gustavo Lopez, *Key facts about black immigrants in the U.S.*, Pew Res. Ctr. (Jan. 24, 2018), <http://www.pewresearch.org/fact-tank/2018/01/24/key-facts-about-black-immigrants-in-the-u-s/>.

¹⁴ *Ross*, 2019 WL 1052434 at *70.

¹⁵ See Jeremy C. Pope & Shawn Treier, *Reconsidering the Great Compromise at the Federal Convention of 1787: Deliberation and Agenda Effects on the Senate and Slavery*, 55 *Am. J. of Pol. Sci.* 289, 289-90 (2011).

¹⁶ See Don E. Fehrenbacher, *The Slaveholding Republic* 21 (2001).

¹⁷ *Id.* at 22 (internal quotation marks omitted).

¹⁸ The Census Act of 1790 would further command that the marshals charged with enumeration of states’ inhabitants “distinguish[] free persons . . . from all others.” Act of March 1, 1790, ch.2, § 1, 1 Stat. 101, 101, https://www.census.gov/history/pdf/1790_Census_Act.pdf.



provisions to protect white supremacy and the institution of slavery and to link the decennial Census with the subordination of Black people.

The Framers' intent in adding a requirement for a decennial Census in the Constitution was to create a non-partisan tool for ensuring fair and equal representation in the House of Representatives, their acquiescence to slavery's prolonging notwithstanding.¹⁹ James Madison, Ben Franklin, Alexander Hamilton, James Wilson, and others argued forcefully that congressional districts should be apportioned equally by population and that each should have the same number of representatives.²⁰ The constitutional drafters knew "that the calculation of populations could be and often were skewed for political or financial purposes," and thus sought to draft a constitutional provision that would help ensure a fair process.²¹ Madison and others were particularly concerned with the accuracy and impartiality of the Census, and saw a system of proportional representation counterbalanced with a system of proportional taxation as the key to ensure such accuracy and impartiality. In 1788, Madison wrote,

As the accuracy of the census to be obtained by the Congress will necessarily depend . . . on the . . . States, it is of great importance that the States should feel as little bias as possible, to swell or to reduce the amount of their numbers. Were their share of representation alone to be governed by this rule, they would have an interest in exaggerating their inhabitants. Were the rule to decide their share of taxation alone, a contrary temptation would prevail. By extending the rule to both objects, the States will have opposite interests, which will control and balance each other, and produce the requisite impartiality.²²

Even before the first Census would be carried out in 1790, ensuring accuracy and nonpartisanship were substantial concerns for the Framers.

¹⁹ See *Wesberry v. Sanders*, 376 U.S. 1, 13-14 (1964) (discussing the Constitution's inclusion of the Census Clause as a way to guarantee "fair representation of the people" in the House of Representatives, as proposed by Edmund Randolph and endorsed by George Mason at the Constitutional Convention).

²⁰ See *id.* at 10-11.

²¹ *Utah v. Evans*, 536 U.S. 452, 500 (2002) (Thomas, J., dissenting).

²²The Federalist No. 54 (James Madison (Publius)) (1788), <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-54>.



When Thomas Jefferson finished conducting the first U.S Census, he feared that undercounting distorted the final tally.²³ While undercounting would be a perpetual problem for Census administrators, the links between undercounting and race would not emerge until the end of the Civil War with the passage of the Thirteenth and Fourteenth (“Reconstruction”) Amendments to the U.S. Constitution. The Thirteenth Amendment, which legally abolished slavery and involuntary servitude, nullified the distinction between “free Persons” and “all other Persons” in the Census Clause in Article I of the Constitution. The Fourteenth Amendment in its second section directly addressed and reversed the three-fifths calculation in the Census Clause, declaring, “Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.”²⁴ The Fourteenth Amendment also shaped the future of civil rights in America through its Due Process Clause, stating that no state “shall deprive any person of life, liberty, or property, without due process of law,” and Equal Protection Clause, stating that no state shall “deny to any person . . . equal protection of the laws.”²⁵ In enacting Section 2 the Fourteenth Amendment, one U.S. Representative explained that the Constitution requires, and had always required, that “the entire immigrant population is included in the basis of representation.”²⁶ He added, the “whole immigrant population should be numbered with the people and counted as part of them.”²⁷ By 1900, Native American people living on and outside reservations would be counted in the decennial U.S Census,²⁸ and the Supreme Court would recognize that citizens and non-citizens alike are protected fully by the Fourteenth Amendment’s Equal Protection Clause.²⁹

²³ See Christopher M. Taylor, *Vote Dilution and the Census Undercount: A State-by-State Remedy*, 94 Mich. L. Rev. 1098, 1101 (1996) (explaining that Jefferson attributed the undercount to “a fear of population-linked taxes”).

²⁴ U.S. Const. amend. XIV, § 2.

²⁵ *Id.* § 1.

²⁶ Cong. Globe, 39th Cong., 1st Sess. 432 (1866).

²⁷ *Id.*

²⁸ U.S. Census Bureau., *Censuses of American Indians*, https://www.census.gov/history/www/genealogy/decennial_census_records/censuses_of_american_indians.html (last visited Aug. 1, 2018).

²⁹ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (unanimously holding that the Chinese American plaintiffs were entitled to equal protection under the Fourteenth Amendment despite not being U.S. citizens and that a race-neutral and otherwise valid law applied in a racially discriminatory manner was unconstitutional under the Fourteenth Amendment’s Equal Protection Clause).



II. The Census, Race, and Ethnicity After the Fourteenth Amendment

Since the end of the Civil War and the abolition of slavery, the decennial U.S. Census has served to disadvantage communities of color and immigrant groups in various ways. In the 1870 Census—the first in which all persons, other than “Indians not taxed,” were required to be counted—Black people were “egregiously undercounted . . . , but lacked the political clout to secure a recount,” unlike predominantly white cities that were undercounted but successfully lobbied for recounts.³⁰ Even if the Census had reported an accurate number for a sizable minority group, however, it was no guarantee that this would have translated into fairer and more proportionate political representation. In 1920, the Census reflected the large-scale waves of migration of Black people in the rural South and immigrant groups from Europe into New York and other urban areas in the Northeast. Representatives from rural districts, however, blocked the reapportionment process, depriving racially and ethnically diverse cities of equal political representation for ten years while concentrating political power in less populous, white regions.³¹

By this point, Congress had created a permanent Census Bureau within the Department of Commerce (DOC), having recognized in 1902 that such an agency was necessary for handling the increasingly complex endeavor of carrying out the decennial Census.³² With the 1940 Census, the DOC first began officially documenting the Census undercount, both with respect to the overall population and, much more acutely, with respect to the Black population.³³ Government officials realized the extent of the undercount when the number of Black men who registered to fight in World War II seemed implausibly large in light of the total number enumerated in the Census.³⁴ The undercount of Black people in the 1940 Census was approximately 8.4%, or 1.2 million people.³⁵

³⁰ Samuel Issacharoff & Allan J. Lichtman, *The Census Undercount and Minority Representation: The Constitutional Obligation of the States to Guarantee Equal Representation*, 13 Rev. Litig. 1, 6 (1993).

³¹*Id.*; U.S. Census Bureau, 1920 Overview, https://www.census.gov/history/www/through_the_decades/overview/1920.html (stating that Congress eventually passed a bill in 1929 requiring reapportionment based on the results of the 1930 Census).

³² U.S. Census Bureau, Agency History, https://www.census.gov/history/www/census_then_now/. In 1903, the Census Bureau was relocated from the Department of the Interior to the Department of Commerce and Labor and remained within the Department of Commerce when Commerce and Labor split into two agencies in 1913. *Id.*

³³ See Taylor, *supra* note 23, at 1101.

³⁴ Christian Salazer, Deepti Hajela, & Randy Herschaf, Associated Press, *Black Undercount Found in 1940 Census Records* (May 21, 2012), <https://www.bet.com/news/national/2012/05/21/black-undercount-found-in-1940-census-records.html>; David A. Graham, *The Unpredictable Political*



In addition to revealing a striking racial undercount, the 1940 Census also produced data that was perniciously used in one of the most shameful chapters in this country’s history. The Census Bureau breached confidentiality requirements and provided the U.S. Secret Service with the addresses of Japanese Americans, facilitating the government’s efforts to round them up for imprisonment in internment camps.³⁶ Echoes of this form of misusing Census data for discriminatory “national security” purposes were seen again in 2004, when the Census Bureau provided the Department of Homeland Security (DHS) with data revealing geographic locations with high concentrations of Arab Americans, and also when members of the Trump administration proposed “national registries” for people from certain countries, premised on what America did to Japanese Americans during World War II.³⁷ From the beginning then, people of color, including immigrant groups, have had had justified reason to be suspicious of the claim that the Census was simply an “actual Enumeration”³⁸ of the people—nothing more, and nothing less.

Undercounting Black people in the decennial U.S. Census at a significantly higher rate than undercounting non-Black people persisted throughout the twentieth century. In fact, the “Black-nonblack undercount rate” was even worse in 1990 (4.4.) than it was in 1940 (3.4).³⁹ Advocates began to pay more attention and demand improvement with each new report of an undercount for minority populations in the decennial Census. At the time of the 1990 census, “minority leaders were expressing dismay that once again hundreds of thousands of

Effects of 2020 Census Tinkering, The Atlantic (June 25, 2018), <https://www.theatlantic.com/politics/archive/2018/06/the-unpredictable-political-effects-of-trumps-census-moves/563645/> (summarizing one source as stating that “the Census only realized how badly off its tally of black men was when more enlisted in World War II than existed, according to Census figures”).

³⁵ Karen Juanita Carrillo, *1940 U.S. Census Missed 1 Million Black People*, N.Y. Amsterdam News (May 30, 2012), <http://amsterdamnews.com/news/2012/may/30/1940-us-census-missed-1-million-black-people/>.

³⁶ Katy Steinmetz, *The Debate Over a New Citizenship Question Isn’t the First Census Fight. Here’s Why the Count Is Controversial.*, Time (Mar. 27, 2018), <http://time.com/5217151/census-questions-citizenship-controversy/>.

³⁷ See Lynette Clemetson, *Homeland Security Given Data on Arab-Americans*, N.Y. Times (July 30, 2004), <https://www.nytimes.com/2004/07/30/us/homeland-security-given-data-on-arab-americans.html>; Jonah Engel Bromwich, *Trump Camp’s Talk of Registry and Japanese Internment Raises Muslims’ Fears*, N.Y. Times (Nov. 17, 2016), <https://www.nytimes.com/2016/11/18/us/politics/japanese-internment-muslim-registry.html>.

³⁸ U.S. Const. art. I, § 2.

³⁹ Skerry, *supra* note 9, at 82.



individuals would not be enumerated in the decennial count.”⁴⁰ And by 2000, “after a decade of litigation and controversy,” the problem remained unresolved, and “concern about the minority undercount continue[d] unabated[.]”⁴¹ Indeed, in 2000, and continuing in 2010, the Census for the first time had begun *overcounting* non-Hispanic white people, while still undercounting the Black population.⁴²

III. Black Political Representation During and After the Civil Rights Movement

The Fifteenth Amendment, passed in 1869, ensured that the right of U.S. citizens “to vote shall not be denied or abridged by the United States or by any state on account of race, color, previous condition of servitude.” Though this other Reconstruction Amendment theoretically provided Black American men with the right to vote, many decades would pass during which voting, or advocating for voting rights, by Black people was denied or abridged and resulted in being imprisoned on false charges, beaten, or murdered. In 1940, due to racist Jim Crow laws and the constant threat of violence, only 3% of eligible Black Southerners were registered to vote.⁴³ And, because legislative districts did not have to be equal in population until 1964,⁴⁴ racist malapportionment caused urban areas with many residents of color to be often severely underrepresented compared to rural areas with white populations. Voting and registering Black people to vote was a key component of the Civil Rights Movement, and Black activists and others were beaten and killed for their efforts even as Congress moved forward with legislation to finally protect minority voting rights through federal legislation.⁴⁵ In 1965, Congress enacted the Voting Rights Act (VRA), widely considered one of this nation’s most important pieces of legislation and certainly a cornerstone of civil rights legislation. Congress passed the VRA to deliver on the unfulfilled promise of

⁴⁰ *Id.* at 1.

⁴¹ *Id.*

⁴² See Press Release, Census Bureau Releases Estimates of Undercount and Overcount in the 2010 Census, U.S. Census Bureau (May 22, 2012), https://www.census.gov/newsroom/releases/archives/2010_census/cb12-95.html; Skerry, *supra* note 9, at 82.

⁴³ Kraig Beyerlein & Kenneth T. Andrews, *Black Voting During the Civil Rights Movement: A Micro-Level Analysis*, 87 *Social Forces* 1, 4 (2008).

⁴⁴ *Reynolds v. Sims*, 377 U.S. 533 (1964) (requiring that legislative districts be equal in population); see also *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) (“Equal representation for equal numbers of people is a principle designed to prevent debasement of voting and diminution of access to elected representatives.”).

