

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
COMMERCE, *et al.*,

Defendants.

No. 1:18-cv-2921 (JMF)

DEFENDANTS' MOTION IN LIMINE

“The purpose of an *in limine* motion is to aid the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial.” *Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996) (internal quotation marks omitted); *see also Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 467 (S.D.N.Y. 2005); *see generally* Fed. R. Evid. 104. *In limine* motions serve the goal of “streamlin[ing] trials and settl[ing] evidentiary disputes in advance.” *United States v. Tokash*, 282 F.3d 962, 968 (7th Cir. 2002). Here, Defendants respectfully request the following pretrial rulings: (1) the admission of the Administrative Record into evidence; (2) the exclusion of all testimony and exhibits beyond the administrative record relating to the merits of this litigation as irrelevant under Federal Rule of Evidence 402; and (3) the disqualification of one of Plaintiffs’ expert witnesses, Dr. Lisa Handley.

I. The Court Should Admit Into Evidence the Administrative Record

Plaintiffs have challenged under the Administrative Procedure Act the Secretary of Commerce's decision to reinstate a citizenship question on the 2020 decennial census. For the reasons stated in Defendants' pretrial memorandum, review of the Secretary's decision should be based solely upon the administrative record. *See* Defs. Pretrial Mem. Accordingly, Defendants maintain that trial in this case is inappropriate. Nevertheless, to the extent the Court proceeds to conduct a trial, judicial review should be confined to the administrative record. Notably, the administrative record appears on both parties' exhibit lists, and there can be no dispute that the administrative record is central to the resolution of Plaintiffs' claims.

Accordingly, Defendants respectfully seek the admission into evidence of the administrative record.

II. The Court Should Exclude All Exhibits And Testimony Concerning the Merits of the Secretary's Decision Under Rule 402 as Irrelevant

Because the administrative record serves as the exclusive source for judicial review of a challenge to final agency action, it necessarily follows that evidence beyond the administrative record is irrelevant for purposes of resolving plaintiffs' claims. As discussed below, Plaintiffs improperly seek to introduce hundreds of exhibits, multiple expert witnesses, and thousands of lines of deposition designations from government employees in an attempt to support their claims on the merits. Because this evidence is irrelevant for review of a final agency decision under the APA, Defendants respectfully request that the Court exclude it from trial.

Under the Federal Rules, evidence must be relevant to be admissible. FRE 402. "Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence . . . and the fact is of consequence in determining the action." *United States v. Scali*, No. 16-CR-466, 2018 WL 543584, *1 (S.D.N.Y. Jan. 23, 2018) (quoting FRE 401(a)-(b)). "The particular

facts of the case determine the relevancy of a piece of evidence.” *United States v. Vallejo*, 237 F.3d 1008, 1015 (9th Cir. 2001). Plaintiffs have the burden of establishing by a preponderance of the evidence that each of their proposed exhibits is relevant. See *United States v. Arce*, No. 16-CR-643, 2018 WL 1662762, at *1 (S.D.N.Y. Mar. 12, 2018).

Here, there can be little doubt that the extra-record evidence Plaintiffs seek to introduce at trial to challenge the Secretary’s decision is irrelevant in this APA case. As discussed in Defendants’ pretrial brief, under the APA’s “arbitrary and capricious” standard, “judicial review of agency action is necessarily narrow.” *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 150 (2d Cir. 2008). A reviewing court does not weigh the evidence or try to determine whether the course taken by the agency was the course the court would have taken; rather, the court’s inquiry is limited to determining “whether the agency has ‘examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.’” *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 498 (2d Cir. 2005) (quoting *Motor Vehicle Mfgs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). That requirement is satisfied “when the agency’s explanation is clear enough that its path may reasonably be discerned.” *Encino Motorcars, LLC v. Navarro*, 136 S. C. 2117, 2125 (2016) (citation omitted). In an action challenging an agency decision as arbitrary and capricious, “the question whether an agency acted in an arbitrary and capricious manner is a legal one which the district court can resolve on the agency record.” *Greene v. Carson*, 256 F. Supp. 3d 411, 424 (S.D.N.Y. 2017) (quoting *Glara Fashion, Inc. v. Holder*, No. 11-cv-889, 2012 WL 352309, at *5 (S.D.N.Y. Feb. 3, 2012)) (alterations omitted). Materials that were not before the agency decisionmaker at the time of the decision, such as expert testimony, see e.g., *Vt. Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 549 (1978), or materials produced in discovery, see, e.g., *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (*per curiam*), are not part of the agency record and should not be considered.

A. The Vast Majority of Plaintiffs' Proposed Exhibits Should Be Excluded As Irrelevant in this APA Case Under Rule 402

Plaintiffs cannot meet their burden of establishing the relevancy of most of their proposed exhibits in their APA challenge to the Secretary's decision to reinstate a citizenship question on the 2020 decennial census. Plaintiffs have identified over 500 exhibits they may seek to admit at trial. The overwhelming majority of these exhibits are in support of Plaintiffs' APA challenge to the Secretary of Commerce's decision to reinstate a citizenship question on the decennial census. Indeed, it is apparent that Plaintiffs intend to use these exhibits to second-guess the wisdom of the Secretary's decision using information that was not considered by the Secretary in his decisionmaking process. As discussed in Defendants' pretrial memorandum, Pretrial Mem. at 26-27, Plaintiffs intended use of exhibits for this purpose is wholly inappropriate in resolving Plaintiffs' APA challenges. *Resolute Forest Prods., Inc. v. U.S. Dep't of Agriculture*, 130 F. Supp. 3d 81, 93–94 (D.D.C. 2015) (“Nor is it the Court’s job to second-guess an agency’s determination: We do not weigh the evidence; we merely examine the record to see if there is evidence . . . support[ing] the determinations of the agency.”).

B. Plaintiffs' Deposition Designations Should Be Excluded as Irrelevant Under Rule 402

Plaintiffs seek to designate thousands of lines of deposition testimony from various Commerce and Census employees, including from Wendy Teramoto, who they are also attempting to subpoena for live testimony at trial. As with many of Plaintiffs' proposed exhibits, Plaintiffs plainly are seeking to rely upon their deposition designations to support the merits of their claim. Plaintiffs have designated hundreds of pages of deposition transcripts from Karen Dunn Kelley, the Under Secretary of Economic Affairs for the Department of Commerce; Wendy Teramoto, the former Commerce Chief of Staff; Earl Comstock, the Commerce deputy chief of staff; Dr. Ron Jarmin, the Acting Director of the Census Bureau, and Dr. John Abowd, the Chief Scientist of the

Census Bureau. These designations focus almost exclusively on the decision-making process undertaken by the Commerce Secretary concerning the reinstatement of a citizenship question on the census. The Secretary detailed his decisionmaking process at length in his Decision Memo, AR 1313–1320, and introduction of further testimony from the Secretary’s advisors on this matter is unnecessarily cumulative and wasteful of the Court’s time. For this reason alone, even if this Court determines that it would be relevant, such testimony should be excluded pursuant to FRE 403.¹

C. Certain of Plaintiffs’ Proposed Experts Seek to Offer Testimony That Should Be Excluded as Irrelevant Under Rule 402

Similarly, Plaintiffs intend to introduce certain expert testimony for the sole purpose of second-guessing the Secretary’s decision to reinstate a citizenship question on the decennial census by providing information that was not before the Secretary in making his decision.

Plaintiffs have identified Dr. Hermann Habermann, the former Deputy Director and Chief Operating Officer of the U.S. Census Bureau from 2002 to 2007, to second-guess the Secretary’s decision by offering the opinion that the need for citizenship data at the block level is unnecessary and that the proper procedure for reinstating a question on the Decennial Census was not followed. *See* Ex. 1, Expert Report of Dr. Hermann Habermann, at 1–2. Plaintiffs also seek to introduce the testimony of the former Director of the Census Bureau, John Thompson, to offer, based on his review, his “opinion that the rationale provided by Secretary Ross for his decision is not supported by the administrative record.” *See* Ex. 2, Expert Report of John Thompson, at 2. In addition, Plaintiffs seek to introduce the testimony of Dr. D. Sunshine Hillygus, a political science professor, who intends to opine that she was “asked to assess various assertions in a March 26, 2018

¹ In addition, if Ms. Teramoto were subpoenaed for live trial testimony, Plaintiffs’ deposition designations for her would be cumulative, and therefore appropriately excluded under Rule 403. Likewise, because the Court has already ruled that Dr. Abowd will present testimony live, Plaintiffs’ extensive deposition designations from Dr. Abowd are cumulative and should be excluded under Rule 403.

memorandum signed by U.S. Secretary Wilbur Ross regarding: (i) existing evidence concerning the effect of adding a citizenship question to the 2020 census on response rates to the census and the undercounting of subpopulations such as Hispanics and noncitizens; and (ii) the adequacy of testing the 2020 census questionnaire featuring the proposed citizenship question.” *See* Ex. 3, Expert Report of D. Sunshine Hillygus, at 2. Finally, Plaintiffs seek to introduce expert testimony from Dr. Lisa Handley. Dr. Handley purports to analyze the Department of Justice’s December 12, 2017 request to the Census Bureau to reinstate a citizenship question, and concludes that “currently available census data, including the citizenship data derived from the Census Bureau’s ACS, has proven to be perfectly sufficient to ascertain whether an electoral system or redistricting plan dilutes minority votes.” *See* Ex. 4, Expert Report of Lisa Handley, at 4.²

These opinions simply have no relevance in an APA case, where the question before the Court is whether the Secretary’s decision is supported by the administrative record. There is no dispute that the Secretary did not have before him these expert opinions in reaching his decision, nor is there any dispute that the purpose of these expert opinions is to disagree with the Secretary’s decision-making process (or, in the case of Dr. Handley, the Department of Justice’s request). Indeed, these opinions seek to usurp the role of the Court as the ultimate decision-maker by offering the opinion that they do not believe the Secretary’s decision is supported by the administrative record. Accordingly, the opinions of Dr. Habermann, Dr. Hillygus, Dr. Handley, and Mr. Thompson are irrelevant to any issue in this APA case and, as such, should be excluded under Rule 401.³

² As discussed below, beyond being irrelevant to any issue in this case, Dr. Handley should be disqualified from testifying based upon her conflict of interest based on her current work for the Department of Justice.

³ For similar reasons, if Ms. Teramoto were subpoenaed for live trial testimony, this Court should exclude any attempt by Plaintiffs to elicit testimony from Ms. Teramoto on whether the Secretary’s decision to reinstate a citizenship question was “correct” or otherwise to second guess the substance

Because Plaintiffs' APA claims present only legal questions, there are no "facts of consequence" in this action and the proposed exhibits, expert testimony, and deposition designations they intend to offer into evidence in support of their APA claims are irrelevant under FRE 402 as a matter of law. Accordingly, the Court should grant Defendants' motion *in limine*. See *Bromberg v. United States*, 389 F.2d 618, 618 (9th Cir. 1968) (affirming exclusion of irrelevant exhibits).

III. The Court Should Disqualify Dr. Lisa Handley From Serving As An Expert Witness In These Cases

As discussed above, Plaintiffs seek to introduce the expert testimony of Dr. Lisa Handley to opine on whether the citizenship data derived from the Census Bureau's ACS is "sufficient to ascertain whether an electoral system or redistricting plan dilutes minority votes." See Ex. 4, Handley Report, at 4. In reaching this conclusion, Dr. Handley takes issue with the Department of Justice's December 12, 2017 letter requesting the reinstatement of a citizenship question on the 2020 decennial census, which she characterizes as "argu[ing] that the [block-level citizenship data] information was needed to accurately determine whether the citizen voting age population of a particular minority group was sufficiently large to constitute a majority in a single-member district – contending the current citizenship data available from the [ACS] is inadequate for this task."⁴ *Id.*

Dr. Handley bases her opinions on her "over thirty years of experience," which includes, among other things, her work for the Department of Justice. *Id.* at 2. Indeed, Dr. Handley explains

of the Secretary's decision. Instead, her testimony should be limited to "whether the agency has 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 498 (2d Cir. 2005) (internal quotation omitted).⁴ The December 12, 2017 letter from the Department of Justice does not actually claim that such data was "needed," see AR 663-65 (stating that block level data gathered from the Decennial Census "would greatly assist the redistricting process"), and Dr. Handley's misinterpretation of that letter is itself grounds for concluding that her opinions are irrelevant under Rule 402.

⁴ The December 12, 2017 letter from the Department of Justice does not actually claim that such data was "needed," see AR 663-65 (stating that block level data gathered from the Decennial Census "would greatly assist the redistricting process"), and Dr. Handley's misinterpretation of that letter is itself grounds for concluding that her opinions are irrelevant under Rule 402.

in her report that she has served as an expert witness in more than 25 voting rights cases, “including six cases on behalf of the U.S. Department of Justice.” *Id.* Dr. Handley further states that she “served as an expert in four cases that involved Voting Rights Act challenges in which Hispanic voting strength was of concern, three as an expert on behalf of the U.S. Department of Justice; *Perry v. Perez*, a Section 2 case challenging Texas congressional and state house districts; *State of Texas v. U.S.*, a Section 5 case regarding proposed congressional and state legislative districts in Texas before the U.S. District Court of the District of Columbia; and *U.S. v. Village of Port Chester*, a Section 2 challenge brought by the U.S. Department of Justice on behalf of Hispanic voters in the Village of Port Chester, New York.” *Id.* at 2-3. Dr. Handley then explains at length the work she performed for the Department of Justice concerning the *Village of Port Chester* case as support for her opinion. *Id.* at 12-13. Dr. Handley further discusses the “district-specific, functional approach” she employed on behalf of the Department of Justice in *Texas v. United States*. *See Rep.* at 16-17, as well as the work she performed on behalf of the Department of Justice in the *Eastpointe* matter.