⁴⁵ See, e.g., Library of Congress, Civil Rights History Project, Voting Rights, <https://www.loc.gov/collections/civil-rights-history-project/articles-and-essays/voting-rights/>.



the Fourteenth and Fifteenth Amendments and to eliminate the “insidious and pervasive evil” of *de jure* and *de facto* racial discrimination in voting.⁴⁶ The core function of the VRA is to allow for robust enforcement of federal protections for voting and to provide for individuals to challenge federal, state, and local voting laws that are racially discriminatory in design or effect.⁴⁷

With the rising number of Black voters resulting from the VRA’s enforcement, came new ways to diminish the political power of minority communities and undermine the Census’s goal of achieving fair and accurate political representation. One of the most harmful methods has been packing and cracking Black voters among as many districts as possible or within as few districts as possible to dilute their voting strength. Historically and into the present, this manipulative redistricting has denied communities of color of the ability to elect their candidates of choice at all levels of government and thereby of access to representation on issues that are of particular concern to communities of color. While Section 2 of the VRA includes protections against such manipulative redistricting, those protections were not fully developed and applied by the U.S. Supreme Court until *Thornburg v. Gingles*, 478 U.S. 30, in 1986. Even still, attempts at attacking the political power of communities of color through this manipulative redistricting persist, contradicting the goals of the Framers of the Fourteenth and Fifteenth Amendments and of the Constitution’s Census Clause.⁴⁸

In addition to discriminatory state action like manipulative redistricting, structural and systemic racism persists through the undercount of Black people in the decennial Census. Groups that have been denied economic opportunity in America are particularly likely not to be counted by the Census. Poverty is often linked with people moving frequently, living in “irregular” or “unusual” housing,⁴⁹

⁴⁶ *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

⁴⁷ See 52 U.S.C.A. § 10302.

⁴⁸ See, e.g., Robert Barnes, *Supreme Court Sends Case on North Carolina Gerrymandering Back to Lower Court*, Wash. Post (June 25, 2018), https://www.washingtonpost.com/politics/courts_law/supreme-court-sends-case-on-north-carolina-gerrymandering-back-to-lower-court/2018/06/25/03c1119e-787e-11e8-93cc-6d3beccdd7a3_story.html?utm_term=.6527180f051f; Josh Gerstein, *Supreme Court Upholds Most of Texas Redistricting Plan*, Politico (June 25, 2018) (explaining the U.S. Supreme Court’s decision to uphold Texas’s redistricting plan despite findings by lower courts that the plan intentionally discriminated against Latinx voters).

⁴⁹ See Skerry, *supra* note 9, at 87-90 (describing the difficulty of enumerating immigrant populations and certain communities of color for Census purposes due to unusual housing linked to poverty, such as “makeshift subdivisions” with multi-family residences in which different people tend to come and go, and housing that often lack visible addresses, working doorbells, or mailboxes).



and experiencing periods of housing instability—all factors that can lead to being missed in the Census count. Specific events that happen shortly before a decennial Census, like the foreclosure crisis of 2008 and certain natural disasters, also disproportionately harm people of color and can exacerbate the undercount.⁵⁰ *In 2010, the Census undercounted Black people by more than 800,000, while, as mentioned above, overcounting non-Hispanic white people.*⁵¹ And more than one in every three Black people in the U.S. currently live in what are considered “hard-to-count census tracts.”⁵²

The Census itself, which had been used at various times to target minority groups and aid in the subordination of Black people, was also deployed during the Civil Rights Movement to enforce civil rights laws, remediate racial harms, and support anti-subordination efforts. For example, Census data was used to reveal “unequal opportunity and access to affordable housing, jobs, and institutions of higher learning, a portrait of inequality in America that helped spur passage of seminal civil rights protections.”⁵³ Census data was also used to implement school desegregation plans after the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954).⁵⁴ The importance of the Census also grew during this time due to a series of U.S. Supreme Court cases holding that various types of electoral districts must be substantially equal in population.⁵⁵ Thus, the need for a fair and accurate Census that ensures equal representation has only become more urgent.

IV. A Climate of Fear: The Citizenship Status Question’s Role in the Assault on Immigrant Communities and Communities of Color

While there are multiple factors that are likely to impede the Census Bureau from conducting a non-discriminatory, complete, and accurate 2020 decennial Census, several of which are discussed below, the most flagrant instance of government manipulation of the Census for partisan gain is the attempt by the Trump administration to ask individuals about their citizenship status. Census officials have considered the merits of a citizenship status question for decades, and *there is a near consensus from civil rights organizations and non-partisan experts*

⁵⁰ See NAACP Legal Def. & Educ. Fund, Inc., Count on Change, *supra* note 3, at 10-11.

⁵¹ The Leadership Conference Educ. Fund, Will You Count? African Americans in the 2020 Census 1 (2018), <http://civilrightsdocs.info/pdf/census/2020/Fact-Sheet-African-Americans-HTC.pdf>.

⁵² *Id.*

⁵³ Leadership Conference, Race and Ethnicity, *supra* note 8, at 1.

⁵⁴ *Id.*

⁵⁵ See *Wesberry v. Sanders*, 376 U.S. 1 (1964) (regarding congressional districts); *Reynolds v. Sims*, 377 U.S. 533 (1964) (regarding state legislative districts), *Avery v. Midland Cnty.*, 390 U.S. 474 (1968) (regarding local government districts).



*that adding the question is likely to suppress the response rate and exacerbate the existing undercount, particularly of already hard-to-count populations of Latinx and Black communities.*⁵⁶ As elaborated in Section VII, *infra*, the addition of the citizenship status question is an intentional attempt to prevent people of color, including immigrant people of any citizenship status, from being counted in the Census for purposes that include manipulating apportionment of congressional representation and redistricting and distorting the allocation of billions of dollars in federal funding.

The harm that would be caused by the citizenship status question—and by the other challenges facing the 2020 Census discussed in Section V, *infra*—are sharply amplified in the current climate of fear caused by racism and xenophobia at the highest levels of government. The citizenship status question does not arise in a vacuum, but rather as part of an orchestrated campaign that involves voter suppression, sowing fear in and targeting immigrant communities, hostility toward communities of color, and the undermining of basic civil rights.

A. Voter Suppression

For almost five decades, one of the most effective shields to attacks on minority voting rights was Section 5 of the Voting Rights Act. Section 5 required jurisdictions with a history of chronic racial discrimination in voting to submit proposed changes to voting laws and procedures to the U.S. Department of Justice (DOJ) or a federal court in Washington, D.C. for pre-approval. Between 2010 and 2013 alone, the DOJ scrutinized 44,790 voting changes to determine whether they harmed minority voters.⁵⁷ This process, known as “preclearance,” “served as our democracy’s discrimination checkpoint by halting discriminatory voting changes *before* they were implemented.”⁵⁸ Between 1982 and 2006, when Congress reauthorized Section 5 for another 25 years, Section 5 blocked over 1,000 proposed

⁵⁶ See Letter from Anti-Defamation League to Jennifer Jessup, Dep’t of Commerce (July 30, 2018) at 3-4 (on file with LDF) (public comment letter opposing the addition of the citizenship status question to the decennial 2020 U.S. Census and stating that hundreds of civil rights groups, Census experts, elected representatives, and faith groups have come out in opposition to the citizenship status question).

⁵⁷ NAACP Legal Def. & Educ. Fund, Inc., *Democracy Diminished: State and Local Threats to Voting Post-Shelby County, Alabama v. Holder 1* (updated February, 2019), <https://www.naacpldf.org/press-release/democracy-diminished-ldf-releases-report-on-state-and-local-threats-to-voting-rights-three-years-after-landmark-shelby-county-decision/>.

⁵⁸ *Id.*



intentionally discriminatory voting changes.⁵⁹ In *Shelby County, Alabama v. Holder*, 570 U.S. 2 (2013), the U.S. Supreme Court effectively nullified Section 5 of the VRA, opening the door for jurisdictions to implement state and local voting laws that were intentionally racially discriminatory or would have a disproportionately suppressive impact on Black voters.

By the 2016 presidential election—the first held in almost 50 years without the protections of Section 5 of the VRA—33 states had enacted voter identification laws.⁶⁰ These laws are typically justified as ways to combat voter fraud, despite the fact that voter impersonation is virtually non-existent.⁶¹ Such laws arguably have a demonstrable effect with respect to suppressing voter turnout among people of color.⁶² A 2017 study on the impact of voter identification laws found that “strict ID laws doubled the turnout gap between whites and Latinos in the general elections, and almost doubled the white-black turnout gap in primary elections.”⁶³ Voter identification laws and other policies facilitating voter suppression have found a renewed surge of support due to President Trump’s repetition of the lie that “millions and millions of people” have committed voter fraud in recent elections.⁶⁴ These laws have also been met with resistance and have been challenged by organizations like LDF in courts around the country.⁶⁵

⁵⁹ NAACP Legal Def. & Educ. Fund, Inc., *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation 1* (2019), <https://www.naacpldf.org/wp-content/uploads/Section-2-costs-02.14.19.pdf>; see also Nat’l Comm’n on Voting Rights, “Executive Summary,” *Protecting Minority Voters: Our Work is Not Done 7* (2014) (“After going into effect, Section 5 blocked thousands of racially discriminatory voting changes from being implemented, and deterred countless others.”).

⁶⁰ See *id.*; Vann R. Newkirk II, *How Voter ID Laws Discriminate*, *The Atlantic* (Feb. 18, 2017), <https://www.theatlantic.com/politics/archive/2017/02/how-voter-id-laws-discriminate-study/517218/>.

⁶¹ See Brendan Nyhan, *Voter Fraud is Rare, but Myth Is Widespread*, *N.Y. Times* (June 10, 2014), <https://www.nytimes.com/2014/06/11/upshot/vote-fraud-is-rare-but-myth-is-widespread.html>

⁶² See Newkirk, *supra* note 60 (summarizing a 2017 study showing the discriminatory impact of voter identification laws).

⁶³ *Id.*

⁶⁴ Miles Park, *Fact Check: Trump Repeats Voter Fraud Claim About California*, *NPR* (Apr. 5, 2018), <https://www.npr.org/2018/04/05/599868312/fact-check-trump-repeats-voter-fraud-claim-about-california>.

⁶⁵ See, e.g., *Veasey v. Abbott*, 249 F. Supp. 3d 868 (S.D. Tex. 2017), *aff’d in part and rev’d in part on other grounds*, 888 F.3d 792 (5th Cir. 2018) (in a challenge brought by LDF and other advocates, holding that Texas’s photo identification law, the strictest in the country, was enacted to purposely discriminate against Black and Latinx voters and had that result in violation of the VRA and Constitution); Complaint, *Greater Birmingham Ministries, et al. v. State of Alabama*, 15-cv-02193(LSC) (N.D. Ala. Dec. 12, 2015) (complaint filed by LDF challenging Alabama’s photo identification law for having a discriminatory purpose and disproportionately burdening Black and Latinx voters in violation of the VRA and Constitution).



Based on the myth of widespread voter fraud, with undocumented people of color scapegoated in particular, there has also been a concerted partisan and racially discriminatory push to purge voter rolls. This has created serious concerns that “counties carrying out aggressive purges under legal duress will push officials to purge eligible voters.”⁶⁶ According to a recent report, states purged almost 16 million voters from the rolls between 2014 and 2016—an increase of 4 million since the two-year period between 2006 and 2008, shortly before *Shelby County* was decided.⁶⁷ Discriminatory voter purges are likely to worsen with the Supreme Court’s recent decision in *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018), which effectively greenlights states to disenfranchise eligible voters solely for voting infrequently and failing to respond to a single mailing. Indeed, Georgia officials purged over half a million individuals, disproportionately Black and Brown, before the 2018 mid-term elections.⁶⁸ Of the people purged, 107,000 were removed from the rolls simply because they did not vote in previous elections and respond to a mailing. And in 2019, Texas has been enjoined by a federal court from attempting to purge thousands of purported non-citizens based on an error-ridden list.⁶⁹

The Trump administration’s repeated lies about rampant voter fraud also led to the creation of the Presidential Advisory Commission on Election Integrity. This now-defunct Commission was led by Vice President Mike Pence and Kris Kobach, the former Kansas Secretary of State and attorney known for representing extreme anti-immigrant groups and authoring “some of the harshest anti-immigrant legislation passed in the country.”⁷⁰ The appointment of Kobach to help lead the Commission was fitting given the false and racist premise perpetuated by the

⁶⁶ Jane C. Timm, *Vote Fraud Crusader J. Christian Adams Sparks Outrage*, NBC News (Aug. 27, 2017), <https://www.nbcnews.com/politics/donald-trump/vote-fraud-crusader-j-christian-adams-sparks-outrage-n796026>.

⁶⁷ Adia Robinson, *Dramatic Increase in Voters Purged from Voter Rolls Between 2014 and 2016: Report*, ABC News (July 24, 2018), https://abcnews.go.com/Politics/millions-voters-purged-voter-rolls-2014-2016-report/story?id=56756914&cid=social_twitter_abcn.

⁶⁸ Johnny Kauffman, *Six Takeaways from Georgia’s ‘Use It or Lose It’ Voter Purge Investigation*, NPR (Oct. 22, 2018), <https://www.npr.org/2018/10/22/659591998/6-takeaways-from-georgias-use-it-or-lose-it-voter-purge-investigation>; see also Press Release, NAACP Legal Def. & Educ. Fund, Inc., Janai Nelson Speaks on MSNBC About Kemp and Georgia’s Purged Voter Rolls, Oct. 13, 2018, <https://www.naacpldf.org/news/janai-nelson-speaks-msnbc-kemp-georgias-purged-voter-rolls/>.

⁶⁹ Press Release, MALDEF Statement on Federal Court Order in Texas Voter Purge Case, MALDEF, Feb. 27, 2019, <https://www.maldef.org/2019/02/maldef-statement-on-federal-court-order-in-texas-voter-purge-case/>.