“A federal court has the inherent power to disqualify an expert witness.” *See Grioli v. Delta Int’l Mach. Corp.*, 395 F. Supp. 2d 11, 13 (E.D.N.Y. 2005) (citing *Koch Ref. Co. v. Jennifer L. Boudreaux M/V*, 85 F.3d 1178, 1181 (5th Cir. 1996)). As one court has recognized, “[t]his power derives from the court’s judicial duty to protect the integrity of the legal process.” *Id.* (quotation omitted). The integrity of the judicial process is protected by disqualification “by ensuring that experts do not use, even unwittingly, confidential information that they learned from a party in the course of an earlier engagement against that party in a later lawsuit.” *See Gordon v. Kaleida Health*, No. 08-CV-3785, 2013 WL 2250506, at *5 (W.D.N.Y. May 21, 2013) (quotation omitted). Courts in the Second Circuit have employed the following test to determine whether an expert should be disqualified: “(1) was it objectively reasonable for the first party who retained the expert to conclude that a confidential relationship existed; (2) was any confidential or privileged information disclosed by the first party to

the expert; and (3) does the public have an interest in allowing or not allowing the expert to testify.”

Id. at 13–14; *see also In re NAMEDNA Direct Purchaser Antitrust Litig.*, No. 1:15-cv-7488, 2017 WL 3613663, at *3 (S.D.N.Y. Aug. 21, 2017). Here, each of these factors are easily satisfied, and disqualification of Dr. Handley is warranted.

First, there can be little dispute that it was objectively reasonable for the Department of Justice to conclude that a confidential relationship existed with Dr. Handley. The contract signed by Dr. Handley engaging her to work on *City of Eastpointe, Texas*, and *Perez*, among other cases, each required her to sign confidentiality agreements in which she agreed not to “reveal, divulge, or publicize any matters dealt with” while working as a retained expert. *See* Ex. 5, Declaration of Timothy F. Mellett (hereinafter “Mellett Declaration”) at ¶¶ 5, 18 & Exs. 1–3, and both *City of Eastpointe* and *Perez* are currently pending in their respective district courts. *See* Mellett Decl. at ¶¶ 4, 17. Accordingly, this first factor tilts sharply in favor of disqualification. *See Marvin Lumber & Cedar Co. v. Norton Co.*, 113 F.R.D. 588, 591 (D. Minn. 1986) (disqualifying expert when “a longstanding series of interactions . . . have more likely than not coalesced to create a basic understanding of [a party’s] modus operandi, patterns of operations, decision-making process and the like.”).

Second, as reflected in the Mellett Declaration, Dr. Handley unquestionably received confidential information in her role as an expert witness for the Department of Justice that could be used against the United States in this litigation. The Department of Justice provided confidential feedback concerning the soundness of Dr. Handley’s analysis and underlying methodologies, based on the Department of Justice’s internal resources and analyses, including from its litigators, social scientists, and systems, and engaged in numerous and substantial confidential communications about Dr. Handley’s analysis, including (1) her use of citizen voting-age population (CVAP) from the American Community Survey (ACS) in the *City of Eastpointe* case; (2) her use of the Bayesian Improved Surname Geocoding to estimate racial composition of voting groups in the *City of*

Eastpointe case; (3) her development of indices to address the ability of minority voters to elect representatives in *Texas v. United States*; and (4) her development of illustrative maps for Texas' 23rd Congressional district in the *Perez* case. Mellett Decl. ¶¶ 7, 10-11, 13, 16, 21, 23. These opinions and analyses are not subject to disclosure. *See* Fed. R. Civ. P. 26(b)(4)(C). These confidential communications with Dr. Handley are “specific[ally] and unambiguous[ly]” relevant to her expert report in the Census cases, *see, e.g., Auto-Kaps, LLC v. Clorox Co.*, No. 1:15-cv-1737, 2016 WL 1122037, at *2 (E.D.N.Y. Mar. 22, 2016), and the tacit argument that the United States has endorsed Dr. Handley’s analysis rests heavily on those confidential conversations.

Some district courts in this Circuit have expanded upon this second factor by requiring a “direct connection” between the previous work using confidential information performed by the expert and the case at issue. *See Hinterberger v. Catholic Health Syst., Inc.*, No. 08-cv-380, 2013 WL 225091, at *11 (W.D.N.Y. May 21, 2015). This “direct connection” requirement prevents a party seeking disqualification from satisfying its burden through “mere conclusory or *ipse dixit* assertions” and instead requires “specific and unambiguous disclosures that if revealed would prejudice the party.” *Eastman Kodak Co. v. Kyocera Corp.*, No. 10-cv-6334, 2012 WL 4103811, at *8 (W.D.N.Y. Sept. 17, 2012); *see Gioli*, 395 F. Supp. 2d at 12-14 (disqualifying plaintiff’s expert in product liability case because the expert had served as defense counsel for defendant’s company, represented defendant in cases that involved the same product at issue in the instant litigation, and therefore knew confidential information and defenses that were “particularly relevant to the instant case.”); *In re Namenda Direct Purchaser Antitrust Litig.*, No. 15-cv-7488, 2017 WL 3613663, at *8 (S.D.N.Y. Aug. 21, 2017) (disqualifying plaintiffs’ proposed expert, a former executive for defendant, who had testified on behalf of defendant 85-95 times, and a search of her emails “uncovered over approximately 1,000 privileged or confidential messages and attachments” concerning the issues in the case).

Here, there is a direct connection between Dr. Handley's work in the Census cases and the confidential information she has obtained based on her work as a current expert on behalf of the Department of Justice. In *City of Eastpointe*, for example, Dr. Handley conducted a racial bloc voting analysis to determine whether black residents were politically cohesive and whether whites consistently voted as a bloc to defeat black-preferred candidates, and she also directed a Department of Justice employee in crafting an illustrative redistricting plan on the Department's Geographic Information System, and each of these analyses was based in part on citizenship and demographic data from the American Community Survey. *See* Mellett Decl. ¶¶ 10-13. In the instant cases, Dr. Handley opines about "the effectiveness of current U.S. Census Bureau data resources," specifically, citizenship data in the current American Community Survey. *See* Handley Rep. at 3-4. The analysis and underlying methodologies Dr. Handley uses in her report in this case so relate to the analysis and underlying methodologies she uses (after extensive confidential communications with the Department of Justice) in *City of Eastpointe* that any testimony Dr. Handley provides at trial would necessarily require divulging those confidential communications. *See* Mellett Decl. ¶ 15 (noting the similarity of the language in Dr. Handley's expert report in the current litigation, which cites the estimation of "CVAP by race and ethnicity by precinct based on the [American Community Survey] to conduct a racial bloc voting analysis on behalf of the U.S. Department of Justice in voting rights litigation currently underway" in *City of Eastpointe* with Dr. Handley's expert report in *City of Eastpointe*, which notes that she is "substituting 2010 VAP by race with black and white CVAP based on the ACS...").

Finally, public policy favors disqualifying Dr. Handley from testifying as an expert in these cases. "Plaintiffs can easily retain a new expert in the field, one who did not work for a company that is a key witness in this case (and a defendant in the related action) for two decades." *See In re Namenda*, 2017 WL 3613663, at *8. Indeed, in the Census cases pending in Maryland and California,

the plaintiffs have retained experts offering opinions similar to Dr. Handley who do not pose the same risk of disclosure of confidential information.⁵ *See, e.g.*, Ex. 6, Expert Report of Pamela S. Karlan in N.D. Cal. Nos. 18-cv-01865 and 18-cv-02279; Ex. 7, Expert Report of David Ely in D. Md. Nos. 18-cv-01041-GJH and 18-cv-01570-GJH. Nor would Dr. Handley's livelihood as a "voting rights and redistricting expert," *see* Rep. at 2, be compromised; rather, it simply would mean that Dr. Handley could not offer opinions that rely upon confidential communications with the Department of Justice while she was retained as an expert witness for the United States. And absent disqualification, the Defendants will be substantially prejudiced, as the ability to cross-examine Dr. Handley will be greatly compromised by the fear of "opening the door" to the disclosure of confidential information that she has relied upon as the basis for her opinions. Indeed, it is difficult to see how the Department of Justice could effectively cross-examine Dr. Handley without risking the disclosure of such confidential information. *See* Mellett Decl. ¶¶ 16, 21, 31. Dr. Handley prominently and repeatedly discusses her work for the Department of Justice as a basis for her opinions. *See* Rep. at 2-3; 12-13; 15 at n.15; 16-17.

Accordingly, Defendants respectfully request that the Court disqualify Dr. Handley as an expert for the Plaintiffs in these cases.

CONCLUSION

For the foregoing reasons, the administrative record should be admitted into evidence; the majority of Plaintiffs' proposed exhibits, Plaintiff's cumulative deposition designations, and the testimony of experts who are merely second-guessing the agency's decision should be excluded; and Dr. Handley should be disqualified.

⁵ As discussed above, because Dr. Handley's testimony is legally irrelevant, Plaintiffs would not be prejudiced by her disqualification.

Respectfully submitted,

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Expert Report of Dr. Hermann Habermann

September 7, 2018

I. Professional experience and qualifications.

I have over thirty-five years of experience as a statistician, earning much of that experience at statistical agencies of the United States government. Among other federal government positions, I have served as Chief Statistician of the United States (from 1988 to 1992), and as Deputy Director and Chief Operating Officer of the U.S. Census Bureau (from 2002 to 2007). I also served for eight years as Director of the United Nations Statistics Division (from 1994 to 2002).

I earned my Ph.D. in Statistics from the University of Wisconsin – Madison in 1975. My curriculum vitae is attached to this report and includes a list of all publications I have authored in the past ten years. I have not previously testified as an expert at trial or by deposition. I am being compensated at the rate of \$250 per hour for my work in this case, including any testimony.

II. Summary of Findings.

I was retained by the plaintiffs in *State of New York v. U.S. Department of Commerce* to provide my expert opinion on the policies and procedures federal statistical agencies follow when designing, modifying, and implementing statistical instruments, and on the extent to which the Commerce Department and Census Bureau complied with or deviated from these policies and procedures in deciding to add a question on citizenship status to the 2020 decennial census. I was also asked to evaluate the Commerce Secretary's reference, in his March 26, 2018 decision memo, to the recommendations of the United Nations regarding population censuses.

In forming my conclusions, I considered the Administrative Record and other materials produced by the Commerce Department and Census Bureau in this lawsuit; the authorities cited in this report; the deposition testimony of Dr. John Abowd on August 15 and August 29, 2018; and the deposition testimony of Dr. Ron Jarmin on August 20, 2018. I worked on this project with Katherine Wallman, the former Chief Statistician of the United States (from 1992 to 2017), who helped me review the Administrative Record and other materials produced in this lawsuit. I discussed aspects of my analysis and the Administrative Record with Amy O'Hara, Senior Research Scholar at Stanford Institute for Economic Policy Research; Constance Citro, Senior Scholar at the Committee on National Statistics; Joe Salvo, Population Director, New York City Department of City Planning; and Annette Jacoby, Demographer, New York City Department of City Planning.

Based on my analysis, I have formed the following opinions:

1. There is insufficient justification of the need for citizenship data at the block level.
2. The Census Bureau's interactions with the Department of Justice do not reflect sufficient coordination with the requesting agency to determine their actual data needs.

3. Even if one accepts the need for block level data there is a less-costly and better-quality alternative which was proposed by the Census Bureau.
4. There is a need for pretesting of the citizenship question, including the impact on response and quality.
5. Creating and maintaining a current database on citizens is likely to damage the credibility of the 2020 census and the Census Bureau.
6. The United Nations recommendations on population censuses do not independently support the Commerce Secretary's decision to add a citizenship question to the census.

III. Overview.

Federal statistics touch every part of the country at all levels of government and affect every resident. Federal economic statistics, such as gross national product and unemployment are used by government and corporate decision makers as well as individual investors. Demographic statistics, including income and wealth data, track poverty trends and the state of inequality and are used in allocation formulas for federal funds. Crime data provide information on the safety of our neighborhoods. Federal statistics not only illuminate the health of the nation but are used in developing policies on improving health at national, state and local levels. Federal statistics are used to determine if a new business comes to a neighborhood or where a new road or hospital goes. The decennial census¹ holds a special place in federal statistics. It is enshrined in the Constitution and is used for apportioning the House of Representatives. The decennial corresponds to a national ceremony. It becomes a series of photographs of where we have been, where we are, and where we are likely to be as a nation.

The use and value of federal statistics – including the decennial census – depends on their being seen as accurate and unbiased. If statistics are seen to be biased and inaccurate, they will not be used and therefore they will be of little or no value. Statistics are trusted when the agencies that produce the data are seen as making decisions based on professional not political considerations. For their data to be credible, the Census Bureau must gain and hold the trust of the nation. Professional independence is a foundation for building this trust. Decisions about statistical matters should be free of any real or perceived political interference.² Professional independence is important not only for the credibility of the statistics agency but also for the credibility of the

¹ The 2000 decennial census was the last census with a long form and a short form. The long form was a large sample which asked questions about the characteristics of the sample population. The short form asked basic demographic questions. After 2000 the decennial census was only the short form and in 2005 the American Community Survey was established to essentially provide the information that was on the long form.

² The Office of Management and Budget, which coordinates the federal statistical system, has identified several fundamental responsibilities of federal statistical agencies, including that they maintain both impartiality and the perception of impartiality. Office of Management & Budget, *Statistical Policy Directive No. 1: Fundamental Responsibilities of Federal Statistical Agencies and Recognized Statistical Units*, Federal Register Vol. 79, No. 231, pp. 71610-71616 (December 2, 2014). The Committee on National Statistics of the National Academy of Sciences has also identified independence from political and other undue external influence as a core principle for federal statistical agencies. National Academies of Sciences, Engineering, and Medicine. (2017). *Principles and Practices for a Federal Statistical Agency, Sixth Edition*, Washington, DC: The National Academies Press. <https://doi.org/10.17226/24810>

decisions made by political appointees. The reason for professional independence is to ensure that decisions based on statistical outputs are not tainted by real or perceived political interference.

In addition, federal statistics cannot be produced without the voluntary cooperation of people and the business community to provide data. This holds even for those data collections that are labeled “mandatory” and are required by law. Respondents provide data with the belief that their data will be confidential and not used against them.

While statistical information is critical to the nation, it is also true that any question that is asked about a person’s characteristics is by its very nature intrusive and a burden. It is the responsibility of the government to ensure that the intrusion and burden are carefully considered and fully justified. When a question is proposed for any census or survey instrument, including the decennial census, federal statistical agencies proceed from the premise that there is a burden of proof on the requestors of the question to demonstrate the need for the question and to demonstrate that the proposed question will not harm the survey instrument nor damage the credibility of the statistical system with the public.

There is not a single federal statistics agency that collects and disseminates statistical information.³ The United States has a decentralized statistical system with over 100 agencies that conduct statistical activities, of which 13 are designated “principal statistical agencies” by the Office of Management and Budget. These agencies are located in their respective Departments (e.g. Bureau of Labor Statistics in the Labor Department, Census Bureau in the Commerce Department) with an oversight and coordinating agency in the Office of Management and Budget (OMB). The head of each statistical agency may be a career official (e.g. National Center for Health Statistics) or a Presidential Appointee with Senate Confirmation (e.g. Census Bureau) who reports to senior officials in the Department in which the statistical agency is located. While OMB does not have line management authority over individual statistical agencies, OMB approval is needed for any data collection that is promulgated to ten or more respondents. Moreover, OMB develops system-wide standards to ensure federal statistics are of high quality and that the burden on the public is minimized. Like all agencies that collect information for statistical purposes, the Department of Commerce and the Census Bureau are accountable for following the OMB standards when they propose to add a question to any of their data collections, including the decennial census.

On March 26, 2018 the Secretary of Commerce concluded that a citizenship question should be added to the 2020 Decennial Census (short form, asked of 100 percent of households). This proposal is intended to produce information on citizenship at the census block level. A census block is the smallest geographic unit used by the Census Bureau for tabulation of 100-percent data (data collected from all houses, rather than a sample of houses). Currently, citizenship information is available from the American Community Survey at the census block group level. A census block group is a geographical unit used by the Census Bureau which is the next largest geographic area than a block. It is the smallest geographic unit for which the bureau publishes sample data, i.e. data which is only collected from a fraction of all households. The Census

³ Statistical information is that which can only be used for aggregate or summary purposes and which protects the confidentiality of individual information.

Bureau can provide estimates of block data from block group data by using statistical modeling techniques.⁴

IV. Evaluation of the decision to add a citizenship question.

1. Justification for the citizenship question.

Applicable Standards.

The Congress and the Executive Branch have developed laws and procedures to reduce the burden of federal information collection on respondents and to ensure that questions proposed for a survey instrument (including the decennial census) have a practical utility. These laws and procedures generally require statistical agencies to demonstrate that a particular data collection is necessary to properly perform a given agency function. The record of the Commerce Secretary's decision to add a citizenship question to the decennial census fails to demonstrate sufficient justification of the need for citizenship data at the block level.

The Paperwork Reduction Act⁵ (PRA) of 1995, the most recent legislative update of laws that commenced with the Federal Reports Act of 1942, was enacted to ensure that agencies minimize burden resulting from the collection of information and maximize the utility of information created, collected, maintained, used, shared, and disseminated by or for the Federal Government⁶. At the heart of the PRA is a requirement that the agency proposing to collect information from the public evaluates the tradeoff between the burden imposed upon the public and the "practical utility" of the collection to the government. Practical utility is defined in Section 3502(11) of the PRA as "the ability of an agency to use information, particularly the capability to process such information in a timely and useful fashion." Furthermore, section 3506(c)(3)(a) of the PRA requires that before seeking final OMB approval of a collection of information, the agency certify (and provide a record supporting such certification, including public comments received by the agency) that the information "is necessary for the proper performance of the functions of the agency, including that the information has practical utility."

The implementing rule for the PRA⁷ outlines agency collection of information responsibilities (prior to seeking OMB approval) that include, among others, an evaluation of the need for the collection of information, a test of the collection of information through a pilot program, the reasons for which the information is being collected, and the way such information is to be used to further the proper performance of the functions of the agency. The proposer of the question is required to justify the reason for the information collection. The implementing rule for the PRA notes that the justification must include a citation and brief description of any statute or Executive Order that requires the collection. (Copies of statutes mandating or authorizing a collection must be included with all submissions.) Agencies must provide background information on the program and describe how the collection supports it, and detail any specific

⁴ A block-group generally contains between 600 and 3000 people.

⁵ P.L. 104-13.

⁶ 44 U.S. Code Section 3501(1), (2).

⁷ 5 C.F.R. Part 1320, "Controlling Paperwork Burdens on the Public," Federal Register Vol. 60, No. 167, pp. 44978-44996 (August 29, 1995).

program problems to be resolved. Further, the agency must furnish justification for the proposed granularity of data including most importantly how the agency would use information at the requested level of detail in fulfilling its responsibilities. For sensitive questions⁸ the agency is expected to indicate why the question is necessary, the specific uses to be made of the information, the explanation to be given to people from whom the information is requested, and any steps to be taken to obtain their consent must also be provided.

Department of Commerce / Census Bureau Adherence to these Standards.

Given the many potential uses of decennial census data, and its highly desired geographic detail, great care must be taken in determining whether to use this vehicle to meet a particular information need. The Census Act⁹ requires that the subjects to be included in the next census be submitted to the Congress no later than three years before the census date (in the case of the 2020 Census, no later than March 31, 2017). This requirement is in addition to the mandates of the PRA. At the three year deadline to identify subjects for the 2020 census, the Census Bureau notified the Congress of a citizenship subject on the ACS but not on the short form.¹⁰

With respect to the addition of a citizenship question, on November 4, 2016¹¹ the Department of Justice sent a letter to the Census Bureau that "...supplements my letter of July 1, 2016¹² in which I advised that, at this time, the Department of Justice had no needs to amend the current content and uses or to request new content in the American Community Survey (ACS) for the 2020 Census." The letter goes on to request the Census Bureau to consider a new topic in the ACS relating to LGBT populations. Approximately 13 months later, on December 12, 2017 the Department of Justice sent a letter to the Census Bureau again outlining its needs and requesting to add a citizenship question to assist with Voting Rights Act enforcement¹³. The Department of Justice did not request block-level citizenship data for purposes of enforcement for any of the decades beginning with 1970, the first decennial census after the Voting Rights Act was enacted in 1965.

On December 22, 2017 John Abowd, the Census Bureau's Chief Scientist, sent a memorandum¹⁴ to Acting Director Ron Jarmin in which he stated: "Based on balanced consideration of multiple factors of quality, cost and feasibility, we recommend that the citizenship data for Department of Justice Voting Rights Act enforcement be obtained through the use of administrative records and not through the addition of a question to the decennial census instrument."

⁸ OMB considers topics such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private to be of a "sensitive" nature. Paperwork Reduction Act Submission OMB 83-I INST, 10/95 Page 3, Specific Instructions A, Item 11.

⁹ 13 U.S. Code Section 141(f).

¹⁰ <https://www.census.gov/library/publications/2017/dec/planned-subjects-2020-ac.html>.

¹¹ AR 311.

¹² No record of this letter in the AR.

¹³ AR 4012.

¹⁴ December 22, 2017 memorandum from John Abowd to Ron Jarmin, AR 10443.

Also on December 22, 2017 Ron Jarmin sent an email to Arthur Gary at DOJ¹⁵. In that email Jarmin stated that the findings of the Census Bureau professional staff “suggest that the best way to provide block-level data with citizen voting population by race and ethnicity would be through utilizing a linked file of administrative and survey data the Census Bureau already possesses. This would result in higher quality data produced at lower cost.” Jarmin goes on to suggest a meeting with technical experts to discuss the details of the DOJ proposal. This suggestion for a meeting is normal Census Bureau procedure. It allows the technical experts to better understand how the Census Bureau can meet the needs of the proposers. It also allows for a discussion of alternative ways of meeting a request. In this case the Census Bureau suggested that modeling of the American Community Survey data would meet the DOJ needs at less cost than adding a question to the decennial census. Without such a meeting it would not be possible to know if the modeling approach would in fact meet the DOJ needs.

A meeting was scheduled but the Department of Justice subsequently cancelled the meeting and declined to further justify or elaborate its requirements. In an email from Jarmin to Acting Deputy Secretary Karen Dunn Kelley on February 6, 2018¹⁶, Jarmin wrote that he spoke with Arthur Gary who reported that DOJ believed its requirements were fully described and did not want to meet.

One of the reasons given by the Secretary in his March 26 memo on the citizenship question for rejecting the approach of the Census Bureau to model the citizenship data was because the Census Bureau could not confirm that such modeling would have a sufficient degree of accuracy. However, without greater degree of specificity from the DOJ on what the DOJ actually intended to use the block-level data for, it is not possible to know whether modeling would satisfy the requirements of the Department of Justice. As noted above, the Census Bureau attempted to meet with the DOJ to obtain more information but DOJ declined to meet.

The Secretary rejected the option of not adding a citizenship question and using modeling techniques on ACS data on the grounds that it does not provide actual, complete number counts and that there is no guarantee that data could be improved using small-area modeling methods. With respect to the insistence on “actual” data, Section C of the March 19, 2018 memorandum from John Abowd to Secretary Ross notes that responses from non-citizens who assert they are citizens are incorrect on the ACS about 30% of the time¹⁷. The record identifies no reason to conclude that responses to a citizenship question would be *more* accurate on the decennial census than on the ACS. With respect to completeness, even with an added question on citizenship some degree of imputation will be required to provide a “complete” set of responses. The problem with statistical modeling of ACS data remains that DOJ has failed to provide sufficient information on its needs – despite efforts of the Census Bureau to obtain this information – which would allow the Census Bureau to determine if modeling was an effective solution.

The PRA final rule says (in part) “the agency . . . shall certify . . . that the proposed collection of information . . . (b) is not unnecessarily duplicative of information otherwise reasonably

¹⁵ AR 5656.

¹⁶ AR 9074.

¹⁷ January 19, 2018 Memorandum for Secretary Ross from John Abowd, AR 1277 also found in AR 1313, March 26, 2018 letter from Secretary Ross.

accessible to the agency”.¹⁸ It further requires that the agency “Describe efforts to identify duplication. Show specifically why any similar information already available cannot be used or modified for use . . .”¹⁹ Because the Department of Justice did not provide sufficient information to enable the Census Bureau to determine that its data request was non-duplicative and could not be met through existing data sources, the request for a citizenship question does not meet the standards a federal statistical agency would ordinarily apply to justify collecting block-level citizenship data.

2. The Census Bureau’s interactions with the Department of Justice do not reflect sufficient coordination with the requesting agency to determine their actual data needs.

Applicable Standards.

The decennial census has long served as the fundamental source of data for agencies across federal, state, and local governments; needs it has addressed range from the enumeration used in congressional reapportionment nationally and redistricting at the state level to allocation of federal, state, and local resources, to ascertaining compliance with statutes and regulations, to providing the denominators for an array of more focused surveys. To ensure that information collected through the decennial census program is required by federal programs, regular content reviews have been carried out for at least the past 50 years. The content review process is intended to confirm that questions on the decennial census are required by federal programs, that only the information needed is requested, and that the information collection is as minimally burdensome as possible.

A critical component of the content review process is interagency communication to determine the data needs of any agency that believes census content is needed for the federal programs it administers. Over the years OMB and the Census Bureau have collaborated on interagency consideration of forthcoming Decennial Census content and question wording. Along with the relevant agencies they participated in assessments of the agencies’ needs for specific questions, with particular attention to the justification for granularity of data (whether data needs had to be met on the short form, the long form, or in fact could be met by the Current Population Survey or some other household survey). In addition to ensuring that requests passed the “granularity²⁰ litmus test,” the interested agencies worked to review, test, and evaluate alternative wording of many questions on items such as educational achievement, employment status, race and ethnicity.

More recently, for example, OMB hosted an ongoing technical group to exchange views and recommendations with respect to the Decennial Census content and questions, including the nascent ACS that ultimately replaced the long (sample) decennial census questionnaire. In addition to the ongoing technical group, on August 2012, OMB and the Census Bureau chartered the Interagency Council on Statistical Policy (ICSP) Subcommittee for the ACS (ICSP-SACS) to “provide advice to the Director of the Census Bureau and the Chief Statistician at OMB on how

¹⁸ 5 CFR 1320.9 instructions page 2, right column.

¹⁹ 5 CFR 1320.9 page 3 Specific Instructions A. Justification para. 4.

²⁰ Granularity refers to the lowest census geographic area that is required.

the ACS can best fulfill its role in the portfolio of Federal household surveys and provide the most useful information with the least amount of burden.” The Subcommittee charter also states that the Subcommittee would be expected to “conduct regular, periodic reviews of the ACS content...designed to ensure that there is clear and specific authority and justification for each question to be on the ACS, the ACS is the appropriate vehicle for collecting the information, respondent burden is being minimized, and the quality of the data from ACS is appropriate for its intended use.” The deliberations of the ICSP-SACS were informed in part by the work of the ongoing technical group. The formation of the ICSP Subcommittee on the ACS also embraced the 2020 OMB-Census Bureau process to examine and confirm the value of each question on the decennial census program that began in 2014, and to confirm and update the statutory and regulatory authorities for the questions.

Department of Commerce / Census Bureau Adherence to these Standards.

In 2014, OMB and the Census Bureau began the inter-departmental review to examine and confirm the value of each question on the ACS, and to confirm and update the statutory and regulatory authorities for the questions. In response to this request, Arthur E. Gary, General Counsel of DOJ’s Justice Management Division, wrote, “Accordingly, please accept this letter²¹ as DOJ’s affirmation that it continues to need relevant information as described above and in the attachment, and that the legal authorities for the use of such information are accurate, current, and complete.” The attachment details statutory requirements, uses, lowest geography (census block group), ACS characteristics, and frequency (annual) for citizenship data required through the ACS.