⁷⁰ Anti-Defamation League, *Numbers USA Donates \$100,000 to Help Defend Anti-Immigrant Ordinance in Famers Branch, Texas* (Sept. 28, 2012), <https://www.adl.org/blog/numbers-usa-donates-100000-to-help-defend-anti-immigrant-ordinance-in-famers-branch-texas>.



Trump administration that it was Latinx and Black voters who were engaged in pervasive voter fraud.

Despite its claim to be protecting the democratic process, the Commission operated in virtual secrecy, was dominated by purveyors of the myth of rampant voter fraud, was entirely partisan with no ideological balance, excluded members of the voting rights community, and was an attempt to supplant the authority to investigate election matters that Congress had delegated to the Election Assistance Commission. In LDF's lawsuit, *LDF v. Trump*,⁷¹ we warned that the Commission intended to undertake a comparison of state voter files to the databases maintained by DHS. Experts have already discredited this kind of comparison process as racially discriminatory and inaccurate. Recognizing the flaws in the sham Commission, 44 states and Washington, D.C. refused to turn over all of the voter data that the Commission had requested.⁷² While the Commission on Election Integrity was dissolved in January due to the pressure of over a dozen lawsuits, including LDF's,⁷³ President Trump and Kobach have indicated that they may ask DHS to continue pursuing the Commission's mission, potentially misusing the trove of voters' data obtained by the Commission to target minority voters.⁷⁴

B. Crackdown on Immigrant Communities

1. The Muslim Bans and Welcoming Hate

For many, the hallmark of the Trump administration has been its comprehensive assault on immigrant communities, an assault marked by racism

⁷¹ Second Amended Complaint, *NAACP Legal Def. & Educ. Fund v. Trump*, No. 17-05427(ALC) (S.D.N.Y. Oct. 20, 2017).

⁷² Liz Stark & Grace Hauk, *Forty-four States and DC Have Refused to Give Certain Voter Information to Trump Commission*, CNN (July 5, 2017), <https://www.cnn.com/2017/07/03/politics/kris-kobach-letter-voter-fraud-commission-information/index.html>.

⁷³ See Brennan Ctr. for Justice, *Legal Actions Taken Against Trump's "Voter Fraud" Commission*, (last updated Dec. 26, 2017), <https://www.brennancenter.org/legal-actions-taken-against-trump%E2%80%99s-%E2%80%9Cfraud%E2%80%9D-commission> (listing federal and state legal actions challenging the Commission's discriminatory intent, invasions of privacy, burdensome requests on the public, due process violations, exceeding its authority, procedural defects, and general failure to comply with various federal and state laws).

⁷⁴ Mark Joseph Stern, *Trump's Voter Fraud Commission Was Done in by Its Own Arrogant Lawlessness*, Slate (Jan 4, 2018), <https://slate.com/news-and-politics/2018/01/why-trumps-voter-fraud-commission-disbanded.html> ("But the commission's vice chair, Kris Kobach, is not abandoning his crusade. Instead, Kobach may exploit the Department of Homeland Security's database of immigrants to raise new, baseless claims of voter fraud.").



and xenophobia. Trump’s presidential campaign began by calling Mexican immigrants drug dealers, criminals, and rapists—repugnant comments aligned with those he has made on many other occasions referring to Black and Latinx people.⁷⁵ Such sentiments have turned out to be a cornerstone of his presidency. Indeed, shortly after the 2016 election, members of the Trump team who would soon become administration officials, including Kris Kobach, began strategizing how they could reinstate an “immigrant registry” for people from certain countries, relying favorably on our history of rounding up Japanese Americans and imprisoning them in internment camps during World War II as precedent.⁷⁶ And one week after his inauguration, the President launched his first attack on immigrant communities and their civil liberties, issuing his first Executive Order temporarily banning entry to the United States for people from seven majority-Muslim countries, in addition to suspending entry for Syrian refugees and severely restricting the number of refugees to be admitted generally.⁷⁷

As the different versions of Trump’s Muslim Bans wove their way through the court system, the President took particular aim at non-white immigrant people of all different citizenship statuses, including those from Mexico, Haiti, Central America, and Sudan, among other places. One way Trump has targeted communities of color and immigrant communities has been through hateful rhetoric that has stirred violence and inspired white supremacists and neo-Nazis around the country and, indeed, the world. Initiating chants of “Build the wall!” and complaining about admitting immigrant people from what Trump has deemed “shithole” countries like Haiti have been fuel for the growing fire of hate around the country, one that white supremacist groups and far-right extremists have fully taken advantage of. According to Heidi Beirich, the director of the Southern Poverty Law Center’s Intelligence Project, “President Trump in 2017 reflected what white supremacist groups want to see: a country where racism is sanctioned by the highest office, immigrants are given the boot and Muslims banned.”⁷⁸

This proliferation of unfiltered bigotry from the administration and other parts of government in 2017 set the tone for the massive Unite the Right rally

⁷⁵ See, e.g., Katie Reilly, *Here Are All the Times Trump Insulted Mexico*, Time (Aug. 31, 2016), <http://time.com/4473972/donald-trump-mexico-meeting-insult/>.

⁷⁶ See Bromwich, *supra* note 37.

⁷⁷ Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

⁷⁸ Southern Poverty Law Center, *President Trump’s First Year in Office Proved to be Just as Racially Divisive as his Campaign — but Even More Consequential* (Feb. 21, 2018), <https://www.splcenter.org/news/2018/02/21/year-hate-trump-buoyed-white-supremacists-2017-sparking-backlash-among-black-nationalist>.



almost exactly one year ago, where hordes of torch-bearing—and gun-bearing—white nationalists, neo-Nazis, neo-Confederates, Ku Klux Klansmen, and assorted members of the racist alt-right marched in Charlottesville, Virginia, attacking counter-protestors and, tragically, murdering one named Heather Heyer. In response, President Trump lauded the “very fine people on both sides” and criticized the “hatred . . . on many sides.” Trump was quickly praised by white supremacists and hate group leaders.⁷⁹

2. DACA Termination

Trump’s immigration policies have matched his rhetoric. He has rescinded the Deferred Action for Childhood Arrivals (DACA), a program created under the Obama administration through which non-citizen people and undocumented persons brought to the United States as children could receive renewable periods of deportation relief and temporary work authorization. Over ten cases have been filed challenging Trump’s decision to terminate DACA, a decision that can affect at least 800,000 people brought to America as children.⁸⁰ On August 3, 2018, a Federal District Court for the District of Columbia judge upheld a previous order to reinstate DACA, holding that the Trump administration had failed to provide sufficient justification for eliminating the program.⁸¹ The case, however, is still ongoing, and the judge’s decision was immediately condemned by U.S. Attorney General Jefferson Beauregard Sessions, who said the DOJ will do all it can to ensure that DACA is terminated.⁸²

3. ICE Surge

The single greatest cause of heightened fear and anxiety in immigrant communities across the country is likely the surge in arrests and raids by Immigration and Customs Enforcement (ICE) officers, with no discretion based on factors like whether a person has a record of past conviction for serious crimes. On January 25, 2017, Trump issued an Executive Order allowing ICE to investigate

⁷⁹ Rosie Gray, “Really Proud of Him”: Alt-Right Leaders Praise Trump’s Comments, *The Atlantic* (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/really-proud-of-him-richard-spencer-and-alt-right-leaders-praise-trumps-comments/537039/>.

⁸⁰ See Nat’l Immig. Law Ctr., *Litigation Related to the DACA Program*, (last updated June 28, 2018), <https://www.nilc.org/issues/daca/litigation-related-to-the-daca-program/>.

⁸¹ Miriam Jordan, *Judge Upholds Order for Trump Administration to Restore DACA*, *N.Y. Times* (Aug. 3, 2018), <https://www.nytimes.com/2018/08/03/us/federal-judge-daca.html>.

⁸² Ted Hesson, *Sessions Rips Judge’s Decision to Restore DACA Program*, *Politico* (Aug. 6, 2018), <https://www.politico.com/story/2018/08/06/jeff-sessions-daca-restart-764874>.



and make arrests in more expansive ways than it was previously.⁸³ ICE has become far more aggressive in patrolling places that were once considered safe zones requiring special approval for safety, humanitarian, and even local law enforcement reasons, including hospitals, courthouses, places of worship, church-run shelters, schools, and locations providing social services.⁸⁴ As a result, non-citizen individuals and undocumented persons, and even those who have obtained citizenship, have expressed fear of interacting with the government, including by seeking social services, being treated at hospitals, or speaking with police, even regarding bias-related crimes committed against them or their community.

The fear instilled by these aggressive policies is not an incidental byproduct; it is the intent. Thomas Homan, Acting Director of ICE until this past June, made very clear during his congressional testimony that undocumented persons in America “should be uncomfortable.” “You should look over your shoulder,” he added. “You need to be worried.”⁸⁵ Meanwhile, as President Trump and Attorney General Sessions unsuccessfully tried to strip essential funding from so-called “sanctuary cities” for protecting the well-being of their residents and communities, Director Homan was even more extreme, demanding that any politician who, for example, would not allow ICE into their city’s hospitals, be arrested and charged with a crime.⁸⁶ Sowing fear and panic into immigrant communities has always been an end in itself, and now, for many, “once ordinary activities are fraught with dread.”⁸⁷

4. Family Separation at the U.S.-Mexico Border

For approximately three months, President Trump has made it a policy to arrest and prosecute parents entering our country at the southern border,

⁸³ Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

⁸⁴ See *ICE Makes Arrests Near Sensitive Locations*, HuffPost, https://www.huffingtonpost.com/entry/ice-makes-arrests-near-sensitive-locations_us_58c9b73de4b059fe9066100d; Shannon Dooling, *American Medical Association Takes Stance Against ICE Patrolling Inside Hospitals*, WBUR (Nov. 15, 2017), <http://www.wbur.org/news/2017/11/15/ama-stand-ice-in-hospitals>; see also Marina Fang, *ICE Steps Up Workplace Arrests of Undocumented Immigrants Under Trump*, HuffPost (July 25, 2018), https://www.huffingtonpost.com/entry/ice-workplace-arrests-undocumented-immigrants-trump_us_5b586cc9e4b0fd5c73ca8c4b.

⁸⁵ Jonathan Blitzer, *In Calling for Politicians’ Arrest, an ICE Official Embraces His Extremist Image*, The New Yorker (Jan. 4, 2018), <https://www.newyorker.com/news/news-desk/in-calling-for-politicians-arrest-an-ice-official-embraces-his-new-extremist-image>.

⁸⁶ *Id.*

⁸⁷ The Marshall Project, *New York On Ice: How Donald Trump’s War on Immigrants Is Playing Out in His Hometown* (July 23, 18), <https://www.themarshallproject.org/2018/07/23/new-york-on-ice?ref=hp-1-111>.



separating them from their children, detaining their children in cages, and then sending their children to various shelters around the country. The ramifications of this policy remain ongoing. Seeing children torn apart from their families is horrifying and heartbreaking—but not unfamiliar—for an organization that serves the Black community in America. From before the Atlantic slave trade and antebellum period to today—when Black parents are incarcerated and Black children are removed from their homes at rates and in circumstances unheard of in white communities—local and federal governments have felt no compunction about dividing Black families in pursuit of their policies. Today, around 2.7 million children have an imprisoned parent, and around 80% of women prisoners are mothers.⁸⁸ And the starkly disproportionate use of surveillance and removal of children against Black and Hispanic women by child welfare agencies has led to the popularization of the shameful term “Jane Crow.”⁸⁹ For Native American people, what is happening at the border is also a cruel and brutal example of history repeating.⁹⁰

During this period, Trump has stated that he wants to strip people detained at the border of the Fifth Amendment’s due process protections,⁹¹ and he has made a policy of detaining asylum seekers fleeing persecution until a federal court put a stop to it in July 2018.⁹² In a different case, a federal court ordered that Trump reunite all 103 separated children under the age of five with their parents by July 10, 2018, though the administration managed to only reunite four children by this

⁸⁸ Antonio Cediel, *Separating Families at the Border Isn’t New. We’ve Been Doing It For Centuries.*, USA Today (June 19, 2018), <https://www.usatoday.com/story/opinion/2018/06/19/separating-families-border-illegal-immigrant-undocumented-column/711086002/>.

⁸⁹ See Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of ‘Jane Crow,’* N.Y. Times (July 21, 2017), <https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html>.

⁹⁰ See Letter from Todd A. Cox, Director of Policy, NAACP Legal Def. & Educ. Fund, Inc., et al., to Twelve U.S. Senators and U.S. Representatives (July 30, 2018) (on file with LDF) (regarding support for ending the Trump administration’s family separation, family detention, and zero tolerance policies).

⁹¹ The due process clause of the Fifth Amendment to the U.S. Constitution states that the federal government shall not “deprive[] [a person] of life, liberty, or property, without due process of law.” U.S. Const. amend. 5. The U.S. Supreme Court held in 1896 that the Fifth Amendment extends to *all* people on U.S. soil, regardless of their citizenship status. *Wong Wing v. United States*, 163 U.S. 228 (1896).

⁹² Miriam Jordan, *Court Blocks Trump Administration From Blanket Detention of Asylum Seekers*, N.Y. Times (July 2, 2018), <https://www.nytimes.com/2018/07/02/us/asylum-court-ruling-detention.html>.



deadline.⁹³ And new government data shows that the Trump administration kept hundreds of children in detention but deported their parents.⁹⁴ A federal court has ordered the Trump administration to reunite separated families, and recently ruled that all migrant families separated by the government during its crackdown should be included in the class action lawsuit.⁹⁵ Through separating families at the border, the Trump administration has sent a clear message regarding the levels of cruelty it will embrace and the degree of terror it will inflict to advance its anti-immigrant and bigoted agenda.