In 2016, the Census Bureau asked Federal agencies to provide updates, if any, to their documentation. In response to this request, DOJ’s Gary wrote²², “This letter updates my letter of July 1, 2016, in which I advised that, at that time, the Department of Justice had no needs to amend the current content and uses or to request new content in the American Community Survey (ACS) for the 2020 Census.” It does not further discuss the citizenship question. But on December 12, 2017, after the subjects for the 2020 Decennial Census and the American Community Survey had been submitted to the Congress, DOJ’s Gary wrote²³ to Acting Census Bureau Director Ron Jarmin regarding a request to reinstate a citizenship question on the 2020 census questionnaire.

Although the Census Bureau undertook all phases of the Interagency Question Revision Process -- including extensive discussions with other federal agencies and outside stakeholders, substantial research and cognitive testing of alternatives, and robust testing in the 2015 National Content Test -- with respect to possible changes in the race/ethnicity questions for the 2020 Census, none of those processes were followed with respect to adding the citizenship question to the 2020 Decennial Census short form.

Despite repeated references in the Administrative Record to steps involving “robust processes” for working with OMB and the ICSP-SACS [see for example AR 3890, AR 5567, AR 5512], the

²¹ June 25, 2014, AR 278

²² AR 311.

²³ AR 4012.

addition of the citizenship question just prior to the submission of planned questions to the Congress appears to have taken place without any apparent consultation with OMB or the ICSP-SACS. In fact, as of March 6, 2018, a Census Bureau briefing for the Department of Commerce indicated that there would be no changes to the 2020 Census subjects, that an OMB briefing had taken place on February 22, and that the ICSP-SACS briefing would take place March 14.²⁴

In addition, as noted above, the Census Bureau requested a meeting with the Department of Justice in order to give the technical experts an opportunity to discuss the details of the proposal to add a citizenship question, but the Department of Justice declined to meet.²⁵ As Dr. Abowd testified on behalf of the Census Bureau, it is unusual to receive a data request from an agency and then for the agency to refuse to meet to discuss the technical aspects of that data request.²⁶

The content review process for the Department of Justice's request for a citizenship question did not follow the basic protocols for interacting with OMB and the Census Bureau to assure that questions on the decennial census are required by federal programs and that the information collection is as minimally burdensome as possible.

Example of An Interagency Collaboration Process.

Revisions to survey questions in the federal statistical system usually involve an extensive, multi-faceted process. This is particularly true when a question may be employed, or its data used, by multiple agencies. While there are many examples that could be elaborated, a salient case is the question employed across the government when asking about race and ethnicity. Prior to the mid-1970's there was no standard approach to asking this question on federal information collections -- whether for general demographic information, for evaluation of federal program initiatives, or for enforcement of government policies. At the request of several agencies, OMB undertook the development of a standard approach to collecting this information and in 1977 issued a standard for use by agencies that intended to collect race/ethnicity data. For the first time, the "denominators" from the decennial census could be used with "numerators" from various surveys (e.g., education, labor, health) as well as administrative reports (school enrollment, employee characteristics, patient records) to better understand access to learning, labor force participation, and use of services. The 1977 standard, based largely on the question then used by the Office of Education in the Department of Health, Education, and Welfare, was adopted following an OMB-led consultation with several federal agencies.

In the early 1990's, Congress highlighted the need for a review and possible revision of the OMB standards for data on race and ethnicity. OMB agreed to undertake this review, outlining a three-pronged process. This included:

- Establishing an interagency committee comprising the producers and users of data on race and ethnicity (30-plus agencies)

²⁴ AR 435, AR 438, AR 441.

²⁵ Abowd 8/30/2018 deposition transcript at pages 96-99.

²⁶ Abowd 8/30/2018 deposition transcript at pages 98-99.

- Conducting a research and testing program to examine and assess alternatives that were under consideration
- Providing multiple opportunities for public input and comment on options (via public hearings as well as multiple Federal Register notices)

The process ultimately spanned four years from inception to announcement of revisions (October 1997). During that time, both affected federal agencies and stakeholders outside government had multiple, continuing opportunities to contribute to the research agenda and to comment on the potential changes. The incremental research and testing program (which included substantial cognitive work) allowed for full consideration of alternatives, some of which came into view as the process unfolded.

The standards that ultimately were adopted -- though not necessarily the first choice of some constituencies -- were well-received as a consequence of the robust process that had been employed. A four year process is not always necessary -- but the critical components of the process need to be carried out: interagency involvement, research and testing, and timely public comment.

3. The Commerce Secretary rejected a less-costly and better-quality alternative that the Census Bureau proposed for producing block level citizenship data.

Part IV.1 of this report discussed the standards that apply to an agency's request for a particular data collection, including the requirement that the request be supported by sufficient justification to demonstrate the practical utility of a collection and the necessity of that collection to properly perform a given agency function. That section of this report further discussed that insufficient information was provided to reject the Census Bureau's opinion that the information needed by the Department of Justice could be obtained through modeling of existing ACS data.

However, assume for the moment that such evidence had been supplied by the Department of Justice. In that event the Census Bureau did develop a solution which would provide block-level data on citizenship but would not require adding a question on citizenship. Moreover, this option would, in the judgment of the Census Bureau, be less costly and provide better quality data than adding a citizenship question to the decennial census to obtain "actual" data²⁷. The solution proposed by the Census Bureau was to link decennial census responses to administrative records to determine the citizenship characteristics of the respondent and to model the remaining estimated 10% for whom a linkage was not possible. This is the Option C described in the March 19, 2018 Abowd memo to the Secretary. The Census Bureau option is based on its extensive administrative records research and its confidence that it could successfully model the citizenship of the approximately 10% of the decennial census responses through a model it would develop.

²⁷ One issue with "actual" data on citizenship is that, as the Secretary notes in his March 26, 2018 memo (AR 1313), a non-citizen is likely to give an erroneous response approximately 30% of the time to the question of whether they are a citizen.

The Secretary rejected this approach by asserting that: “However, the Census Bureau is still evolving its use of administrative records, and the Bureau does not yet have a complete administrative records data set for the entire population.”²⁸

The Census Bureau will always be evolving in its use of administrative records. The Census Bureau has always looked at the use of administrative records as a way to reduce the burden on respondents and there is no evidence that it is the Bureau’s intention (nor its mandate) to have a complete administrative records data set for the entire population. The position of the Bureau, in its analysis of the options, is that the Bureau was confident that Option C could be accomplished through a combination of the Bureau’s existing record linkage program, augmentation of existing agreements with those agencies possessing administrative records on citizenship, and development of an estimation model.

After reviewing the options identified in Dr. Abowd’s January 19, 2018 memorandum,²⁹ the Secretary directed the Census Bureau to develop an Option D that would be a combination of the administrative records approach (Option C), and the option proposed by the Secretary to add a citizenship question to the decennial census (designated as Option B). As described in the March 1, 2018 memo from Dr. Abowd to the Secretary³⁰, the Census Bureau understands that Option D can be described as follows:

“Administrative data from the Social Security Administration (SSA), Internal Revenue Service (IRS), U.S. Citizenship and Immigration Services (USCIS), and the State Department would be used to create a comprehensive statistical reference list of current U.S. citizens. Nevertheless, there will be some persons for whom no administrative data are available. To obtain citizenship information for this sub-population, a citizenship question would be added to the 2020 Census questionnaire. The combined administrative record and 2020 Census data would be used to produce baseline citizenship statistics by 2021. Any U.S. citizens appearing in administrative data after the version created for the 2020 Census would be added to the comprehensive statistical reference list. There would be no plan to include a citizenship question on future Decennial Censuses or American Community Surveys. The comprehensive statistical reference list, built from administrative records and augmented by the 2020 Census answers would be used instead. The comprehensive statistical reference list would be kept current, gradually replacing almost all respondent-provided data with verified citizenship status data.”

In its analysis of Option D the Census Bureau notes that³¹: “In sum, Alternative D would result in poorer quality citizenship data than Alternative C. It would still have all the negative cost and quality implications of Alternative B outlined in the draft January 19, 2018 memo to the Department of Commerce.”

²⁸ AR 1316.

²⁹ AR 1277.

³⁰ Memo to Secretary Wilbur L. Ross, Jr. from Dr. John M. Abowd, March 1, 2018 (AR 1308).

³¹ Ibid. (last paragraph AR 1312).

As discussed in Part IV.1 above, the applicable standards require federal statistical agencies to minimize respondent burden, demonstrate practical utility, minimize cost and utilize existing information when conducting a collection of information from the public.³² Even if the Department of Justice's need for block-level data on citizenship had been adequately justified, the Secretary's decision to reject the Census Bureau's less-costly and better-quality alternative failed to meet these standards.

4. Statistical Standards for developing questions.

Applicable Standards.

Standards and Guidelines for Statistical Surveys (including censuses) are government-wide methods and practices issued to ensure the maximum usefulness of the statistics produced. Under the PRA, OMB is responsible for developing and overseeing the implementation of government-wide policies, principles, standards and guidelines concerning statistical collection procedures and methods³³. With expertise from its Federal Committee on Statistical Methodology³⁴ (FCSM), OMB most recently updated and issued these standards in 2006³⁵, and supplemented the standards with an addendum on Standards and Guidelines for Cognitive Interviews in 2016³⁶.

There are 20 core standards issued by OMB that apply to federal censuses and surveys: they set forth the professional principles and practices to which federal agencies are required to adhere and the level of quality and effort expected in all statistical activities. Among these are several that contribute directly to the utility of information, including survey planning, survey design, survey response rates, and pretesting of survey systems. For example, the survey planning standard requires agencies to provide a justification that includes, in part, the decisions the survey is designed to inform, the precision required of estimates (e.g., the size of differences that need to be detected), when and how frequently users need the data, and the tabulations and analytic results that will inform decisions and other uses. The pretesting survey systems standard requires agencies to ensure that all components of a survey function as intended when implemented in the full-scale survey and that measurement error is controlled by conducting a pretest of the survey components.

Standards and guidelines for *cognitive interviews* issued by OMB similarly apply to federal censuses and surveys. Cognitive interviewing is a key method used to pretest survey questions and questionnaires that can indicate whether a survey question captures the intended construct

³² PRA Section 3501; OMB Statistical Policy Directive No. 1, Federal Register, Vol. 79, No. 231, pp. 71614-71615.

³³ PRA Section 3504(e)(3)(A).

³⁴ As previously described the United States has a decentralized statistical system. The overwhelming preponderance of statistical expertise resides in the agencies, not in OMB. OMB then relies on agency workgroups and committees to develop technical standards and guidelines for the entire statistical system under OMB sponsorship and direction. The Census Bureau has traditionally played a prominent role in these committees, including the FCSM.

³⁵ Federal Register, Vol. 71, No. 184, pp. 55522-55523.

³⁶ Federal Register, Vol. 81, No. 197, pp. 70586-70587.

and identify difficulties that respondents experience in understanding and accurately answering proposed questions.

Department of Commerce / Census Bureau Adherence to these Standards.

In adding a question to a survey, the normal practice is to test the question. This testing is done to understand, inter alia, how the question will be received by different respondents (including response rates and quality of response); what wording of the question performs best, and the question's impact on other questions; and the correct placement of the question. These practices are part of the OMB standards; with respect to these OMB standards on development of questions the Census Bureau stated it needed to undertake a rigorous process³⁷ to evaluate proposed content additions to the decennial census. This process includes several steps related to testing, including:

- “The Census Bureau must test the wording of the new question. It is too late to add a question to the 2018 End-to-End Census Test, so additional testing on a smaller scale would need to be developed and implemented as soon as possible. This test would also require approval from OMB, which includes notifying the public and inviting comments through a Federal Register Notice (FRN).”
- “The Census Bureau must make additional operational adjustments, beyond testing, to include new content. This includes re-designing the paper questionnaires and adjusting the paper data capture system. For all automated data collection instruments (including Internet self-response, Census Questionnaire Assistance, and Nonresponse Followup), the additional question will require system redevelopment, for English and all supported non-English languages. In addition, the training for the enumerators and Census Questionnaire Assistance agents will need redevelopment.”
- “Based on the result of the testing, the Census Bureau must finalize the actual 2020 Census questionnaires (paper and automated). The Census Bureau then must submit for OMB approval of the 2020 Census information collection. This submission also requires notifying the public and inviting comments through a Federal Register Notice.”

This rigorous and “well-established process” is referenced repeatedly in the Administrative Record and is consistent with OMB standards.³⁸

In his March 26 memo, the Secretary, while acknowledging the principle of testing, concludes:

“The Census Bureau staff have advised that the costs of preparing and adding the question would be minimal due in large part to the fact that citizenship question is already included on the ACS, and thus the citizenship question has already undergone the cognitive research and questionnaire testing required for new questions.”

³⁷ Census Bureau talking points dated December 12, 2017, AR 3890.

³⁸ AR 4773, AR 4874, AR 5512, AR 5565, AR 5567.

John Abowd took this same position, that testing of the citizenship question was not required because it had been included on the ACS, in his January 19, 2018 memo to the Secretary.³⁹ However, at least some in the Census Bureau have stated a different opinion of the need for pretesting of the citizenship question. In a September 20, 2017 memo the Center for Survey Management (CSM) of the Census Bureau⁴⁰ noted that they had noticed recent increases in respondents expressing concerns about confidentiality in some of the pretesting studies in 2017. In particular, interviewers reported that respondent's fears have increased markedly in the past year. For example, respondents reported "being told by community leaders not to open the door without a warrant signed by a judge..." To address these concerns, the memo recommended:

"...designing and pretesting wording that could address these concerns in mailing materials, the Decennial Internet Self Response instrument, FAQs provided to enumerators, etc."

It should be noted that this material was anecdotal and not based on any randomized control study. Moreover, by itself the CSM position might not be determinative. However, this was not the only voice calling for pretesting of the citizenship question. With respect to the importance of testing a proposed citizenship question, on January 26, 2018 six former Directors of the Census Bureau wrote a letter⁴¹ to Secretary Ross. In that letter they state that:

"We strongly believe that adding an untested question on citizenship status at this late point in the decennial planning process would put the accuracy of the enumeration and success of the census in all communities at grave risk."

They further state:

"Adding a citizenship question without a testing opportunity in a contemporary, census-like environment will invalidate the results and lessons learned from the End-to-End test."

The subject of testing was also addressed by the Committee on National Statistics. In their letter report of August 7, 2018 the Committee points out⁴² the 2020 census is not the same as the American Community Survey and is much more than a single, simple questionnaire. They note that both paper and electronic questionnaires would need to add a citizenship question and that it should not be assumed that respondents would react the same way to any question on paper or as an electronic form. They point out that:

³⁹AR 1277.

⁴⁰ Memo for Associate Directorate for Research and Methodology on Respondent Confidentiality Concerns, September 20, 2017, AR 10386.

⁴¹ Letter from Barabba, Farnsworth Riche, Prewitt, Murdock, Groves and Thompson to Honorable Wilbur L. Ross January 26, 2018, AR 1057.

⁴² FR Doc. 2018-12365, proposed Information Collection: Comment Request: 2020 Census. Docket number USBC-2018-005, letter report from National Academies of Sciences, Committee on National Statistics, Task Force on the 2020 Census to U.S. Department of Commerce, Departmental Paperwork Clearance Officer, Aug. 7, 2018, p. 4-5

“Because many households will not respond to the 2020 Census, either via the Internet or by mail (and the extent of nonresponse could be increased due to publicity about the citizenship item), the citizenship question would also have to be included on the Enumerator Questionnaire used in nonresponse follow-up (NRFU) operations. ... Though an objective of the 2020 census is to reduce the NRFU field workload through recourse to administrative records data from other federal government sources, the quality of citizenship information in those administrative data is known (and acknowledged, explicitly, in the Secretary’s decision memorandum) to have issues. And even with the use of administrative records, enumerators will be making millions of NRFU field visits throughout the country. It is not known the extent to which publicity about the citizenship question would induce households to not provide this information or avoid the interview entirely.”

The operating conditions of an annual survey like the American Community Survey and the decennial census are vastly different. The publicity and national effort involved in a decennial census cannot be compared to any survey, even one as large as the American Community Survey. Moreover, comparing the state of the country now and even ten years ago ignores the added complexities that are now involved in conducting a decennial census. The country is more polarized now and the ability of individual groups to disseminate their views and possibly provoke dissent is much greater. It would seem more than prudent, even necessary then, to understand how different groups and segments of society will react to such a question and the best way to prepare for the additional question. Even though response to the decennial census is required by law, a successful census depends on the voluntary cooperation of respondents. Without this voluntary cooperation costs will go up and quality will go down. Testing to determine improved methods for outreach to these groups would seem to be mandatory. Without testing the Census Bureau will be forced into conducting the 2020 decennial census with limited awareness of the impact of adding a citizenship question.

5. Credibility and Public Trust.

Applicable Standards.

In addition to the utility of proposed questions and adherence to good practice is the importance of ensuring that new questions and surveys do no harm to the credibility of the statistical agency and do not have a deleterious effect on public trust.

The recognition of the importance of agency credibility for public trust is found globally. The “Fundamental Principles of Official Statistics” were first adopted by the United Nations Statistical Commission in April 1994 and later were adopted by the General Assembly of the United Nations⁴³ in January 2014. This document states, inter alia:

“To retain trust in official statistics, the statistical agencies need to decide according to strictly professional considerations, including scientific principles and professional ethics,

⁴³ Fundamental Principles of Official Statistics (A/RES/68/261 from 29 January 2014), p. 2-2. The sixty-eighth session of the General Assembly, in its resolution 68/261 of 29 January 2014, endorsed the Fundamental Principles of Official Statistics.

on the methods and procedures for the collection, processing, storage and presentation of statistical data.”

The Office of Management and Budget also recognized the importance of trust, and the part that professional independence and professional judgment plays in generating that trust, in OMB Statistical Policy Directive No. 1⁴⁴. The Directive states that the four “Fundamental Responsibilities” of a federal statistical agency are: (1) “produce and disseminate relevant and timely information,” (2) “conduct credible and accurate statistical activities,” (3) “conduct objective statistical activities,” and (4) “protect the trust of information providers by ensuring the confidentiality and exclusive statistical use of their responses.”⁴⁵

Since 1992 the Committee on National Statistics of the National Academy of Sciences has issued a report on Principles and Practices for a Federal Statistical Agency⁴⁶. They echo the importance of the OMB principles and they note:

“To be credible and unhindered in its mission, a statistical agency must maintain a widely acknowledged position of independence from undue external influences. It must avoid even the appearance that its collection, analysis, or reporting processes might be manipulated for political purposes or that individually identifiable data collected under a pledge of confidentiality might be turned over for administrative, regulatory, or law enforcement uses.”

Department of Commerce / Census Bureau Adherence to these Standards.

What do these principles say about the statistical decision making process that was employed with respect to adding a question on citizenship? The Census Bureau developed lower cost and higher quality alternatives than proposed by the Commerce Department and the public may well believe that political judgments were substituted for what should have been professional ones. As a result, the credibility of the 2020 census and the Census Bureau itself are likely to be damaged by the addition of a citizenship question.

Moreover, as noted in Part IV.3 above, one outcome of the Secretary’s decision is the planned creation of a current, comprehensive statistical reference list on citizens.⁴⁷ This comprehensive statistical reference list could be, and has already been perceived by experts as, the beginning of a population register of characteristics which would be maintained by the Census Bureau.⁴⁸ The Census Bureau rests its credibility as a statistical agency on the foundation that it collects data

⁴⁴ Federal Register, Vol. 79, No. 231, p.71612 (December 2, 2014).

⁴⁵ Ibid. at pp.71614-71615.

⁴⁶ National Academies of Sciences, Engineering, and Medicine. (2017). *Principles and Practices for a Federal Statistical Agency, Sixth Edition*, Washington, DC: The National Academies Press. <https://doi.org/10.17226/24810>.

⁴⁷ AR 1309.

⁴⁸ FR Doc. 2018-12365, proposed Information Collection: Comment Request: 2020 Census. Docket number USBC-2018-005, letter report from National Academies of Sciences, Committee on National Statistics, Task Force on the 2020 Census to U.S. Department of Commerce, Departmental Paperwork Clearance Officer, Aug. 7, 2018, p. 9, at <https://www.nap.edu/read/25215/chapter/1>.

solely for statistical purposes and that the information provided by individuals will not be used against them by law enforcement or administrative agencies. The existence of such a comprehensive statistical reference list is unprecedented and will raise doubts about the credibility of the Census Bureau and the 2020 Decennial census. For example, in its August 2018 letter report on the citizenship question⁴⁹, the Committee on National Statistics of the National Academy of Sciences notes:

“Because there is no apparent statistical justification for the Census Bureau to create this citizenship registry, legitimate concerns arise that this information could somehow be used for law enforcement, adjudicatory, or other non-statistical purposes in some manner, which would undermine the mission of the Census Bureau (as well as violate title 13, Section 9).”

The Secretary’s decision to add a citizenship question against the advice of Census Bureau professionals, and his decision to further create a current, comprehensive statistical reference list on citizenship, risks undermining the credibility of the Census Bureau and the 2020 Decennial census as well as the professional staff of the Census Bureau.

6. The United Nations recommendations on population censuses do not support the Commerce Secretary’s decision to add a citizenship question to the census.

In the Secretary’s March 26, 2018 decision memorandum,⁵⁰ the Secretary stated that the United Nations recommends “that its member countries ask census questions identifying both an individual’s country of birth and country of citizenship.”⁵¹ This reference to the United Nations Principles and Recommendations for Population and Housing Censuses (the UN Principles) omits important context and fails to capture the full scope of the UN’s recommendations on population censuses.

The United Nations develops statistical standards and recommendations for a broad range of statistical systems and for countries with greatly varying needs. It is not intended that all the recommendations would apply equally to all countries. The specific needs and state of development of each country must be considered. Some countries will decide that only relatively few of the recommendations apply to them while others will adopt most of the recommendations. The United Nations recognizes this, and notes in the UN Principles that “[e]ach country’s decision with regard to the topics to be covered should depend upon a balanced

⁴⁹ FR Doc. 2018-12365, proposed Information Collection: Comment Request: 2020 Census. Docket number USBC-2018-005, letter report from National Academies of Sciences, Committee on National Statistics, Task Force on the 2020 Census to U.S. Department of Commerce, Departmental Paperwork Clearance Officer, Aug. 7, 2018, p. 9.

⁵⁰ AR 1313.

⁵¹ AR 1319, citing Principles and Recommendations for Population and Housing Censuses (Revision 3), United Nations 121 (2017).

appraisal of how urgently the data are needed and whether the information could be equally well or better obtained from other sources.”⁵²

Among the country-specific considerations that the UN Principles identify as central to determining census content is the sensitivity of a particular topic or question (and the accompanying respondent burden) in light of local conditions: “It is advisable to avoid topics that could increase the burden on respondents and those that are likely to arouse fear, local prejudice or superstition or that might be used to deliberately promote political or sectarian causes as these are likely to have a detrimental effect on response rates and support for the census.”⁵³

The UN Principles also state: “It should be stressed that no country should attempt to cover all the topics included in the list of population topics (see Table 3).”⁵⁴

In fact, there are 49 total topics in the list of United Nations recommendations and 26 of these are considered “core” recommendations. However, of these 26 core recommendations, the United States has decided that only five are to be directly included in the short form: age, sex, marital status, ethnicity, and place of residence. The United States also includes race but it is not a separate category in the list of recommended topics by the United Nations. Citizenship is one of the core recommendations in the UN Principles, and the United States does collect this information, through the American Community Survey which is the replacement of the long form on the decennial census.

Apart from census topics, the UN Principles also identify core considerations for every country to follow in planning to conduct a population census. Among these is the recommendation that in developing census content, countries “ensure that the topics are appropriate for meeting the demonstrated requirements of users,” including “suitable consultation with existing and potential users at all stages,” and “adequate testing of new topics to ensure successful collection and production of reliable results.”⁵⁵ As I stated earlier in this report, the Secretary’s decision to add a citizenship question did not follow suitable consultation with the requesting agency (the Department of Justice), and did not involve adequate testing of the new question.

The list of population census topics in the UN Principles thus means only that a global consensus has been reached that the topic warrants consideration – along with the list of other topics - by the country, bearing in mind local conditions, and consistent with the foundational obligations to justify and test all census content.

The Secretary states in his decision memo that it is important to note that other major democracies inquire about citizenship on their census. He supplied a disparate list with respect to cultural and political norms as well as the development of their statistical systems. Two of the countries on his list which seem most comparable to the United States are Australia and Canada.

⁵² UN Principles ¶ 4.6, at 172. See https://unstats.un.org/unsd/demographic-social/Standards-and-Methods/files/Principles_and_Recommendations/Population-and-Housing-Censuses/Series_M67rev3-E.pdf.

⁵³ UN Principles ¶¶ 4.2(c), 4.10, at 171, 173.

⁵⁴ UN Principles ¶ 4.14, at 174.

⁵⁵ UN Principles ¶ 2.8, at 33.

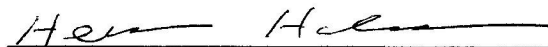
Australia has only a long form census which can be responded to either online or by paper and asks 51 questions, including one on citizenship, relating to individuals. Canada conducts its census in much the same manner as did the United States. During the census there is both a short and a long form. The long form goes to approximately one in four households and it is on this long form that questions about citizenship are asked. Questions on citizenship are not asked on the short form. The United States has moved away from simultaneously conducting a short and long form census. It now conducts a short form census every ten years which is intended to reach every household. The successor to the long form is the ACS, a yearly survey of 3.5 million households, and it is on the ACS that questions on nativity and citizenship are already currently asked.

V. Conclusion.

The proposal of the Department of Commerce to add a citizenship question fails to demonstrate need, does not allow for required preliminary testing and provides inadequate justification for rejection of a lower cost and higher quality Census Bureau proposal. Additionally, if implemented, the option proposed by the Department would damage the Census Bureau's position of trust with the public.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED: September 7, 2018

A handwritten signature in dark ink, appearing to read 'Hermann Habermann', written over a horizontal line.

Hermann Habermann, Ph.D.

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Employment History

2007-present Independent Consultant

Projects for, among others, the United Nations, World Bank, International Monetary Fund.

Projects in Georgia, Kenya, South Africa, Indonesia, Lesotho, CARICOM.

Examples include: Report for UN Statistical Commission on the future of City Groups;

Lectures to National Research University, Higher School of Economics, Moscow;

Modernizing the statistical system of the Republic of Georgia.

Participated in Panel on Approach for Criteria for High Level Decisions for National Center for Education Statistics, US Department of Education and similar statistical agency advisory meetings

2009 – 2018 National Academies of Sciences, Washington DC, Senior Associate
Example activities include: Director of Future of Innovation Workshop, Director of The Forum on Open Science, Chair of Expert Meeting for the Office of Management and Budget on Improving the Relevance of Federal Statistics

2011 – 2016 Oxford Policy Management, Oxford, England, Associate Consultant
Example activities include: Team leader for the project to modernize the Statistical System of Barbados, project quality control for Indonesia statistical transformation and quality improvement, and evaluating efforts to improve the measurement of Millennium Development Goals at the United Nations.