5. Suspension of Temporary Protected Status Programs

President Trump's anti-Black racism, which has been well-documented since at least 1973 when he was charged with discriminating against minority renters under the Fair Housing Act,⁹⁶ has been most glaring in the immigration context in his decision to terminate the Temporary Protected Status (TPS) designation for immigrant people from Haiti. While Trump has also suspended the TPS program for immigrant people from other countries, including Sudan and Honduras, his hostility toward Haitian people also evinces clear discriminatory intent and racial animus, which is what led LDF, along with the NAACP, to file an ongoing lawsuit challenging the TPS termination on January 24, 2018.⁹⁷

President Trump's racial bias against people who immigrated to the U.S. from Haiti recalls the United States' long, ignominious history of discrimination against Haiti, the world's first Black republic. In August 1791, enslaved people in northern Haiti launched the largest slave revolt in history.⁹⁸ Within two years, everyone in the colony was free. The Haitian Revolution terrified many in the U.S.

⁹³ Thom Hals, *All migrant kids under five to be back with parents by Thursday: U.S. official*, Reuters (July 11, 2018), <https://www.reuters.com/article/us-usa-immigration/u-s-seeks-to-reunite-more-young-immigrants-as-new-deadline-looms-idUSKBN1K12YM>

⁹⁴ Heather Timmons, *New Data Shows the US Government Kept Hundreds of Immigrant Kids and Deported their Parents*, Quartz (July 25, 2018), <https://qz.com/1335561/hundreds-of-immigrant-kids-were-kept-in-us-custody-while-their-parents-were-deported/>.

⁹⁵ Maria Sacchetti, *In another blow to Trump, judge rules in favor of ACLU in family separation case*, Texas Tribune (Mar. 8, 2019), <https://www.texastribune.org/2019/03/08/trump-aclu-family-separation-lawsuit-texas-reunite-federal-judge/>.

⁹⁶ See Lisa Desjardins, *Every Moment in Trump's Charged Relationship With Race*, PBS News Hour (May 30, 2018), <https://www.pbs.org/newshour/politics/every-moment-donald-trumps-long-complicated-history-race>.

⁹⁷ Complaint, *NAACP v. U.S. DHS*, No. 18-00239(MJG) (D. Md. Jan. 24, 2018). The court recently allowed the case to proceed, denying in part defendants' motion to dismiss. See *id.* at Dkt. No. 67, Mar. 12, 2019, <https://www.naacpldf.org/wp-content/uploads/093110118080.pdf>.

⁹⁸ See Laurent Dubois, *Haiti: The Aftershocks of History* 22-51 (2012).



government, which refused to recognize Haiti's independence for decades.⁹⁹ American consternation reflected that Haiti's leaders were Black and, from the perspective of the U.S. government, embodied an explosive message. That discrimination by the United States has endured and prompted several successful challenges in the 1980s and 1990s to federal policies surrounding the discriminatory treatment of people who emigrated from Haiti. Such discriminatory policies included, for example, the double standard applied toward people from Cuba who entered America without a visa versus people from Haiti who did the same.¹⁰⁰

The Obama administration granted Haitian immigrant people TPS in 2010 after Haiti suffered a devastating earthquake that killed hundreds of thousands of people, leaving millions more homeless. Haiti's TPS status has been extended multiple times in light of subsequent events that have hampered Haiti's recovery efforts, such as massive hurricanes and an outbreak of cholera shortly after the earthquake. Because of the TPS designation, Haitian immigrant and refugee people could remain in the United States and obtain work authorization without fear of being deported back to Haiti. Nevertheless, despite persistent food insecurity, a housing shortage, and a new cholera epidemic, and despite a formal extension request from the Haitian government and various American officials from across the political spectrum, the Trump administration terminated TPS for Haitian people in November 2017, putting as many as 58,000 Haitian individuals with TPS in jeopardy.

Prior to rescinding Haitian TPS status, President Trump had made no secret of his antipathy for immigrant people from Black countries in the Caribbean and Africa. In June 2017, upon learning that 15,000 Haitian people and 40,000 Nigerian people were granted visas to enter the United States, the President reportedly exclaimed that Haitians "all have AIDS," and that, upon seeing the United States,

⁹⁹ *Id.*

¹⁰⁰ Under the Wet-Foot/Dry-Foot immigration policy, people who entered the United States from Cuba without a visa could remain and become U.S. citizens, while this special privilege was denied to people entering the United States from Haiti. See Council on Hemispheric Affairs, *Disparities in U.S. Immigration Policy Toward Haiti and Cuba: A Legacy to be Continued?* (June 24, 2010), <http://www.coha.org/disparities-in-u-s-immigration-policy-toward-haiti-and-cuba-a-legacy-to-be-continued/>. As one of the final acts of his presidency, President Obama ended the Wet-Foot/Dry-Foot policy. See Elise Labott, et al., *US Ending 'Wet Foot, Dry Foot' Policy for Cubans*, CNN (Jan. 13, 2017), <https://www.cnn.com/2017/01/12/politics/us-to-end-wet-foot-dry-foot-policy-for-cubans/index.html>.



Nigerian people would “never go back to their huts” in Africa.¹⁰¹ On January 11, 2018, during a meeting with several Senators and Cabinet members, President Trump stated that he did not want our country to receive immigrant people from African countries, which he derided as “shithole countries.” Trump also asked, “Why do we need more Haitians?” and directed that Haitian immigrant people should not be admitted through any proposed immigration plan. In marked contrast, Trump said that immigrants from countries with overwhelming white populations “like Norway” were more desirable and should be admitted.¹⁰²

In addition to Trump’s racist rhetoric regarding Haiti and Haitian people, DHS’s investigation of Haitian immigrant individuals prior to the TPS rescission demonstrates the administration’s use of invidious racial stereotypes and its search for a rationale to carry out its anti-immigrant plan. Demonstrating the administration’s intent to discriminate, DHS sought crime data on Haitian individuals with TPS, as well as information on how many Haitian nationals were recipients of public benefits.¹⁰³ This attempt to manufacture a narrative of criminality with respect to the Haitian American community echoes Trump and his administration’s fixation on exaggerating Black crime and pathologizing Black people in America to provoke fear and push law and order policies. Indeed, the racist rhetoric and policies from the White House, combined with a long history of Black communities being subject to over-policing, over-surveillance, and rampant constitutional violations, is likely to result in Black people generally expressing more skepticism of interacting with federal Census officials and providing private information. This is another reason why the Census Bureau should be working to do outreach and working with communities, including America’s Haitian American communities, to ensure that they are counted in April 2020, rather than spending resources and energy to add an untested, untimely, and counterproductive citizenship status question.

The 4.2 million Black immigrant people in America are harmed by Trump’s anti-immigrant policies and would be further harmed by the addition of the citizenship status question to the 2020 decennial U.S. Census. In fact, the Census

¹⁰¹ Michael D. Shear & Julie Hirschfeld David, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. Times (Dec. 23, 2017), <https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html>.

¹⁰² See Josh Dawsey, *Trump Derides Protections for Immigrants from ‘Shithole’ Countries*, Wash. Post (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.d689e8cae8e4.

¹⁰³ Alicia A. Caldwell, *U.S. Digs for Evidence of Haiti Immigrant Crimes*, Associated Press (May 9, 2017), <https://apnews.com/740ed5b40ce84bb398c82c48884be616>.



Bureau is already aware of evidence that Haitian American people are a particularly hard-to-count population for Census purposes, making the combination of the TPS rescission and the citizenship status question especially harmful. According to an Ethnographic Evaluation conducted for the 1990 Census, recent Haitian immigrant people in Miami, Florida, presented all the relevant “barriers to census coverage” and many salient factors that would lead the researchers “[w]ith confidence” to predict that this population would “be undercounted.”¹⁰⁴ These factors included considerable movement in and out of households and described both recent immigrant people and also those who had been in the United States for a long time. In one long-term study, researchers found that over a two-year period, 40%-50% of those surveyed “had moved at least once with many, many households moving twice or more.”¹⁰⁵ The Census Bureau, the DOC, and the Trump administration are well aware of or should be well aware of research of this nature pertaining to many immigrant groups—and they are not advancing the citizenship status question in spite of it, but because of it.

6. Denaturalization and Derailing Those on the Path to Citizenship

Even naturalized citizens are in the Trump administration’s crosshairs. This might not be too shocking: while deporting non-citizen individuals and undocumented persons is desirable for this administration, deporting immigrants who are currently eligible to vote is surely more desirable. Under President Trump, the frequency of “denaturalization cases” has surged, “part of a campaign of aggressive immigration enforcement that now promises to include even the most protected class of legal immigrants: naturalized citizens.”¹⁰⁶ In fact, President Trump’s administration is so dedicated to prosecuting these once-rare cases that the United States Citizenship and Immigration Services is opening a separate office just for that purpose. ICE, in addition to its other aggressive enforcement activities discussed above, will be abetting the denaturalization project, and has “requested \$207.6 million to hire an additional 300 agents to investigate more cases, including marriage, visa, residency and citizenship fraud.”¹⁰⁷

¹⁰⁴ Alex Stepick & Carol Dutton Stepick, *Alternative Enumeration of Haitians in Miami Florida 2-3* (1992), <https://www.census.gov/content/dam/Census/library/working-papers/1992/adrm/ev92-08.pdf>.

¹⁰⁵ *Id.*

¹⁰⁶ Patricia Mazzei, *Congratulation, You’re a Now a U.S. Citizen. Unless Someone Decides Later You’re Not.*, *N.Y. Times* (July 23, 2018), <https://www.nytimes.com/2018/07/23/us/denaturalize-citizen-immigration.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region®ion=top-news&WT.nav=top-news>.

¹⁰⁷ *Id.*



Moreover, reports indicate that the Trump administration will soon issue a proposal that will prevent many people in this country who are on the path to citizenship from obtaining it or receiving green cards if they have ever been the recipients of various public benefits, including the Affordable Care Act (Obamacare), food stamps, and children’s health insurance.¹⁰⁸ This policy, which experts estimate would harm over 20 million immigrant people, would particularly target people “working jobs that don’t pay enough to support their families.”¹⁰⁹

As elaborated below, the fear stemming from the Trump administration’s crackdown on immigrant communities, and an eagerness to protect oneself and one’s family, has already deterred immigrants of any citizenship status from being completely responsive on the decennial U.S. Census. This climate of fear is only worsening as the Trump administration takes new and extreme measures, such as stoking fear and declaring a national emergency to build a wall on the southern border,¹¹⁰ or orchestrating a plan by which DHS would provide the Census Bureau with a trove of personal information about non-citizens, including their immigration status.¹¹¹ The addition of a specific citizenship status question is a thinly veiled attempt to manipulate that prevailing fear and drive down the response rate in immigrant communities, which includes millions of Black immigrants and other communities of color.¹¹²

C. Keeping Information from the State: A Known Problem

The policies, issues, and rhetoric discussed above are just a sample of the reasons that people of color in America, including non-citizen individuals and undocumented persons, would choose not to interact and share personal information with the federal government, especially information related to citizenship status.

¹⁰⁸ Julia Ainsley, *Now the Trump Administration Wants to Limit Citizenship for Legal Immigrants*, NBC News (Aug. 7, 2018), <https://www.nbcnews.com/politics/immigration/now-trump-administration-wants-limit-citizenship-legal-immigrants-n897931>.

¹⁰⁹ *Id.*

¹¹⁰ See Press Release, LDF Statement on the President’s National Emergency Declaration, NAACP Legal Def. & Educ. Fund, Inc. (Feb. 14, 2019), <https://www.naacpldf.org/press-release/ldf-statement-presidents-national-emergency-declaration/>.

¹¹¹ Garance Burke & Frank Bajak, *Ahead of court ruling, Census Bureau seeks citizenship data*, AP (Mar. 7, 2019), <https://apnews.com/0f33f3454d7f4fd78803455d4da672c6>.

¹¹² See Section VII, *infra*.



This is despite that federal statutes protect the confidentiality of Census data, as recognized by administration officials.¹¹³

None of this concern about participating in the Census is new to the officials charged with overseeing a fair, accurate, and impartial decennial Census. The Census Bureau knows that Black and Latinx people were significantly undercounted in the 2010 decennial Census.¹¹⁴ The Census Bureau knows that immigrant groups and non-citizen individuals are hard to count; it knows why they are hard to count; and it even delineates between the attitudes of different subgroups when it comes to likely responsiveness to the Census. For instance, researchers found that immigrant people from the Dominican Republic have particularly been likely to refuse to answer Census questions about citizenship status, not necessarily because of their immigration status, but because they feared that the immigration status of someone they lived with would lead to them losing public benefits.¹¹⁵ The Census Bureau also knows that, while undocumented immigrants from Mexico may have expressed less concern about a Census citizenship status question in the early 1990s, citing the ease with which they could re-cross the border if they were deported, that assessment is likely different in 2018 because of this administration's actions and policies described above.¹¹⁶ The Census Bureau, in other words, has perhaps the deepest understanding of the problems contributing to the undercount and possesses volumes of research that demonstrate the negative impact of the policy change that it is pursuing.