2002 – 2007 U.S. Department of Commerce, U.S. Census Bureau,
Deputy Director and Chief Operating Officer

1994 - 2002 United Nations, Director, United Nations Statistics Division

1992 -1994 Executive Office of the President of the United States, Office of Management and Budget, Deputy Associate Director for Budget

1988 -1992 Executive Office of the President, Office of Management and Budget, Chief Statistician

1984 -1988 Executive Office of the President, Office of Management and Budget,
Chief, Information Technology Management

1979 –1984 Forest Service, U.S. Department of Agriculture, Director of Computer Sciences and Telecommunications

1977 –1979 Forest Service, U.S. Department of Agriculture, Assistant to Deputy Chief for Research

1976 -1977 University of Wisconsin, Adjunct Faculty Member

1970 – 1977 Forest Products Laboratory, Forest Service, U.S. Department of Agriculture, Station Statistician

Education 1975 Ph.D. Statistics, University of Wisconsin – Madison, Wisconsin
Thesis: “Estimation of Transition Matrices with Application to Empirical Bayes
Methodology”, 1975

 1966 MS Mathematics, Adelphi University, Garden City, New York
 1964 BS Mathematics, Pratt Institute, Brooklyn, New York

Professional Organizations

International Statistical Institute (Elected Member)
Committee on National Statistics (Past Member), National Academies of Science
American Statistical Association (Fellow)
National Academy of Public Administration (Fellow)

Board Memberships/ Advisory Groups

Centers for Disease Control and Prevention, National Center for Health Statistics, Board of
Scientific Counselors, 2011 - 2015
US Department of Transportation, Advisory Council on Transportation Statistics, 2012 - 2015
National Center for Education Statistics Expert Group, 2015 – 2017
Member, National Academy of Sciences Panel on “The Transportation Data Needs of the
United States”, 2010
Center for Internet Security, Board of Directors, 2007 – 2010

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Statistics, Volume 22, No. 4, 2006, pp. 599-614.

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national development indicators, including MDGs, Final Report by OPM, M. Powell, J. Compton,
H. Habermann, January 2016.

Presentations

Introduction to the Federal Statistical System – A short course sponsored by the Joint Program in Survey Methodology, 15 March 2017 and various other dates beginning in 2012, with Brian Harris-Kojetin

Forum on Open Science presented to the National Intelligence Science and Technology Committee, 19 November 2015

“Future of the National Statistic Office” presented to the Inter-American Development Bank, 20 October 2015

New Directions in Data Collection and Analysis presented to the Inter-American Development Bank, 16 September 2015

Keynote Speaker at 2014 IAOS Conference, Danang, Vietnam, “ New Directions in Data Collection, The Role of Official Statistics”, October 2014

Shifting Role of Official Statistics presented to the National Research Council, 8 April 2014

Chair, High Level Forum on Fundamental Principles of Official Statistics, UN Statistical Commission, 2014

“Future of the BLS”, invited presentation for the Bureau of Labor Statistics, 18 September 2013

The Nation Statistical Office in 2030, Assuring Trust in Official Statistics, National and International Statistics, and U.S. Statistical Community presentations to Higher School of Economics, Moscow, December 2013

United Nations Committee for the Coordination of Statistical Activities, 1995-1997 (as Director of UN Statistics Division)

Chair, National Academy of Public Administration Panel on "A Program Review of Diversity Strategic Initiatives", June 1, 2009

“The Future of Innovation in the Federal Statistical System”, presented at a joint symposium of the Committee on National Statistics and the American Academy of Political and Social Science on “The Federal Statistical System: Recognizing Its Contributions, Moving It Forward”, 8 May 2009, Washington, D.C.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

NEW YORK IMMIGRATION
COALITION, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
COMMERCE; and WILBUR L. ROSS,
JR., in his official capacity as Secretary
of Commerce, *et al.*

Defendants.

Civil Action No. 1:18-cv-05025

RULE 26(A)(2)(B)
EXPERT REPORT AND
DECLARATION OF
JOHN THOMPSON

Expert Report of Mr. John Thompson
in *New York Immigration Coalition et al. v. Department of Commerce et al.*

I. Introduction

On March 26, 2018 Secretary of Commerce Wilbur Ross announced that he had decided to include a citizenship question on the 2020 Decennial Census Questionnaire. The 2020 Decennial Census results will be of great importance to our nation. The Constitution requires that the Decennial Census be used for reapportioning the Congress of the United States and the Electoral College. The 2020 Decennial Census will also be used for numerous other functions to support good policymaking and economic growth including: redrawing Congressional and local voting districts; allocating over \$650 billion of federal funds annually; informing sound policy development; providing critical information for state, local and tribal government planning; and supplying critical information to large and small businesses to generate growth and job creation. Inaccuracies or errors in the 2020 Decennial Census will have grave consequences on these uses for the subsequent 10-year period.

I have served as both the Director of the U.S. Census Bureau and as the career senior executive in charge of management of all aspects of the 2000 Decennial Census. I am also a distinguished professional in the area of statistics and survey design. I have a deep understanding of the processes that are necessary to achieve a complete and highly accurate Decennial Census. I am being paid \$150 an hour for my work as an expert in this case.

I have carefully reviewed the publicly available administrative record upon which the Secretary of Commerce based his decision to add a question concerning citizenship on the 2020 Decennial Census, the depositions of Dr. Ron Jarmin and Dr. John Abowd and materials produced in discovery in this case. I have also reviewed the March 26, 2018 memorandum prepared by Secretary of Commerce Wilbur Ross documenting his decision to include a question on citizenship on the 2020 Decennial Census questionnaire. I have concluded that there is no evidence in these documents that the Census Bureau conducted any of the proper testing that should be done in order to determine the effects of including a citizenship question on a Decennial Census before the decision was made to add such a question to the 2020 Census. Nor has the Census Bureau conducted any of the proper testing that would allow one to conclude that non-response follow up (“NRFU”) procedures will effectively address the increase in non-response that may be caused by the addition of the citizenship question. Furthermore, based on my review of these materials, it is my opinion that the rationale provided by Secretary Ross for his decision is not supported by the administrative record.

In this report, I first describe my credentials as an expert on the design and conduct of all phases of the Decennial Census including the development of the questionnaire. I then discuss the proper processes for testing a proposed question prior to its inclusion on the Decennial Census questionnaire. I also describe how these processes have been used in previous Decennial Censuses to consider and test proposed changes to questions on the questionnaire sent to all

households, and how these standard Census Bureau practices differ from the process that was conducted to consider the inclusion of the citizenship question on the 2020 Decennial Census questionnaire. I also describe how deviations from these well-established procedures can have serious consequences on accuracy and response rates. Finally, I discuss my review of the publicly available administrative record upon which the Secretary of Commerce based his decision to add a citizenship question to the 2020 Census questionnaire, including his March 29, 2018 decision memorandum. This discussion provides the basis for my conclusion the citizenship question was not properly tested before Secretary Ross decided to add it to the Decennial Census questionnaire and that the rationale for his decision is not supported by the administrative record.

II. Qualifications

Below I briefly describe specific aspects of my qualifications and work experience that establish my credentials as an accomplished statistician and an expert on the Census Bureau and Decennial Census. I have also attached a copy of my CV to this report.

In addition to the work experience described below, I am an elected Fellow of the American Statistical Association, and was selected to serve on the National Academies of Science, Engineering, and Medicine Committee on National Statistics.

1. U.S. Census Bureau (Director August 2013 – June 2017; Career Census Bureau Employee 1975-2002)

The Census Bureau is the largest Statistical Agency and produces a wide range of demographic and economic statistics including the Decennial Census, the American Community Survey, the Current Population Survey, the National Crime Victimization Survey, the National Health Interview Survey, the Economic Census, the release of 13 principle key economic indicators on a monthly or quarterly basis, and conducts about 100 additional surveys. The Director of the Census Bureau is appointed by the President and confirmed by the Senate.

My responsibilities as Director of the Census Bureau included overseeing the research and testing program for improving the 2020 Decennial Census questions on Race and Ethnicity. This testing program began with the 2010 Decennial Census and culminated with the 2015 National Content Test on Race and Ethnicity questions for the 2020 Decennial Census. The final report was published in February 2017 and provides a documentation of the extensive testing required to adequately determine if a new or revised question to collect race and ethnicity data should be included on the 2020 Decennial Census. The report also provides analysis of the test results and recommendations for the optimal design of questions on Race and Ethnicity for the 2020 Census.

Prior to becoming Director, I worked at the Census Bureau for 27 years. I started my career as a mathematical statistician in 1975. I spent the majority of my employment at the Census Bureau focused on the Decennial Census and ultimately served as the Associate Director for the 2000

Decennial Census, with management responsibility for all phases of the 2000 Decennial Census. My work included collaboration with the Office of Management and Budget on the extensive research and testing program that lead to the inclusion of a new race question on the 2000 Census questionnaire.

2. NORC at the University of Chicago (President 2008 – 2013, Executive Vice President 2002 – 2008)

NORC at the University of Chicago is an objective, non-partisan independent research institution that delivers reliable data and rigorous analysis to guide critical programmatic, business, and policy decisions. Clients include government, corporate, and nonprofit organizations around the world who partner with NORC to transform increasingly complex information into useful knowledge. NORC conducts research in five main areas: Economics, Markets, and the Workforce; Education, Training, and Learning; Global Development; Health and Well-Being; and Society, Media, and Public Affairs. NORC services include designing and conducting surveys (telephone, Internet, and in-person) as well as analytical studies.

At NORC, my responsibilities encompassed the management of all survey operations including the design and testing of survey questionnaires.

3. Council of Professional Associations on Federal Statistics (Executive Director July 2017 – August 2018)

The Council of Professional Associations on Federal Statistics (COPAFS) is an organization with a membership consisting of professional associations and research organizations that depend on and support high quality federal statistics. The Executive Director of COPAFS must have a deep understanding of the Federal Statistical System and the wide range of data products that are produced. Serving as the Executive Director of COPAFS reinforced my appreciation of the importance of high quality Decennial Census data to the entire Federal Statistical System.

III. Protocols for Proper Research and Testing of a Question Proposed for Inclusion on the Decennial Census

The uses of the data generated by the Decennial Census are extremely important for all components of our democracy and economy, including: the constitutionally required reapportionment of the Congress; redrawing Congressional and local voting districts; allocating over \$650 billion in federal funds annually; supporting evidence based policy making by state, local and tribal governments; and allowing informed decisions by large and small business to generate economic growth and job creation. Inaccuracies or undercounts in Decennial Census data will result in under-representation of the affected population groups not just in the immediate term, but for ten subsequent years until the next Decennial Census results are available.

It is a widely accepted principle among statisticians and survey methodologists that even minor changes in question wording or placement on a questionnaire can have unanticipated effects on both response rates and the accuracy of the data respondents provide. Given the importance of the Decennial Census, the Census Bureau has established extensive testing processes in order to properly assess proposed changes to the content of the questionnaire and avoid the risk of introducing undercounts or other inaccuracies into the census data. The current proposal to add a question on citizenship to the 2020 Decennial Census questionnaire is a deviation from these well-established principles for developing a Decennial Census questionnaire.

a. Examples of Prior Extensive Research and Testing Conducted When Considering Adding a New Question

Two examples of the extensive research and testing that is standard practice when the Census Bureau considers making changes to the Decennial Census questionnaire took place during my tenure overseeing the 2000 and 2020 Decennial Censuses.

i. Race and Ethnicity on the 2000 Decennial Census

For the 2000 Decennial Census there was a proposal to revise the questionnaire to allow respondents to indicate that they identified with multiple races. In 1977, the Office of Management and Budget (OMB) issued Statistical Directive No. 15 to establish the standards for the classification of Federal data on race and ethnicity. Following the 1990 Decennial Census, the standards in Directive No. 15 came under increasing criticism from those who believed that the minimum race categories set forth in Directive No. 15 did not reflect the increasing diversity of our Nation's population that resulted primarily from growth in immigration and in interracial marriages.¹ Many of these respondents did not identify with a single race category and wanted the OMB standards to allow them to report more than one race.² In response to the criticisms, OMB announced in July 1993 that it would undertake a comprehensive review of the current categories for data on race and ethnicity. The review was conducted over four years and included extensive cognitive and field testing components conducted by the Census Bureau. This program of research is documented in a Federal Register Notice issued on October 30, 1997³ in which OMB announced that it intended to revise the standards to allow reporting of multiple races in all Federal data collections including the 2000 Decennial Census. The testing conducted by the Census Bureau that supported OMB's decision to make these revisions also

¹ Federal Register Notice, Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, (October 30, 1997), https://obamawhitehouse.archives.gov/omb/fedreg_1997standards.

² Roderick Harrison et al., *Findings on Questions on Race and Hispanic Origin Tested in the 1996 National Content Survey*, Census Bureau Special Populations Statistics Population Division Working Paper Number POP-WP016, (December 1996), <https://www.census.gov/population/www/documentation/twps0016/report.html>.

³ Federal Register Notice, Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, (October 30, 1997), https://obamawhitehouse.archives.gov/omb/fedreg_1997standards.

included the development and extensive testing of a question to be included on the 2000 Decennial Census questionnaire.⁴

ii. Race and Ethnicity on the 2020 Decennial Census

Similarly, planning for the 2020 Decennial Census also included an extensive research and testing program to determine how the questions on race and ethnicity could be improved beyond those announced in 1997. This research started more than ten years prior to the 2020 Decennial Census as part of the 2010 Decennial Census as the Alternate Questionnaire Experiment.⁵ The design of the Alternate Questionnaire Experiment began in 2008.⁶ This testing involved three components: 1) a questionnaire sent by mail that respondents received in lieu of the standard 2010 Decennial Census questionnaire; 2) a telephone re-interview of the mail respondents to assess the accuracy and the reliability of both the control and the alternative race and Hispanic origin questions; and 3) a series of focus groups conducted to complement the quantitative analyses.⁷

The results of the Alternate Questionnaire Experiment were promising but not conclusive and thus testing continued following the 2010 Decennial Census. Throughout 2014 and 2015, the Census Bureau research team “shared and discussed plans for testing different question designs, and participated in numerous public dialogues about their research plans in order to obtain community feedback.”⁸ In 2015 the proposed changes were extensively tested through the National Content Test (NCT). This comprehensive research program is documented by the Census Bureau in the *2015 National Content Test Race and Ethnicity Analysis Report*.⁹

⁴ See, e.g., Roderick Harrison et al., *Findings on Questions on Race and Hispanic Origin Tested in the 1996 National Content Survey*, Census Bureau Special Populations Statistics Population Division Working Paper Number POP-WP016, (December 1996),

<https://www.census.gov/population/www/documentation/twps0016/report.html#background-rho>. See also Claudette Bennett et al., *Results of the 1996 Race and Ethnic Targeted Test*, Census Bureau Population Division Working Paper No. 18, (May 1997),

<https://www.census.gov/population/www/documentation/twps0018/twps0018.html>.