Of course, findings about the harmfulness of adding a citizenship status question are not just buried in Census research. In 1980, a federal court found that “any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count.”¹¹⁷ And the Center for Survey Measurement (CSM), a

¹¹³ According to then-acting Director of DOJ's Civil Rights Division, John Gore, “No one should have to fear responding to the census questionnaire or to a citizenship question, if in fact it is included. To that end, the Department is committed to abiding by all laws protecting the confidentiality and nondisclosure of such responses.” Hansi Lo-Wang, *DOJ, asked about data confidentiality, crafted intentionally vague answer*, NPR (Nov. 19, 2018), <https://www.npr.org/2018/11/19/669378077/confidentiality-of-responses-to-u-s-census-may-come-up-for-renewed-debate>.

¹¹⁴ Press Release, *Census Bureau Releases Estimates on Undercount and Overcount in the 2010 Census*, U.S. Census Bureau, (May 22, 2012), https://www.census.gov/newsroom/releases/archives/2010_census/cb12-95.html.

¹¹⁵ Boanerges Dominguez, et al., *Alternative Enumeration of Undocumented Mexicans in the South Bronx 9-10* (1993).

¹¹⁶ Skerry, *supra* note 9, at 97.

¹¹⁷ *Fed'n for Am. Immig. Reform v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980).



department of the Census Bureau, issued a memorandum on September 20, 2017, about “Respondent Confidentiality Concerns” that stated,

In particular, CSM researchers heard respondents express new concerns about topics like the “Muslim ban,” discomfort “registering” other household members by reporting their demographic characteristics, the dissolution of the “DACA” (Deferred Action for Childhood Arrival) program, repeated references to Immigration and Customs Enforcement (ICE), etc. [Field representatives] and [field supervisors] emphasized facing a “new phenomenon” in the field and reported that respondents’ fears, particularly among immigrant respondents, have increased markedly this year. Respondents reported being told by community leaders not to open the door without a warrant signed by a judge, and CSM researchers observed respondents falsifying names, dates of birth, and other information on household rosters. [Field representatives] requested additional training to help them overcome respondents’ fears regarding confidentiality and data sharing with other agencies like ICE, as well as materials they could share with respondents to reassure them about these concerns.¹¹⁸

But the most direct evidence that the Trump administration knows, and is ignoring, that the citizenship status question will likely exacerbate the undercount for non-citizen individuals and undocumented persons comes directly from DOC Secretary Wilbur Ross. In a March 26, 2018 memorandum from Secretary Ross directing the Census Bureau to reinstate the citizenship status question to the 2020 decennial U.S. Census, he wrote, “The Census Bureau and many other stakeholders expressed concern that . . . add[ing] a citizenship question to the decennial census[] would negatively impact the response rate for non-citizens.”¹¹⁹ He added, “[a] significantly lower response rate by non-citizens could reduce the accuracy of the decennial census and increase costs for non-response follow up (“NRFU”) operations.” To reconfirm what the Census Bureau, Secretary Ross, and President Trump already know, two former DOC Secretaries (one Republican and one

¹¹⁸ Memorandum from the Ctr. for Survey Measurement, U.S. Census Bureau, to Associate Directorate for Research and Methodology (Sept. 20, 2017), <https://www2.census.gov/cac/nac/meetings/2017-11/Memo-Regarding-Respondent-Confidentiality-Concerns.pdf> (regarding “Respondent Confidentiality Concerns”).

¹¹⁹ Memorandum from Wilbur Ross, Secretary, U.S. Dep’t of Commerce, to Karen Dunn Kelley, Under Secretary for Economic Affairs, U.S. Dep’t of Commerce at 1 (Mar. 26, 2018), https://www.commerce.gov/sites/commerce.gov/files/2018-03-26_2.pdf.



Democrat),¹²⁰ and at least six former Census Bureau directors, have publicly urged the administration not to add the citizenship status question, with four of the former Bureau directors filing an *amicus* brief arguing that,

[It is not] possible to accurately obtain a count of voting age citizens by inquiring about citizenship status as part of the Census count. Recent experience demonstrates lowered participation in the Census and increased suspicion of government collection of information in general. Particular anxiety exists among non-citizens. There would be little incentive for non-citizens to offer to the government their actual status; the result would be a reduced rate of response overall and an increase in inaccurate responses. Both would frustrate the actual express obligation the Constitution imposes on the U.S. Census Bureau to obtain a count of the whole number of persons in order to apportion House of Representatives seats among the states.¹²¹

And, finally, in an internal memorandum, a Census Bureau Chief Scientist informed Secretary Ross that adding a citizenship status question to the 2020 Census “is very costly, harms the quality of the census count, and would use substantially less accurate citizenship status data than are available from administrative sources.”¹²²

In light of all this, neither Secretary Ross nor anyone from the administration has been able to proffer a minimally sensible explanation of why it is worth the substantial risk of a more severe undercount, with the attending devastating and anti-democratic effects, including financial and other costs (discussed in more detail below), to add a citizenship status question. In fact, the proposal to add the citizenship question in the face of

¹²⁰ Penny Pritzker & Carlos Gutierrez, *U.S. Census Is Not About Citizenship*, Bloomberg (Apr. 4, 2018), <https://www.bloomberg.com/view/articles/2018-04-04/u-s-census-is-not-about-citizenship>.

¹²¹ Brief of Former Directors of the U.S. Census Bureau as *Amici Curiae* Supporting Appellees, *Evenwel, et al. v. Abbott, et al.*, 136 S. Ct. 1120 (2016), <http://www.scotusblog.com/wp-content/uploads/2015/10/Evenwel-FormerCensusBureauDirectorsBrief092515.pdf>; *see also* Letter from six former directors of the U.S. Census Bureau to Wilbur Ross, Secretary, 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?tid=a_mentx.

¹²² Memorandum from John M. Abowd, U.S. Census Bureau, to Wilbur L. Ross, Jr., U.S. Dep’t of Commerce, Jan. 19, 2017, <http://www.osec.doc.gov/opog/FOIA/Documents/AR%20-%20FINAL%20FILED%20-%20ALL%20DOCS%20%5bCERTIFICATION-INDEX-DOCUMENTS%5d%206.8.18.pdf#page=1289>.



this evidence indicates that it is being made for the primary purpose of undermining the civil rights of communities of color and subverting their equal opportunity to participate in the political process.

V. Moving Backwards: Making the Census Less Accurate, Less Fair, Less Equal

Instead of moving forward with proposals that could ameliorate and minimize to the extent practicable the undercount for people of color, including immigrant communities and undocumented persons,¹²³ the Trump administration is either ignoring problems that contribute to the gap in undercounted populations, or actively seeking to widen that gap, including with the addition of the citizenship status question. While two centuries of experience demonstrate that perfectly precise decennial U.S. Census requires effort and is difficult, the Supreme Court has recognized that the “Constitution’s mandate that the federal government count the population of the entire nation to ensure equal representation for all persons creates a strong constitutional interest in accuracy.”¹²⁴ While the citizenship status question is the most consequential and urgent matter threatening to undermine the 2020 Census, several other challenges that compound that threat and individually may compromise the fairness and accuracy of the Census are explored below.

A. Need for Qualified and Stable Leadership

As a foundational element of the democratic process, the decennial U.S. Census must be overseen by someone with the experience and leadership to ensure that the enumeration is fair, accurate, and non-discriminatory. Until June 2017, the Census Bureau was led by John Thompson, a career statistician who had worked at the Bureau for nearly three decades before being appointed Director. Between June 2017 and January 2019, the Census Bureau operated without a permanent Director, despite the urging of many U.S. Senators for the DOC to “prioritize finding a new director.”¹²⁵ In a May 17, 2018 letter to DOC Secretary Ross and Office of Presidential Personnel Director John DeStefano, 34 Senators pointed out that one

¹²³ For example, using “census sampling” to correct errors within the data. *See generally Race, Rights, and Remedies: Census Sampling and the Voting Rights Act*, Note, 114 Harv. L. Rev. 2502 (2001).

¹²⁴ *Utah v. Evans*, 536 U.S. 452, 478 (2002) (internal quotation marks omitted).

¹²⁵ Letter to Wilbur Ross, Secretary of the Dep’t of Commerce, & John DeStefano, Dir. of Office of Presidential Personnel, from 21 U.S. Senators (May 17, 2018), <https://www.schatz.senate.gov/imo/media/doc/FINAL%20Letter%20to%20Sec.%20Ross%20and%20Dir.%20DeStefano%20re.%20Census%20Director%20Nominee,%205-17-18.pdf>.



reason for the urgency of appointing a new director is that “the inclusion of an untested citizenship question, as well as the \$500 million being [spent] on an untested communications program to explain the question, will further exacerbate the budgetary problems the Census Bureau faces.”¹²⁶ Having a non-partisan, Senate-approved Director of the Census Bureau to conduct the 2020 decennial Census is critical, and the specific qualifications necessary were considered important enough to require by statute: “Such appointment shall be made from individuals who have a demonstrated ability in managing large organizations and experience in the collection, analysis, and use of statistical data.”¹²⁷

On July 18, 2018, President Trump named Steven Dillingham, currently Director of the Office of Strategic Information, Research, and Planning for the Peace Corps, as the nominee for Census Bureau Director.¹²⁸ He was confirmed by the Senate on January 2, 2019. While Dillingham is new to the Census Bureau, he brings statistical experience from his time leading the Bureau of Justice Statistics and the Bureau of Transportation Statistics.¹²⁹ Less known than his relevant job experience, though, is his commitment to acting as a non-partisan leader who will oversee a fair, accurate, and impartial 2020 decennial Census.

B. Race and Ethnicity Questions

As discussed above, the manner in which the decennial U.S. Census has collected information on race and ethnicity has changed many times over its history, and the Census Bureau is still working to accurately document how people in America identify their race and ethnicity. This history started, of course, with counting three fifths of enslaved people before the ratification of the Fourteenth Amendment. The Census Act of 1790 also directed Marshals conducting the enumeration to “distinguish[] . . . the sexes and colours of free persons[.]”¹³⁰ In the 1800s, the Census would expand at different times to include “Black,” “Mulatto,” “Quadroon,” “Octoroon,” “Chinese” (which included all East Asians), and “American Indian” racial and ethnic categories.¹³¹

¹²⁶ *Id.*

¹²⁷ 13 U.S.C. § 21(a)(2).

¹²⁸ Press Release, The White House, President Donald J. Trump Announces Intent to Nominate Personnel to Key Administration Post (July 18, 2018).

¹²⁹ *Id.*

¹³⁰ Act of March 1, 1790, ch.2, § 1, 1 Stat. 101, 101.

¹³¹ Leadership Conference, Race and Ethnicity, *supra* note 8, at 4.



The 1980 Census was the first national attempt at using modern methodology to count the number of people of “Hispanic/Spanish” origin, and, thus, was the first Census to include a standalone question on ethnicity.¹³² The 2010 Census form contained one question asking if a person was of Hispanic, Latino, or Spanish origin, followed by a separate question asking respondents to choose one or more of 15 options comprising five racial categories (White, Black or African American, American Indian/Alaska Native, Asian, or Native Hawaiian/Other Pacific Islander), plus a category for “some other race.”¹³³ In response to the 2010 Census, approximately 6.2% of respondents chose “some other race,” a figure that many have argued would decrease if there were a single, combined race/ethnicity question on the decennial Census form.¹³⁴ In fact, the Census Bureau tested this hypothesis during the 2010 Census and found that the percentage of people who chose “some other race” was significantly lower for the combined race/ethnicity question (0.2%) than for the separate questions on race and ethnicity (5.6% - 7.1%).¹³⁵ Despite these findings and despite the urging of various stakeholders, like LDF, the DOC announced in January of this year that it would continue using two separate questions for race and ethnicity.¹³⁶

The agency has also denied the many requests it has received over decades, including in advance of the decennial 2020 Census, to add a “Middle Eastern or North African” (MENA) category to the Census form, despite the Census Bureau’s own research and findings that it would be “optimal” to add this category to “help[]

¹³² See *id.*; D’Vera Cohn, *Census History: Counting Hispanics*, Pew Res. Ctr. (Marc 3, 2010), <http://www.pewsocialtrends.org/2010/03/03/census-history-counting-hispanics-2/>.

¹³³ Leadership Conference, Race and Ethnicity, *supra* note 8, at 5.

¹³⁴ See Jens Manuel Krogstad and D’Vera Cohn, *U.S. Census Looking at Big Changes in How It Asks About Race and Ethnicity*, Pew Res. Ctr. (Mar. 14, 2014), <http://www.pewresearch.org/fact-tank/2014/03/14/u-s-census-looking-at-big-changes-in-how-it-asks-about-race-and-ethnicity/>

(describing how, using a combined race and ethnicity question, (1) “people would be offered all the race and Hispanic options in one place;” (2) people “could check a box to identify as white, black, Hispanic/Latino/Spanish origin, American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander or some other race origin;” and (3) people “would be offered a line under each category to supply more information about their origin, tribe or race[, such as] German, African American, Mexican, Navajo, Asian Indian and Samoan”).

¹³⁵ Leadership Conference, Race and Ethnicity, *supra* note 8, at 5-6 (citing U.S. Census Bureau, 2010 Race and Hispanic Origin Alternative Questionnaire Experiment Final Report (2013), https://www.census.gov/2010census/pdf/2010_Census_Race_HO_AQE.pdf).

¹³⁶ 2020 Census Program Memorandum from Albert E. Fontenot, Jr., Associate Director for Decennial Census Programs, U.S. Dept of Commerce (Jan. 26, 2018), https://www2.census.gov/programs-surveys/decennial/2020/program-management/memo-series/2020-memo-2018_02.pdf.