⁵ 2010 Census Planning Memorandum Series No. 211 *2010 Census Race and Hispanic Origin Alternative Questionnaire Experiment*, (2013), https://www.census.gov/2010census/pdf/2010_Census_Race_HO_AQE.pdf.

⁶ Research to Improve Data on Race and Ethnicity, U.S. Census Bureau, (2017), <https://www.census.gov/about/our-research/race-ethnicity.html>.

⁷ Karen Humes, *2010 Census Alternative Questionnaire Experiment: Race and Hispanic Origin Treatments*, U.S. Census Bureau Population Division, (2009), http://www.nlpnetwork.org/Census_-_Alt_Exper_Ques_Plan_-_Summer_2010.pdf.

⁸ Research to Improve Data on Race and Ethnicity, U.S. Census Bureau, (2017), <https://www.census.gov/about/our-research/race-ethnicity.html>.

⁹ Mathews, Kelly, Jessica Phelan, Nicholas A. Jones, Sarah Konya, Rachel Marks, Beverly M. Pratt, Julia Coombs, Michael Bentley, *2015 National Content Test Race and Ethnicity Analysis Report*, Census Bureau Report, (February 28, 2017), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2015nct-race-ethnicity-analysis.pdf>.

The 2015 NCT was conducted with a nationally representative sample of 1.2 million housing units in the United States, including Puerto Rico.¹⁰ This sample was designed to ensure that the results accurately reflected the nation as a whole, across a variety of demographic characteristics. The NCT oversampled census tracts that contained relatively high percentages of race and ethnicity groups who were susceptible to undercounts or were likely to have low self-response rates.¹¹

The NCT examined several key dimensions for improving the data on race and ethnicity. This included question format (e.g. whether to ask separate questions on race and ethnicity or to combine them), response categories (e.g. whether to include a “Middle Eastern or North African” category), instruction wording (e.g. comparing two sets of instructions: “Mark [X] one or more boxes” vs. “Mark all that apply” in paper data collections; and “Select one or more boxes” vs. “Select all that apply” in Internet data collections) and question terminology (e.g. whether to include “race,” “origin,” “ethnicity,” or no terms).¹²

Following the initial NCT sampling a re-interview was conducted with approximately 75,000 respondents. This re-interview asked three questions about how respondents self-identify, as well as collecting more detailed information about respondents’ racial and ethnic background and was designed to confirm how effective the initial questionnaire had been.¹³

After the release of the 2015 NCT results the Census Bureau had extensive dialogue about the NCT results with other agencies and received additional feedback from the public through the Federal Register Notice process in order to develop the final recommendation to OMB. Despite all of these extensive testing and research, in January 2018 Albert Fontenot, the Associate Director for Decennial Census Programs announced that the Census Bureau would continue to use two separate questions for collecting data on race and ethnicity and would not add a separate Middle Eastern or North African category on the 2020 Census.¹⁴ The stated justification for this decision was that although extensive testing had been conducted for over a decade, a final decision had to be made by December 31, 2017 in order to allow the Census Bureau adequate time to deliver the final question wording for the 2020 Decennial Census to Congress by March 31, 2018.¹⁵

¹⁰ *Id.*

¹¹ Kelly Mathews, Jessica Phelan, Nicholas A. Jones, Sarah Konya, Rachel Marks, Beverly M. Pratt, Julia Coombs, Michael Bentley, *2015 National Content Test Race and Ethnicity Analysis Report*, Census Bureau Report, (2017), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2015nct-race-ethnicity-analysis.pdf>.

¹² *Id.*

¹³ *Id.*

¹⁴ 2020 Census Program Memorandum Series: 2018.02 *Using Two Separate Questions for Race and Ethnicity in 2018 End-to-End Census Test and 2020 Census*, Census Bureau, (2018), https://www2.census.gov/programs-surveys/decennial/2020/program-management/memo-series/2020-memo-2018_02.pdf.

¹⁵ *Id.*

These two extensive multi-year testing programs are reflective of the great care which the Census Bureau determined was necessary to ensure that both the 2000 and 2020 Census results would not be influenced by unanticipated biases or undercounts due to changes in the questionnaires relating to race and ethnicity. As I will discuss in more detail below, there is no evidence in the administrative record that any similar testing supported the decision to include the citizenship question on the 2020 Census.

I will now describe the components of a research and testing program that should be carried out to determine whether a new question should be included on a Decennial Census.

b. Determination of a Potential Need for a New Question on the Decennial Census Questionnaire

The determination of a need for a new question on the Decennial Census questionnaire begins when a federal agency identifies a need for new information that is only possible to be collected from the Decennial Census and makes a formal request to the Census Bureau to consider adding a new question. The request can come in response to a formal solicitation from the Census Bureau or when circumstances arise that cause an agency to identify a new program need. Upon receiving the request, the Census Bureau typically works with the Office of Management and Budget and with the Department of Commerce Office of General Counsel to determine whether this information should be collected from the Decennial Census questionnaire. The three key components of this review are: (1) validating the legislative basis for the information need; (2) validating that the information is needed from every person in the United States such that it cannot be obtained from some other survey such as the American Community Survey; and (3) that there is no other source for the information. If the review indicates that the information should be collected from the Decennial Census a rigorous testing program will then begin as described below.

In my experience, the process that took place to determine the need for a citizenship question to be included on the 2020 Decennial Census is unprecedented. The administrative record makes clear that the Secretary of Commerce solicited the Department of Justice to request that a citizenship question be added to the 2020 Census questionnaire.¹⁶ This latter action by Secretary Ross is very unusual – during my tenure at the Census Bureau as both a long-time senior career executive and as a political appointee, I never observed a political official at the Department of Commerce solicit another federal agency to request that a specific question be added to the Decennial Census questionnaire.

¹⁶ On page 1 of his decision memorandum Ross makes the statement “Following receipt of the DOJ request, I set out to take a hard look at the request and ensure that I considered all facts and data relevant to the question so that I could make an informed decision on how to respond.” However, the administrative record makes it very clear that Secretary Ross actually approached DOJ and requested that they initiate the request much earlier than December 12, 2017 therefore this is an inaccurate statement. *See also* Supplemental Memorandum by Secretary of Commerce Wilbur Ross Regarding the Administrative Record in Census Litigation, (June 21, 2018), AR 1308-1321.

c. Initial Question Design

The first step in designing a new question to be added to a Decennial Census questionnaire is for experts in both subject matter and cognitive design to develop several reasonable alternatives for the question wording. The subject matter experts usually consist of staff from both the Census Bureau and the requesting agency.

The Commerce Department has asserted that since a citizenship question was included on previous Decennial Census long form questionnaires that were sent to a sampling of households and on the American Community Survey such a question has been adequately tested.¹⁷ However, there are a number of design issues that must first be considered before reaching such a conclusion. Based on my review of the administrative record, these issues were not addressed before the decision was made to include a citizenship question on the 2020 Decennial Census questionnaire.

i. Consultation With Subject Matter Experts

Input from subject matter experts is essential to the development of a new question. There must be a clear understanding of the desired uses of the new data so that the new question can be worded to achieve the desired outcome. However, the administrative record and the depositions of Acting Census Bureau Director Dr. Ron Jarmin and Census Bureau Chief Scientist Dr. John Abowd make it clear that the Department of Justice refused to meet with the Census Bureau to discuss their request that a citizenship question be included on the 2020 Census. Without these discussions, there is a significant risk that the resulting citizenship data will not meet their needs. For example, Dr. Abowd stated that the Census Bureau still doesn't know how the responses from the citizenship question will be combined with administrative records to form the tabulation of block-level citizenship data, the details of how the citizenship data will be altered to prevent disclosure of respondent's citizenship status, whether the citizenship data produced after the 2020 Decennial Census will have larger or smaller margins of error than the citizenship data currently relied on by the Department of Justice, whether the error margins associated with the data will allow the Department of Justice to use the data effectively, or even whether the block-level data will be included in the standard redistricting data file produced by the Census at all (the "P 94-171 Data File").¹⁸

ii. Design of Questionnaire

Good test design requires considering not just an individual question, but the effect of the question in the context of the entire questionnaire. For example, the testing that was done relating to potential changes to the race and ethnicity questions for the 2000 and 2020 Decennial

¹⁷ Secretary Wilbur Ross, *Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire*, (March 26, 2018), AR 1314. (the ACS "has included a citizenship question since 2005. Therefore the question has been well tested.")

¹⁸ 30(b)(6) Dep. of J. Abowd, dated Aug. 29, 2018 at 55-62, 70. J. Abowd Dep. dated Aug. 15 2018, at 174-178.

Census questionnaires that I described above considered this issue extensively. Assessment of the potential design should also take into account the order in which the questions will appear.

The ACS is a much longer questionnaire than the Decennial Census questionnaire. The ACS questionnaire includes over 70 questions while the 2020 Decennial Census will contain 11 questions if the citizenship question is included. A question concerning citizenship may take on added significance to a respondent in the context of a shorter questionnaire where it is only one of 11 questions. The administrative record does not document any design considerations related to putting the citizenship question that appears on the ACS on the much shorter 2020 Decennial Census questionnaire.

The effects of the interactions between questions included on a questionnaire must also be considered. For example, the ACS includes the following question on place of birth that is asked just before the question on citizenship¹⁹:

Where was this person born?

☐ In the United States – *Print name of the state.* _____
☐ Outside the United States – *Print name of foreign country, or Puerto Rico, Guam, etc.* _____

The potential effects on the subsequent responses to the ACS citizenship question given that respondents have been influenced by the place of birth question need to be carefully studied. For example, it is possible that the place of birth question may cause ACS respondents to be more comfortable with the citizenship question. As such, the absence of the place of birth question before the citizenship question on the 2020 Decennial Census may generate respondent concerns that the citizenship question is intrusive. However, the actual outcome is unknown without testing.

Whether the wording and length of the question to be added is consistent with the instrument on which it is to be included is another important design consideration. Yet, my review of the administrative record did not reveal any evidence that such concerns were considered before the decision was made to include a citizenship question on the 2020 Decennial Census. The language of the citizenship question that Secretary Ross has indicated will be added is as follows:

Is this person a citizen of the United States?

☐ Yes, born in the United States
☐ Yes, born in Puerto Rico, Guam, the U.S. Virgin Islands, or Northern Marianas
☐ Yes, born abroad of U.S. parent or parents
☐ Yes, by naturalization – print year of naturalization – ____

¹⁹ The American Community Survey, U.S. Census Bureau, (2018), <https://www2.census.gov/programs-surveys/acs/methodology/questionnaires/2018/quest18.pdf>.

___ No, not a U.S. citizen

There are potential concerns with the five response categories that are included in the ACS question. For example, concerns have been publicly expressed by members of Congress and other stakeholders about the response category “Yes born in Puerto Rico, Guam, the U.S. Virgin Islands, or Northern Marianas” because respondents in Puerto Rico may be offended by the perception that their citizenship is different from that of citizens in the mainland United States.²⁰ To my knowledge no testing has been done to confirm whether this may affect response rates if asked on the 2020 Decennial Census.

A reasonable alternative for the 2020 Decennial Census question on citizenship could be a very short question such as:

Is this person a citizen of the United States?

___ Yes

___ No

However, there is no evidence in the administrative record that such an alternative—or any alternatives at all—were considered or tested.

iii. Iterative Cognitive Testing to Refine Alternatives

Once the reasonable alternative question designs have been developed, the next step in considering a new question is for cognitive survey methodology experts to conduct a number of facilitated focus group studies to examine how potential respondents react to each of the alternative questions. It is very important that the focus group testing focus on the entire questionnaire and the sequence that questions will be asked. Often these focus groups are conducted in a cognitive laboratory in which a group of 10 to 12 respondents are administered questions by a facilitator. While this administration is being conducted, other cognitive survey methodologists unobtrusively observe how the respondents react to the questions. An important objective of these studies is to determine whether respondents understand the questions and are providing accurate answers. The focus groups will also give an indication if questions are posed in such a fashion that they will lead to non-response that could result in an undercount. The focus groups must be conducted with a representative sample of the population of the United States. For example, the 2010 Census Alternative Questionnaire Experiment included 67 focus groups with about 800 total respondents. During this process it is common for the initial alternative question designs to be revised based on the reactions of the focus group respondents and then for the revised designs to be subjected to additional focus group testing. At the end of this iterative process, a set of alternative questions are then ready for field testing.

²⁰ See e.g., *Bureau of the Census FY 2019 Budget: Hearing Before the Committee on Appropriations 115th Cong.* (April 18, 2018) (Statement of Representative Serrano at 2:15:10-2:16:50), <https://appropriations.house.gov/calendar/eventsingle.aspx?EventID=395239>.

The administrative record provides no evidence of any cognitive testing of the Decennial Census questionnaire with the ACS citizenship question included. One critical objective of focus group testing of the inclusion of the ACS citizenship question would be whether doing so would increase the propensity for certain historically hard-to-count population groups to resist responding to the entire 2020 Decennial Census questionnaire. The Census Bureau has produced research that indicates growing concerns that respondents have with privacy, confidentiality and government surveys,²¹ underscoring the importance of such testing. However, the administrative record indicates that there has been no evaluation of the effect of these concerns on how respondents may view the citizenship question on the 2020 Decennial Census questionnaire. As Dr. Abowd testified, Census Bureau staff concluded that, with respect to “cognitive testing,” the 2020 census questionnaire was “not adequately tested with the citizenship question.”²²

iv. Field Testing of Alternative Questionnaires

While cognitive focus group testing of alternative questionnaires is very important, it is not sufficient to conclude that a question is ready to be included in a data collection activity. This is particularly the case for the Decennial Census where field testing of alternative questions and questionnaires is of critical importance to understand how respondents will react in an unsupervised environment.