MENA respondents to accurately report their MENA identities.¹³⁷ At a public meeting regarding preparations for the 2020 Census, the Census Bureau’s Population Division chief, Karen Battle, stated that the MENA category would not be added, citing that adding it as an ethnicity category has not been sufficiently tested by the Bureau.¹³⁸ While the MENA category—with its potential to help better capture how people identify and decrease the instances of people not answering race/ethnicity questions or choosing “some other race”—will not be added to the 2020 Census, the Trump administration continues to fight vigorously to add the thoroughly untested citizenship status question, with all its known risks and likely harms.

C. Layers of Disenfranchisement: The Census and Prison-Based Gerrymandering

Over half a century after the Voting Rights Act of 1965, nearly six million people, a disproportionate number of whom are people of color, are deprived of their right to vote because of a past felony conviction resulting in part because of a government sanctioned era of over-policing and mass incarceration.¹³⁹ Communities of color, thus, are deprived of potential voters and the ability to elect their candidates of choice through felony disenfranchisement laws and policies. Compounding this is prison-based gerrymandering: the practice of counting incarcerated persons as residents of the prison facilities where they are housed when election district lines are drawn based on Census data. This practice distorts our democratic process by artificially inflating the population count—and thus, the political influence—of the districts where prisons and jails are located—often rural and overwhelmingly made up of white residents. As a result, the voting power of everyone living outside of those districts is weakened. And the communities that are the most harmed by prison-based gerrymandering are urban communities of color—a result of the racial discrimination that infects our nation’s criminal justice, housing, and other policies.

¹³⁷ Kelly Matthew, et al., 2015 National Content Test, Race and Ethnicity Analysis Report 72 (2017), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2015nct-race-ethnicity-analysis.pdf>; see also Hansi Lo Wang, *No Middle Eastern or North African Category on 2020 Census, Bureau Says*, NPR (Jan. 29, 2018), <https://www.npr.org/2018/01/29/581541111/no-middle-eastern-or-north-african-category-on-2020-census-bureau-says>.

¹³⁸ Wang, *No Middle Eastern or North African Category on 2020 Census*, *supra* note 137.

¹³⁹ See NAACP Legal Def. & Educ. Fund, Inc., *Felony Disenfranchisement*, (last visited Aug. 1, 2018), <http://www.naacpldf.org/case-issue/free-vote-people-felony-convictions>.



For example, Maricopa County, Arizona, is home to 59% of the state’s population and the state’s largest city, Phoenix. 64% of people incarcerated in Arizona resided in Maricopa County before they were arrested.¹⁴⁰ And nearly one-third of Maricopa County residents are Latinx.¹⁴¹ Maricopa County has for years been notorious for anti-immigrant policies and racial profiling, with multiple court orders being entered against it for its continued unconstitutional practices, including one upheld as recently as July 31, 2018.¹⁴² After years of litigation, Latinx drivers are still 1.7 times more likely to be arrested than white drivers.¹⁴³ Despite Maricopa County producing a disproportionate number of the state’s incarcerated population, the vast majority of people from Maricopa County who are incarcerated are housed outside the county, which “contains only 19% of . . . Arizona’s state prison cells.”¹⁴⁴ In addition to being overpoliced, racially profiled, and subject to disproportionate punitive punishment compared to other parts of Arizona, Maricopa County residents are stripped of their voting power as members of their communities are imprisoned in other counties that are typically rural, less populous, and have larger white populations, which increase in political clout as a result.

Black people are 12.7% of the general population, but are 41.3% of the federal and state prison population. Nationally, rural communities make up only about 20% of the U.S. population, but it is estimated that 40% of all incarcerated persons are held in facilities located in rural regions. Across the country, prison-based gerrymandering undermines fair representation in communities of color, weakens minority voting strength, and transfers political power from urban communities of color to predominantly white areas.¹⁴⁵ In the face of years of advocacy by LDF and

¹⁴⁰ Prison Policy Initiative, *Fixing Prison-based Gerrymandering After the 2010 Census: Arizona* (March 2010), <https://www.prisonersofthecensus.org/50states/AZ.html>.

¹⁴¹ U.S. Census Bureau, *QuickFacts, Maricopa County, Arizona*, July 1, 2017 (last visited August 2, 2018), <https://www.census.gov/quickfacts/fact/table/maricopacountyarizona/PST045217>.

¹⁴² See Michael Kiefer, *9th Circuit Upholds Injunction in Racial Profiling Case Against Arpaio, Maricopa County, Arizona Central* (July 31, 2018), <https://www.azcentral.com/story/news/politics/border-issues/2018/07/31/injunction-upheld-racial-profiling-case-against-arpaio-county/874951002/>.

¹⁴³ Rebecca Spiess, *Report: Hispanic Motorists in Maricopa County Still Arrested, Searched More Often*, *Cronkite News* (July 10, 2018), <https://cronkitenews.azpbs.org/2018/07/10/report-hispanic-motorists-in-maricopa-county-still-arrested-searched-more-often/>.

¹⁴⁴ *Id.*

¹⁴⁵ States and local jurisdictions typically rely on the Census Bureau’s data to redistrict and apportion representatives among districts, although they are not required to do so. Fortunately, in recognition of the problems with how the Bureau counts incarcerated people, at least seven states—Colorado, Mississippi, New Jersey, New York, Maryland, Michigan, and Virginia—encourage or require local governments to exclude incarcerated people when redistricting, and over 200 local



others to change this practice,¹⁴⁶ on February 5, 2018, the Census Bureau announced that it would continue counting incarcerated persons as residents of the locality in which they are incarcerated rather than as residents of their home communities on Census Day.¹⁴⁷ At least one lawsuit is pending,¹⁴⁸ while others have been brought, challenging prison based gerrymandering as violative of the U.S. Constitution.¹⁴⁹

D. Data Confidentiality Concerns

The 2020 decennial Census—“the first electronic Census in U.S. history”¹⁵⁰—will use new technology and methods in an effort to reduce per household costs below those incurred during the 2010 Census.¹⁵¹ The Census Bureau plans “to implement a more efficient internet response option, automate key components of training and field operations, and develop cloud infrastructure to streamline data collection.”¹⁵² While this type of innovation has the potential to improve efficiency, traditionally undercounted populations are most likely to be disproportionately harmed by any technological failures, and are at greater risk of having their data intercepted or compromised.¹⁵³ Reliance on internet-based technology also raises

jurisdictions have adjusted the Bureau’s flawed data to prevent prison-based gerrymandering. Prison Pol’y Initiative, *Local Governments That Avoid Prison-Based Gerrymandering*, (last updated Nov. 19, 2016), <http://www.prisonersofthecensus.org/local>.

¹⁴⁶ See Letters from Ifill to Humes, *supra* note 4.

¹⁴⁷ Memorandum from Albert E. Fontenot, Jr., *supra* note 136, at 2.

¹⁴⁸ Matthew Kauffman, *NAACP Sues Connecticut Over ‘Prison Gerrymandering,’*, Hartford Courant (June 28, 2018), <https://www.courant.com/news/connecticut/hc-naacp-prison-gerrymandering-suit-20180629-story.html>.

¹⁴⁹ See, e.g., ACLU, *Federal Court Declares “Prison Gerrymandering” in Jefferson County, FL Unconstitutional* (Mar. 21, 2016), <https://www.aclu.org/news/federal-court-declares-prison-gerrymandering-jefferson-county-florida-unconstitutional>; Cristian Farias, *Prison gerrymandering is unconstitutional, federal judge rules*, HuffPost (May 24, 2016), https://www.huffingtonpost.com/entry/prison-gerrymandering-rhode-island_us_5744a524e4b0452a92e1fa55 (regarding Cranston, Rhode Island).

¹⁵⁰ Joshua A. Geltzer & Matthew G. Olson, Opinion, *The Census Bureau Owes Us Some Peace of Mind*, Wash. Post (July 25, 2018), https://www.washingtonpost.com/opinions/the-census-is-a-prime-hacking-target-we-have-no-idea-if-its-safe/2018/07/25/76ba0d90-9039-11e8-b769-e3fff17f0689_story.html?utm_term=.c028f76f220b.

¹⁵¹ U.S. Census Bureau, 2020 Census Operational Plan: A New Design for the 21st Century 7 (2016), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan2.pdf>.

¹⁵² The Leadership Conference Educ. Fund, Inc., et al., *Counting Everyone in the Digital Age 3* (2017), <http://www.civilrightsdocs.info/pdf/reports/Counting-Everyone-in-the-Digital-Age.pdf>.

¹⁵³ See *id.* at 3, 21.



concern about communities, particularly in rural regions, that lack consistent access to the internet.¹⁵⁴

Further, for the reasons referenced above, those already concerned about sharing information may be even more wary about doing so online. The Census Bureau has refused to provide basic information regarding its preparation for the 2020 Census, including how it will handle the cybersecurity risks, despite repeated requests from Congress and the public.¹⁵⁵ According to a letter sent to Secretary Ross and Census Bureau Acting Director Ron Jarmin from the New America Public Interest Technology Team, consisting of 11 cybersecurity experts, no information released by the Census Bureau thus far “specifies how the Bureau is implementing even the most basic cybersecurity practices.”¹⁵⁶ Moreover, given that the Census Bureau is required to use DHS cybersecurity systems, civil rights groups have expressed concern that “[p]eople who fear that their civil rights are threatened may be especially sensitive to government data collection and less likely to participate in a census that relies on DHS for protection against hacking.”¹⁵⁷ Such fears may not be unjustified given DHS’s previous obtainment of Census data revealing locations with high concentrations of Arab Americans, as referenced above.¹⁵⁸ In fact, in an unprecedented move, the Census Bureau has recently requested that DHS provide them with immigrants’ personal data, including their citizenship status and “full names and addresses, birth dates and places, as well as Social Security numbers and highly sensitive alien registration numbers.”¹⁵⁹ Moreover, Census respondents may be especially concerned about the security of their data in light of current news regarding hacking and electronic interference in the 2016 presidential election by foreign governments.¹⁶⁰ Under this administration, advocates have also challenged

¹⁵⁴ Demographic groups statistically less likely to use the internet include people in rural communities (78% versus 92% for people in urban communities); people who earn less than \$30,000 per year (81%); people who did not graduate high school (65%); and people over the age of 65 (66%). People at the intersections of two or more of these demographic groups are even more likely to not use the internet. Pew Res. Ctr., Internet/Broadband Fact Sheet, (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/internet-broadband/>.

¹⁵⁵ See Letter from Cybersecurity Experts to Secretary Wilbur L. Ross, Jr., Dep’t of Commerce, and Director Ron S. Jarmin, Census Bureau, July 16, 2018, <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/07/Census-Cybersecurity-Letter.pdf>.

¹⁵⁶ *Id.*

¹⁵⁷ Leadership Conference, Counting Everyone in the Digital Age, *supra* note 152, at 23.

¹⁵⁸ See note 37, *supra*, and associated text.

¹⁵⁹ Burke & Bajak, *supra* note 111.

¹⁶⁰ See Geltzer & Olson, *supra* note 150 (“First, foreign governments — Russia in particular — could use the bounty of information from the decennial census for microtargeting on social media to propagandize and polarize U.S. voters. Second, these countries could undermine Americans’ trust in



the federal government’s misuse of personal data, including by President Trump’s Voter Fraud Commission, discussed above, which was accused of handling voters’ data in a way that “could imperil the safety of millions of peoples’ records.”¹⁶¹

VI. The Need for Accurate Census Data in the Black Community

The addition of the citizenship status question to the 2020 decennial U.S. Census will inevitably exacerbate the Census undercount, which, as discussed above, historically has been far worse for Black people and other people of color than for white people, but now exists only for people of color, while non-Hispanic white people are actually overcounted.¹⁶² A race-based undercount is a deprivation of rights and a democratic defect, with equal political representation, that value so core to the Framers and to the Constitution, at stake. But in addition to the apportionment of the 435 seats in the House of Representatives and the apportionment of Electoral College votes among the states, Census data is used for the crucial purposes of drawing representational districts at other levels government like school boards, as well as determining which localities will receive billions of dollars of federal and state funding and how those funds will be allocated among different programs. Census data is also used to help plan social services, such as the location of schools, roads, hospitals, childcare and senior citizens centers, and other essential services. Finally, Census data can be an important component of enforcing civil rights under anti-discrimination statutes, including the Voting Rights Act, Title VI (non-discrimination in education) and VII (non-discrimination in employment) of the Civil Rights Act of 1964, the Elementary and Secondary Education Act, the Higher Education Act, the Fair Housing Act, the Americans with Disabilities Act, Title IX of the Education Amendments of 1972, the

democratic institutions, as governments from Moscow to Beijing have already made clear is in their interest.”).

¹⁶¹ Jessica Huseman & Derek Willis, *The Voter Fraud Commission Wants Your Data—But Experts Say They Can’t Keep It Safe*, ProPublica (Oct. 23, 2017), <https://www.propublica.org/article/crosscheck-the-voter-fraud-commission-wants-your-data-keep-it-safe>; see also Second Amended Complaint, *NAACP Legal Def. & Educ. Fund v. Trump*, No. 17-05427(ALC) (S.D.N.Y. Oct. 20, 2017) (alleging that (1) the Presidential Advisory Commission on Election Integrity was created unconstitutionally with the intent to discriminate against voters of color; (2) President Trump lacked the executive authority to form a Commission to investigate individual or groups of voters; and (3) the Commission’s overwhelmingly partisan composition and pre-determined findings violated the law governing federal advisory committees); Section (IV)(A), *supra* (further discussing the Presidential Advisory Commission on Election Integrity and its Vice Chair, Kris Kobach).

¹⁶² See *supra* note 42 and associated text.



Patient Protection and Affordable Care Act, and criminal justice reform laws like the Second Chance Act of 2008 and the Smarter Sentencing Act of 2013.¹⁶³

In Fiscal Year 2015, 132 government programs used Census data to distribute more than \$675 billion.¹⁶⁴ The five programs receiving the most federal funding, ranging from \$311,805,244,413 to \$29,916,694,438, were: (1) Medical Assistance Program; (2) Supplemental Assistance Program; (3) Medicare Part B Physicians Fee Schedule Services; (4) Highway Planning and Construction; and (5) Federal Pell Grant Program.¹⁶⁵ Other programs receiving a significant amount of federal funding include housing programs, school lunch programs, Head Start and various education programs, foster care, the Children’s Health Insurance Program, unemployment insurance, crime victims assistance, employment services, and environmental/wildlife programs.¹⁶⁶

An accurate Census count is critical for communities of color, which are disproportionately harmed by a host of social and economic issues. As of 2016, 22% of the Black population in our country was living in poverty, as compared to 20% of the Hispanic population and 9% of the white population.¹⁶⁷ And the ten counties with the highest food insecurity rates in the country all have at least a 60% Black population.¹⁶⁸ Regarding median income in 2018, Black households are earning considerably less (\$38,555) than white households (\$63,155).¹⁶⁹ And with respect to the racially discriminatory criminal system, which, as discussed above, already distorts political representation and federal funding through felony disenfranchisement and prison-based gerrymandering, Black Americans are 2.5 times more likely to be arrested than white people, and almost half of all Black men are arrested at least once by the age of 23.¹⁷⁰ Complete and accurate Census profiles can help address these issues by ensuring the appropriate funding for government services, strong political representation, policy proposals, and civil rights enforcement. We cannot risk lowering the quality of this data and decreasing its

¹⁶³ See Leadership Conference, Race and Ethnicity, *supra* note 8, at 9-14.

¹⁶⁴ Hotchkiss & Phelan, *supra* note 10, at 8.

¹⁶⁵ *Id.* at 3.

¹⁶⁶ *Id.* at 3-7.

¹⁶⁷ Kaiser Family Foundation, State Health Facts, Poverty Rate by Race/Ethnicity, <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>.

¹⁶⁸ Feeding America, African American Hunger Facts, <http://www.feedingamerica.org/hunger-in-america/african-american.html>.

¹⁶⁹ Nat’l Urban League, State of Black America 2018 11 (2018).

¹⁷⁰ Angela J. Davis, “Introduction,” in *Policing the Black Man* xv (2017).



accuracy through the addition of a counterproductive, costly, and untested citizenship status question.

VII. Procedural Defects: The Administration’s Contradictions and Pretexts

There has been interest in using the Census to collect citizenship status data since immigration became a matter worth studying and researching, or worth controlling through social and political policy, in America. A citizenship status question was included in every decennial U.S. Census from 1890 through 1950, but no citizenship status questions have been asked on the decennial Census since.¹⁷¹ Rather, a citizenship status question has been included on several long-form questionnaires since 1950 that were sent to small samples of the population and, starting in 2005, has been included on the American Community Survey (ACS), which the Census Bureau sends out annually to a sample of the population.¹⁷²

Secretary Ross claimed in his March memorandum that the DOJ made the initial request for the Census Bureau to reinstate the citizenship status question to effectively enforce Section 2 of the VRA and “protect[] minority population voting rights.”¹⁷³ Section 2 of the VRA allows minority plaintiffs to challenge discriminatory voting laws, like electoral methods or manipulative redistricting schemes, if they have the purpose or effect of denying communities of color the equal opportunity to elect their preferred candidates.¹⁷⁴ Notably, this administration has not brought a single case under Section 2 to enforce minority voting rights in the past two years. The previous Obama administration, like all other administrations dating back to 1965, have been able to bring Section 2 actions under the VRA without the additional citizenship data that the Trump administration now claims is necessary to bring Section 2 actions. This is consistent with the reality that virtually all non-partisan Census experts and lawyers who bring Section 2 lawsuits on behalf of minority plaintiffs, such as LDF, agree that

¹⁷¹ D’Vera Cohn, *What to Know About the Citizenship Question the Census Bureau Is Planning to Ask in 2020*, Pew Res. Ctr. (Mar. 30, 2018), <http://www.pewresearch.org/fact-tank/2018/03/30/what-to-know-about-the-citizenship-question-the-census-bureau-is-planning-to-ask-in-2020/>.

¹⁷² See Tamara Keith, *Fact Check: Has Citizenship Been A Standard Census Question?*, NPR (Mar. 27, 2018), <https://www.npr.org/2018/03/27/597436512/fact-check-has-citizenship-been-a-standard-census-question>; Priscilla Alvarez, *The Controversial Question DOJ Wants to Add to the U.S. Census*, The Atlantic (Jan. 10, 2018), <https://www.theatlantic.com/politics/archive/2018/01/the-controversial-question-doj-wants-to-add-to-the-us-census/550088/>.

¹⁷³ Memorandum from Secretary Wilbur Ross, *supra* note 119, at 1.

¹⁷⁴ 52 U.S. C. § 10301.



the citizenship data from the ACS is fully adequate to enforce the VRA.¹⁷⁵ Recent federal court decisions recognized evidence from authorities on Section 2 enforcement that this data is not necessary.¹⁷⁶ Moreover, it is now apparent that the justification for the citizenship status question that Secretary Ross has been providing—to purportedly enforce the VRA—may be factually misleading in addition to pretextual.¹⁷⁷

The Trump administration’s desire to add a citizenship status question to the 2020 Census was evident well before the DOJ sent its letter requesting the addition of a citizenship status question to Census Bureau Acting Director Ron Jarmin on December 12, 2017.¹⁷⁸ In fact, just days after his inauguration, President Trump circulated a draft executive order among his administration that called for adding a citizenship status question to the 2020 Census to purportedly “be more transparent with the American people, and in order to more effectively implement policies that serve the national interest.”¹⁷⁹ The draft executive order was titled “Executive Order on Protecting American Jobs and Workers by Strengthening the Integrity of Foreign Worker Visa Programs.” Nothing about Section 2 of the Voting Rights Act, or about voting rights at all, appeared in the January 2017 draft executive order.

More revealing about the motivations for adding the citizenship status question is the evidence that Secretary Ross may have misled the House of Representatives Ways and Means Committee when he testified that the DOJ “initiated the request” for the citizenship status question in its December 2017

¹⁷⁵ See Alvarez, *supra* note 172; Progress Report on the 2020 Census: Hearing Before the H. Comm. on Oversight & Gov’t Reform, 115th Cong. 14 (2018) (testimony of Justin Levitt) [hereinafter “Levitt Testimony”].

¹⁷⁶ See *California v. Ross*, 18-cv-01865 (RS), 18-cv-02279 (RS), 2019 WL 1052434 at *55-59, *66 (N.D. Cal. Mar. 6, 2019).

¹⁷⁷ See Opening Statement of Chairman Elijah E. Cummings, U.S. House Oversight Committee, Hearing with Commerce Secretary Wilbur Ross, Mar. 14, 2019, <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/EEC%20Opening%20Statement%20-%20PRESS%20VERSION.pdf> (“Two judges have already struck down the citizenship question, and they issued stinging decisions finding that Secretary Ross violated federal law and the United States Constitution. They found that his claim of merely responding to a request from the Department of Justice was a pretext—and a false one.”).

¹⁷⁸ Letter from Arthur E. Gary, General Counsel, Dep’t of Justice, to Dr. Ron Jarmin, Acting Director, Census Bureau, Dec. 12, 2017, <https://www.documentcloud.org/documents/4340651-Text-of-Dec-2017-DOJ-letter-to-Census.html>.

¹⁷⁹ Memorandum for the President from Andrew Bremberg (Jan. 23, 2017), https://cdn0.vox-cdn.com/uploads/chorus_asset/file/7872567/Protecting_American_Jobs_and_Workers_by_Strengthening_the_Integrity_of_Foreign_Worker_Visa_Programs.0.pdf.



letter, citing the rationale of VRA enforcement.¹⁸⁰ After a federal lawsuit forced the release of new documents showing that Ross desired and was considering the addition of a citizenship status question well before receiving the DOJ letter, he issued a memorandum on June 21, 2018, contradicting his congressional testimony and stating that he and his staff were discussing the citizenship status question since shortly after his appointment as Secretary in February 2017. Ross's memorandum also stated that he requested that the DOJ submit its letter formally asking for the reinstatement of the question.¹⁸¹ Recently revealed emails to other Census Bureau officials demonstrate Ross's eagerness to have the question added. For example, in May 2017, Ross wrote, "I am mystified why nothing [has] been done in response to my months old request that we include the citizenship question. Why not?"¹⁸² According to the federal judge who reviewed the internal documents produced in the case, "It now appears that the idea of adding the citizenship question originated with Secretary Ross, not the Department of Justice, and that its origins long predated the December 2017 letter from the Justice Department."¹⁸³ In his opening remarks before Wilbur Ross appeared before the House Oversight Committee, Chairperson Elijah Cummings said:

Just this past week, this Committee conducted a transcribed interview with a key witness from the Department of Justice—John Gore—who was involved with drafting the request for a citizenship question. Mr. Gore admitted that a former [Trump Administration] Transition Team official provided him an initial draft of a letter from the Department of Justice asking for the citizenship question to be added. . . . Unfortunately, throughout this entire process, the Trump Administration has obstructed and delayed our investigation. Both the Department of Commerce and the Department of Justice have withheld key documents and refused to answer legitimate questions.¹⁸⁴

With lawsuits, congressional hearings, and other advocacy, a clearer picture of what transpired continues to come into focus: President Trump wanted to add a citizenship status question to the 2020 decennial U.S. Census from the beginning,

¹⁸⁰ Ways and Means Committee, *Hearing with Commerce Secretary Ross*, YouTube (Mar. 22, 2018), <https://www.youtube.com/watch?v=vylt-NTsT8I&feature=youtu.be&t=1h27m37s>.

¹⁸¹ See Hansi Lo Wang, *Census Overseers Seeded DOJ's Request to Add Citizenship Question, Memo Shows*, NPR (June 21, 2018), <https://www.npr.org/2018/06/21/622409505/before-doj-request-commerce-secretary-considered-adding-census-citizenship-quest>.

¹⁸² Hansi Lo Wang, *Commerce Secretary Grew Impatient Over Census Citizenship Question, Emails Reveal*, NPR (July 24, 2018), <https://www.npr.org/2018/07/24/631537992/commerce-secretary-grew-impatient-over-census-citizenship-question-emails-reveal>.

¹⁸³ *Id.*

¹⁸⁴ Chairman Cummings, *supra* note 177.



hence his draft executive order written soon after taking office. So did Steve Bannon and Kris Kobach—considered two of the most anti-immigrant, nativist, and white supremacist zealots associated with Trump. While Secretary Ross was already well on board with the citizenship status question, he was likely energized by a July 2017 email from Kobach urging him, at Bannon’s direction, to add the question.¹⁸⁵ Kobach and Bannon did not attempt to hide behind a hard-to-believe pretext like purporting to be concerned with minority voting rights; instead, the email warned that including undocumented persons in the Census count would lead to the problem “that aliens who do not actually ‘reside’ in the United States are still counted for congressional apportionment purposes.”¹⁸⁶ Thus, two of Trump’s closest advisors were direct and up front about their xenophobic desire to undermine the longstanding purpose of the Census to be an actual enumeration of the total population. Secretary Ross, becoming increasingly impatient, called upon the DOJ to formally request the reinstatement of the citizenship status question. The task of coming up with a non-discriminatory justification for the request fell to DOJ official John Gore, who at the time was acting head of the Civil Rights Division.¹⁸⁷ Under the pretextual rationale of needing data to enforce Section 2 of the VRA that could only be provided through the addition of a new Census citizenship status question, Gore wrote the letter that would be sent under a DOJ career staffer’s signature on December 12, 2017.¹⁸⁸ At a May 8, 2018 House hearing on the citizenship status question, Gore dodged questions from representatives and never discussed the purported need for new data to enforce the VRA.¹⁸⁹ Further, none of the records produced pursuant to LDF’s FOIA litigation against DOJ have demonstrated DOJ’s need for new data, or have even shown that the matter was discussed in any kind of substantive way.

Neither Ross, Jarmin, Gore, nor anyone in the Trump administration has set forth evidence or findings showing that the ACS citizenship data is inadequate to enforce Section 2 of the VRA. Since the VRA was enacted in 1965, enforcing Section 2 and protecting voting rights has been a vital part of LDF’s mission, yet not once

¹⁸⁵ Liz Robbins & Katie Benner, *Documents Show Political Lobbying in Census Question About Citizenship*, N.Y. Times (June 9, 2018), <https://www.nytimes.com/2018/06/09/nyregion/kobach-bannon-lobbying-census-question-on-citizenship-documents.html>.

¹⁸⁶ *Id.*

¹⁸⁷ Justin Elliott, *The Trump Appointee Behind the Move to Add a Citizenship Question to the Census*, ProPublica (Mar. 7, 2018), <https://www.propublica.org/article/john-gore-trump-appointee-citizenship-question-census>.

¹⁸⁸ Letter from Gary, *supra* note 178.

¹⁸⁹ See Hansi Lo Wang, *DOJ Official Punts at House Hearing on Census Citizenship Question*, NPR (May 8, 2018), <https://www.npr.org/sections/thetwo-way/2018/05/08/609548162/lawmakers-to-subpoena-doj-official-over-census-citizenship-question>.



has an issue regarding the lack of citizenship data arisen, nor has the issue impeded any other serious racial justice organization or voting rights organization that advocates for marginalized communities.¹⁹⁰ And prior to the Trump administration, no evidence has been presented of any other DOJ officials struggling to enforce the VRA for want of more thorough citizenship data. According to former DOJ official Justin Levitt, “Despite a deep commitment to enforcing the Voting Rights Act . . . 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.”¹⁹¹ Former U.S. Attorney General Eric Holder called the Trump administration’s attempt to add a citizenship status question “a direct attack on our representation democracy,” to which a *Baltimore Sun* editorial replied, “We [are] inclined to agree. Secretary Ross’ justifications are so flimsy, and the political motivations so obvious, that it’s impossible to see this in any other light — at least one unfiltered by right-wing partisanship.”¹⁹²

A citizenship status question will inevitably lead to a more severe undercounting of people of color, including non-citizen individuals and undocumented persons. Thus, not only is the ACS data already sufficient, but the Trump administration’s proposal will in all likelihood produce *worse* data. And this inaccurate data will negatively affect vulnerable communities who not only stand to lose the most from loss of federal funding and political representation, but who are also the exact communities Section 2 of the VRA was intended to protect. For these reasons alone, adding a citizenship status question to the 2020 decennial Census bears no “relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census,” as required by the U.S. Supreme Court.¹⁹³ Realizing this, the Trump administration is now refusing to recognize the constitutional standard of counting every individual in the

¹⁹⁰ See, e.g., Hearing on Questions Regarding the U.S. Census Before the H. Comm. on the Judiciary, H. Subcomm. on the Const. and Civil Justice, 115th Cong. 14 (2018) (testimony of Kristen Clarke, President and Executive Director of Lawyers’ Committee for Civil Rights Under Law) (explaining that the Lawyers’ Committee for Civil Rights has filed multiple voter dilution cases under Section 2 without the need for citizenship data other than that provided by the ACS).

¹⁹¹ Levitt Testimony, *supra* note 175.

¹⁹² Editorial, *Sabotaged Census: Citizenship Question Guarantees Undercount*, *Baltimore Sun* (Mar. 27, 2018), <http://www.baltimoresun.com/news/opinion/editorial/bs-ed-0328-census-undocumented-20180327-story.html>.

¹⁹³ *Wisconsin v. New York City*, 517 U.S. 1 (1996).



country, and instead is stating that it only “intend[s] to count as many people as possible.”¹⁹⁴

Moreover, the addition of the citizenship status question is going to be an exceedingly costly endeavor, undermining the stated goal of the Census Bureau to decrease relative costs from the 2010 decennial Census.¹⁹⁵ The Census Bureau’s own research found that adding the question would likely result in “[m]ajor potential quality and cost disruptions,” which include an expenditure increase of at least \$27.5 million simply to follow up with people who did not respond to the Census because they were deterred by the citizenship status question.¹⁹⁶ The Census Bureau’s research analyzed multiple aspects of the citizenship status question, but the plain overall takeaway was that the quality of the response rate and data would significantly drop, while the costs would significantly rise. This raises particular concerns in light of the longstanding doubts over whether the 2020 Census is adequately funded.¹⁹⁷ And given that the citizenship status question has not undergone the type of rigorous testing that other new Census questions undergo, and given that Census officials have not answered questions specifying what testing the question would be subjected to, such costs may be even higher than predicted, with only an exacerbated, racially disproportionate undercount to show for it.

The Trump administration thus far has been characterized by virulent anti-immigrant sentiment and action, racist rhetoric and policies, and a striking comfort with violating democratic norms and principles. The administration, including officials at the DOC and the Census Bureau, are keenly aware of the effects that the addition of the citizenship status question to the 2020 Census will have on political representation and federal funding for communities of color, including immigrant communities. The process of trying to reinstate the citizenship status question has been fraught with contradictions, irregularity, and deception. And, finally, the citizenship status question is not only untested, but also very likely to be far more expensive, and less accurate, than the current method of collecting citizenship data through the ACS. The conclusion that the Trump administration’s purported

¹⁹⁴ DOC Secretary Wilbur Ross, Prepared Remarks in front of House Oversight Committee (Mar. 14, 2019), <https://talkingpointsmemo.com/muckraker/wilbur-ross-opening-remarks-house-oversight>.

¹⁹⁵ See Memorandum from John M. Abowd, *supra* note 122.

¹⁹⁶ *Id.*

¹⁹⁷ See, e.g., Complaint, *NAACP v. Bureau of the Census*, 18-cv-00891(PWG) (D. Md. Mar. 28, 2018), <http://www.naacp.org/wp-content/uploads/2018/03/Complaint-as-filed-3.28.18.pdf> (alleging that underfunding, understaffing, and inadequate preparation will lead to a severe undercounting of people of color in the 2020 U.S. Census in violation of the constitutional requirement to conduct an actual enumeration of the population in the decennial Census).



justification is pretext could not be clearer. The attempt to add a citizenship status question to the 2020 decennial U.S. Census is an end-run around the Constitution and another weapon being loaded to attack people of color and immigrant communities and suppress their power in America.

VIII. Assessing the Voting Rights Justification

Administration officials like Wilbur Ross and John Gore have essentially declined to defend the voting rights rationale underlying the campaign to add the citizenship status question by refusing to answer questions about it in detail in testimony before Congress and otherwise. Notwithstanding, certain groups with a history of trying to make voting more difficult for marginalized communities of color have attempted to make their case for it.¹⁹⁸ Their arguments, though, are consistently lacking. *First*, they typically emphasize the need for citizenship data for certain types of Section 2 of the VRA claims without explaining why the citizenship status data collected yearly by the ACS is inadequate, and without citing any legal actions where insufficient citizenship data was an actual factor.¹⁹⁹ For instance, the Public Interest Legal Foundation (PILF) cites several lawsuits in its testimony in which citizenship data was used. PILF makes no claim, however, that the data used in these actions was inadequate in any way, just the conclusory statement that the addition of a citizenship status question would result in “precise citizenship data” that will “enhance enforcement of civil rights laws.”²⁰⁰ Thus, there is no indication that any civil rights laws, particularly the VRA, are currently inadequately enforced because of lack of citizenship status data, nor is there any argument as to why adding the citizenship status question would result in “precise citizenship data”—a bold claim given what we know about the likelihood of exacerbated inaccuracy and a more profound undercount. Perhaps most importantly, no court has found that the use of ACS data is insufficient to ensuring robust enforcement of the VRA.²⁰¹

Second, the voting rights enforcement rationale also tends to shift the argument and attempt to divide Black and Latinx communities, such as in PILF’s testimony that, “[b]ecause of the lack of robust citizen data in the Census, African-

¹⁹⁸ See, e.g., Public Interest Legal Foundation, Questions Regarding the 2020 U.S. Census Before the U.S. House Subcommittee on the Constitution and Civil Justice, June 8, 2018 (testimony of J. Christian Adams).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 2, 3.

²⁰¹ See, e.g., *New York v. U.S. Dep’t of Commerce*, 18-cv-2921 (JMF), 18-cv-5025 (JMF), 351 F. Supp. 3d 502 (S.D.N.Y. 2019); *California v. Ross*, 18-cv-01865 (RS), 18-cv-02279 (RS), 2019 WL 1052434 (N.D. Cal. Mar. 6, 2019).



Americans have steadily lost power and seats in district line drawing in areas near a large Hispanic population containing non-citizens. . . . Over time, black voters had their political power diluted and diminished because non-citizens were being counted for legislative line drawing.”²⁰² That claim is simply unsubstantiated by PILF or anyone else and is false. Indeed, organizations that enforce Section 2 on behalf of Black communities, like LDF, are vigorously opposed to the addition of this question. To be clear, there are jurisdictions all over this country where Black voting power is being minimized by electoral structures and are ripe for Section 2 actions. The lack of citizenship status data is in no way an impediment to bringing those actions to cure the dilution of Black voting strength.²⁰³

PILF’s argument is not only flawed and misleading, it distracts from what should be the analytical focus: whether the citizenship status question is necessary (it is not, as courts have recognized) and how its inclusion will impact participation of communities of color, including Black people (negatively). Thus, this claim by PILF is not about the addition of the citizenship status question, but rather about the true desire to make the Census count and the apportionment, redistricting, and allocation of federal funding that stems from it a zero sum game. Their aim is to fully strip undocumented persons, some of whom themselves are Black, of political representation, worsen the undercount for people of color and undocumented persons, and pit minority communities against each other.

As described above, the voting rights justification for the citizenship status question is obvious pretext, but, even upon serious examination, the argument fails. Adding the citizenship status question would in no way benefit Black people; rather, doing so would be at the expense of Black communities’ access to fair and accurate data, billions of dollars of federal funding for programs that are critical to their

²⁰² Public Interest Legal Foundation, *supra* note 198, at 8-9.

²⁰³ For the related purpose of apportionment, it is currently done by counting the total population, not just people who are citizens. See Joseph Fishkin, *Weightless Votes*, 121 Yale L.J. 1888, 1890 (2012) (“[L]ine-drawers across the nation rely almost uniformly on total population,” an approach “that has become the *de facto* national policy”). This is the measure that LDF has supported and which the U.S. Supreme Court, as recently as 2015, ruled was constitutional. See also Brief of NAACP Legal Def. & Educ. Fund., Inc. as *Amicus Curiae* in Support of Appellees, *Evenwel, et al. v. Abbott*, et al., 136 S. Ct. 1120 (2016), http://www.naacpldf.org/files/case_issue/Evenwel%20v.%20Abbott%20Amicus%20Brief.pdf; *Evenwel, et al. v. Abbott*, et al., 136 S. Ct. 1120 (2016). LDF has argued that it is critical that everyone be counted regardless of citizenship status for purposes of apportionment. Enumerating the total population allows everyone—including children who are not old enough to vote, individuals who are not yet registered to vote, people on the path to citizenship, people rendered ineligible to vote by felony disenfranchisement laws, people with mental disabilities, and others—to be represented in state and local legislative bodies via apportionment.



communities' health, education, and more, as well as to fair and accurate apportionment and redistricting processes.

Conclusion

The decennial U.S. Census tends not to be at the forefront of the news cycle or public debate, instead maintaining a position in the national consciousness as a rare and benign ritual that produces interesting information about who we are as a nation. And manipulation of the Census for partisan ends does not often immediately appear as such, and thus does not capture public attention the way regressive voting restrictions or inhumane anti-immigrant policies reasonably do. The Trump administration and likeminded nativist activists like Kris Kobach and Steve Bannon count on this and know that it is precisely what makes the Census an ideal vehicle for circumventing the Constitution and pursuing a partisan, anti-democratic, and racist agenda.

President Trump wasted no time since taking office before trampling on civil rights protections and taking aim at communities of color. Black people in America have been directly and disproportionately harmed by this administration's policies, which are only becoming bolder in their bucking of democratic norms and their disregard of the needs of marginalized communities. With the attempt to add a citizenship status question to the 2020 decennial U.S. Census, though, the Trump administration also is attempting to pit the Black community against other racial and ethnic minority groups while claiming that it must pursue a discriminatory action (*i.e.*, the addition of the citizenship status question) to protect the voting rights of the Black community. No serious racial justice or voting rights advocacy groups, such as LDF, however, have supported the addition of a citizenship status question over the past half century—and most in fact have vigorously opposed and challenged it.²⁰⁴ Thus, it is not at all difficult to see that this justification is false and that the true intent behind the citizenship status question is advancing a

²⁰⁴ At least 171 civil and human rights groups have opposed the citizenship status question, in addition to 160 Republican and Democratic mayors, six former Census Bureau directors, two former DOC Secretaries, over 120 U.S. Representatives, and more than 600 faith leaders. Anti-Defamation League, *supra* note 56, at 3-4. And at least six lawsuits have been brought challenging it. See Kelly Percival, *Where Things Stand in the Citizenship Question Lawsuits*, Brennan Ctr. (Oct. 12, 2018), <https://www.brennancenter.org/blog/where-things-stand-citizenship-question-lawsuits>. Further, in response to the June 8, 2018, Federal Register Notice, 136,454 public comments were submitted opposing the inclusion of the citizenship question, as compared to the 1,241 public comments submitted supporting the inclusion of the citizenship question. U.S. Dep't of Commerce, U.S. Census Bureau, Information Collection Request 2020 Census—Enumeration Operations, OMB Control Number 0607-1006 38-39 (2019).



partisan agenda that concentrates political power and other resources in predominantly white areas of the country.

Every ten years, the Census provides our country with the opportunity to gain a fuller understanding of who lives with us and to make it a fairer and more equitable place for everyone. It is a tool to ensure the health and functionality of the democratic system, to allocate resources where they are most needed, and to plan for the future among dynamic social, economic, and population trends. We cannot allow those who are hostile to a heterogenous democracy and the Constitution to weaponize the Census and deploy it against people of color in this country, including undocumented persons. It is beyond question that Black people will be hurt, not helped, by the addition of a citizenship status question. Attacks on marginalized communities and democratic principles have always made us weaker and have always been moments that we look back on as stains on American history. We cannot let this become one of them. A citizenship status question must not be added to the 2020 decennial U.S. Census. It must be rejected.

If you have any questions, please feel free to contact Leah Aden, Deputy Director of Litigation, or Lisa Cylar Barrett, Director of Policy.

Sincerely,

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