The field testing must also be based on a well-designed national sample of households that simulates to the greatest extent possible a Decennial Census environment. Importantly, the sample must be representative of the population of the United States and include sufficient observations to assess the effects on the hard-to-count populations. Some other important aspects of a proper field test design are as follows:

- (1) A stratified sample must be designed to allow for analysis of the effectiveness of alternative questions on producing data for both population and geographic subgroups (e.g., Racial and Hispanic populations, urban and rural areas, American Indian Reservations, etc.).
- (2) The alternative questionnaires are administered to the sample households in a manner that replicates to the greatest extent possible the way in which the Decennial Census will be conducted. For example, since the 2020 Census will allow both internet and paper questionnaire response options, the test design must allow for an analysis of these different response modes.
- (3) A re-interview of either all or at least a subsample of the respondents who completed the initial questionnaires should be conducted. This is an extremely critical component of the testing of a new question. The purpose of the re-interview is to determine whether the respondents are providing accurate answers that the alternate questionnaires were designed to

²¹ AAPOR Panel on *Changes in Respondent Privacy, Confidentiality, and Data Sharing Concerns*, Meyers, Goerman, Harris-Kojetin, Terry, and Fobia, Denver, Colorado, May 18, 2018.

²² Abowd 30(b)(6) Dep. Tr. at 142:18-43:4.

collect. In addition, if misreporting is detected, the re-interview will identify the factors that are causing the response error. This would be of critical importance to designing a question on citizenship because it is well known that over 30 percent of non-citizens report themselves as citizens when responding to the citizenship question included on the ACS questionnaire,²³ and it is essential to understand the factors that are generating such errors.

Despite the importance of field testing a new question before inclusion on the Decennial Census—especially for a question that is already known to have a high incorrect response rate on the ACS—the administrative record contains no evidence that any field testing of the citizenship question to be included on the 2020 Decennial Census was conducted.

In his decision memorandum Ross states that “the citizenship question has been well tested.”²⁴ However, the administrative record does contain any documentation of a research testing program that would be appropriate for supporting the inclusion of the citizenship question on the 2020 Decennial Census questionnaire. In fact, the administrative record demonstrates that little is known about the effects of a citizenship question. Thus, I conclude that Secretary Ross’s statement is not supported by the administrative record.

v. Analysis of Field Test Results

At the conclusion of the field test the results are analyzed to determine which of the alternative questions, if any, is producing the desired outcome or if more testing is needed. In the case of the Decennial Census, the analysis of the results would typically be discussed with the Census Bureau advisory committees, the Office of Management and Budget, and outside researchers with expertise in questionnaire design and in the subject matter area related to the new questionnaire.

A good example of such analysis is the work that the Census Bureau carried out as part of the 2015 National Content Test. Census Bureau staff made numerous presentations of each stage of analysis to their federal advisory committees, and other stakeholders including OMB. The Census Bureau published the final research report and then met with numerous stakeholder groups to discuss the findings and answer questions. A primary objective of this outreach was to ensure that the research adhered to the established principles of openness and objectivity.

In the case of the decision to include a citizenship question on the 2020 Decennial Census questionnaire, the administrative record documents that in deviation from standard practice Secretary Ross made his decision in the absence of any field test results or other research on the potential effects of including the question on the 2020 Decennial Census questionnaire and

²³ John Abowd, *Technical Review of the Department of Justice Request to Add Citizenship Question to the 2020 Census*, Memorandum to Wilbur Ross (January 19, 2018), AR 1277-1285.

²⁴ Secretary Wilbur Ross, *Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire*, (March 26, 2018), AR 1314.

without the input of the Census Bureau's own advisory committees or other important stakeholders.

vi. Census Bureau Recommendations

Based on the analysis, and input of the external review, the Census Bureau would then make a recommendation regarding whether to move forward with proposing that a new questionnaire should be added to the 2020 Census questionnaire. The recommendations would be discussed with officials at the Department of Commerce with oversight responsibilities including the Secretary of Commerce.

The administrative record documents that the Census Bureau conducted timely and well-thought-out research on how to best produce data on citizenship to meet the Department of Justice's request. This research clearly indicated that there were more cost effective and more accurate methods to produce these data by using administrative records instead of asking the question directly on the 2020 Census questionnaire.^{25 26} In addition, Dr. Abowd testified that, speaking for the Census Bureau, he does not agree with the concluding passage of Secretary Ross's decision memorandum that the addition of the citizenship question "is necessary to provide complete and accurate data in response to the DOJ request."²⁷ The Census Bureau provided these recommendations to Secretary Ross, but they were not adopted and the administrative record does not include a rationale for Ross ignoring them. In my experience, it is unprecedented for a senior Department of Commerce official to dismiss a Census Bureau technical recommendation based on extensive research without documenting a rationale for such an action.

IV. Review of the Administrative Record Upon Which the Secretary of Commerce Based his Decision to Add a Citizenship Question to the 2020 Decennial Census

I have carefully reviewed the administrative record that has been produced in this case and upon which the Secretary of Commerce based his decision to add a question concerning citizenship on the 2020 Decennial Census, as well as the March 26, 2018 Memorandum from Secretary Ross to Karen Dunne Kelley in which he announced his decision to reinstate a citizenship question on the 2020 Decennial Census questionnaire. I have found that serious inconsistencies exist between the materials in the administrative record and the rationale Secretary Ross provides in support of his decision. I have also found that Secretary Ross has made certain assumptions that are contrary to his stated goal of prioritizing "complete and accurate data."²⁸ These problematic areas in Secretary Ross's decision memorandum are as follows:

²⁵ John Abowd, *Technical Review of the Department of Justice Request to Add Citizenship Question to the 2020 Census*, Memorandum to Wilbur Ross (January 19, 2018), AR 1277-1285.

²⁶ John Abowd, *Preliminary analysis of Alternative D (Combined Alternatives B and C)*, Memorandum to Wilbur Ross (March 1, 2018), AR 1308-1312.

²⁷ 30(b)(6) Dep. of J. Abowd, dated Aug. 29, 2018, at 331:8-17.

²⁸ Secretary Wilbur Ross, *Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire*, (March 26, 2018), AR 1313.

a. Ross Failed to Consider the Likelihood of Increased Undercount

The most problematic issue with Ross's decision memorandum is that it contains no consideration of whether the addition of the citizenship question to the 2020 Decennial Census questionnaire will result in increased undercounts of those population groups that have been traditionally hard-to-count.

The Census Bureau has made good progress since the 1990 Decennial Census, and had great success during both the 2000 and 2010 Decennial Censuses, in reducing undercounts. A key component of this success has been the deployment of a combined national and local advertising and local partnership program to deliver a message to hard-to-count populations that the census is important to their community, and that the data collected through the census is completely confidential. No individual's information is shared with any other organization or law enforcement entities. This messaging program was responsible for dramatic gains in the accuracy and coverage of the 2000 and 2010 Decennial Census relative to the 1990 Census, which did not include such a program. For example, the undercount of Black or African Americans dropped from 4.6 percent in 1990 to 2.1 percent in 2010.²⁹ For the Hispanic population the undercount dropped from 5.0 percent to 1.5 percent.³⁰

There is no research cited in Ross's decision memo or in the administrative record that supports the conclusion that including the citizenship question on the 2020 Decennial Census questionnaire will not significantly reduce the effectiveness of this messaging, therefore resulting in increased undercounts relative to previous Decennial Censuses.

In his decision memo Ross claims that "neither the Census Bureau nor the concerned stakeholders could document that the response rate would in fact decline materially." The reason that neither the Census Bureau nor other stakeholders could provide such documentation is that including a citizenship question on a Decennial Census short form has not been tested. Obtaining such documentation would involve a multi-year testing and research program following the steps I outlined above. Instead, Secretary Ross simply assumed that there will be no adverse effects on response rates without any supporting evidence.

In fact, in their depositions, Dr. Ron Jarmin and Dr. John Abowd both stated that the inclusion of the citizenship question may result in reducing self-response rates. And it is reasonable to conclude that this drop in self-response rates will result in increased undercounts. The Census Bureau identifies hard-to-count areas as those with a low response score or low self-response rate.³¹ Lower self-response rates indicate that an area should receive a higher rating as hard-to-count than those areas with higher self-response. Decennial Census undercounts would be

²⁹ P. Cantwell, *DSSD 2010 Census Coverage Measurement Memorandum Series # 2010-G-01*, (May 22, 2012), https://www.census.gov/coverage_measurement/pdfs/g01.pdf.

³⁰ *Id.*

³¹ Response Area Outreach Mapper, Census.gov, www.census.gov/roam, (July 2018).

expected to occur in those areas that are hard-to-count. Given that the Census Bureau has provided research indicating that it is very likely that the 2020 Census self-response rates will be lowered by the addition of a citizenship question,³² it follows that the number of hard-to-count areas will increase, and it is therefore likely that undercounts will also increase.

Both Dr. Jarmin and Dr. Abowd, however, testified that the in-person operations to collect information from non-respondents (referred to as “Non Response Follow Up” or “NRFU”) will still be able to obtain complete information for the populations whose self-response is lowered by the citizenship question. That is, despite having a lower self-response rate, the final results for these populations will not show an increased undercount. However, there is no research cited in the administrative record—and I know of no research outside of the administrative record—to support this conclusion. Instead, an internal Census Bureau analysis produced in this case and provided to me by counsel raises questions about the accuracy of NRFU procedures for addressing an increase in non-response resulting from the citizenship question.³³ The same Census Bureau staff that analyzed the possible effect of the citizenship question on response rates also acknowledged that “[h]ouseholds deciding not to self-respond because of the citizenship question are likely to refuse to cooperate with enumerators coming to their door in NRFU.”³⁴ That is, Bureau staff concluded that it is likely that households that refuse to respond to the Decennial Census questionnaire because of the citizenship question are also likely to respond to enumerators. Dr. Abowd also testified that there is no empirical evidence that someone who chooses not to respond to the 2020 Decennial Census because of the citizenship question would respond in a face-to-face interaction with the census enumerator.³⁵ There is also data in the administrative record indicating that NRFU efforts for the ACS have been less successful in census tracts with the largest percentages of non-citizen households, and that ACS NRFU success rates have been declining.³⁶ These facts all strongly suggest that NRFU efforts may be unsuccessful with respect to households that decline to answer the Decennial Census questionnaire because of the citizenship question, particularly noncitizen households.

The 2020 Decennial Census is too important to not have an assessment of the potential for increased undercounts that could result from the inclusion of a citizenship question. A decision criteria should **not** be *there is no evidence that the inclusion of a citizenship question will increase undercounts*. Instead, the correct decision criteria under governing professional standards **must** be that *there is strong evidence that the inclusion of a citizenship question will not increase undercounts*. In the absence of this latter criterion, the risk of serious undercounts in the 2020 Decennial Census is very high.

³² J. David Brown, Misty L. Heggeness, Suzanne M. Dorinski, Lawrence Warren, and Moises Yi, *Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census*, (August 6, 2018), COM_DIS00009873-74.

³³ *Id.*

³⁴ *Id.*

³⁵ Abowd 30(b)(6) Dep. at 251:15-22.

³⁶ Chart of Response Rates, AR 10408-10413; Abowd 30(b)(6) Dep. at 128:1-11.

As Census Bureau staff concluded, when such households do not respond to the questionnaire or to NRFU enumerators because of the citizenship question, it “result[s] in the use of neighbors as proxy respondents on their behalf.”³⁷ That is, when households refuse to respond to an enumerator, the enumerator seeks a proxy response from someone outside the household.³⁸ But as noted by Census Bureau staff, proxy enumeration generally produces a lower correct enumeration rate, and poorer quality individual demographic information, than a self-response. Finally, if a proxy response is unavailable for a household, the Census Bureau may attempt to enumerate that household using administrative records; but as Dr. Abowd testified, such records are more likely to exist for citizens than for noncitizen households.³⁹

b. Ross Ignored the Recommendation of the Census Bureau

On page 4 of his decision memorandum, while discussing Option C, which involved the use of administrative records rather than adding a citizenship question, Ross makes the statement:

While impressive, this means that more than 10 percent of the American population – some 25 million voting age people – would need to have their citizenship imputed by the Census Bureau. Given the scale of this number, it was imperative that another option be developed to provide a greater level of accuracy than either self-response alone or use of administrative records alone would provide.

The other option that Secretary Ross refers to was Option D, which he ultimately selected. However, the Census Bureau conducted a thorough assessment of Option D and clearly demonstrated that Option D would increase the level of inaccuracy in citizenship data. The administrative record shows that the Census Bureau sent Secretary Ross a memorandum on March 1, 2018 with the subject *Preliminary analysis of Alternative D (Combined Alternatives B and C)*. This memorandum documented a well-designed analysis of Alternative D and concluded “In sum, Alternative D would result in poorer quality than Alternative C. It would still have all of the negative cost and quality implications of Alternative B outlined in the draft January 19, 2018 memo to the Department of Commerce.”⁴⁰ In other words, the administrative record makes clear through the research conducted by Dr. Abowd, that the citizenship data would best be met by using other means than including a question on citizenship on the 2020 Decennial Census questionnaire. Secretary Ross stated on page one of his decision memorandum “The Department and Census Bureau’s review of the DOJ request – as with all significant Census assessments – prioritized the goal of obtaining *complete and accurate data*.” Despite this claim, the administrative record indicates that he actually rejected the recommendation of the Census Bureau and decided on a less accurate one.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Abowd 30(b)(6) Dep. at 233:3-11.

⁴⁰ John Abowd, *Preliminary analysis of Alternative D (Combined Alternatives B and C)*, Memorandum to Wilbur Ross (March 1, 2018), AR 1308-1312.

On page 6 of the decision memorandum Ross states that:

[O]ther stakeholders who opposed reinstatement did so on the assumption that the data on citizenship that the Census Bureau collects through the ACS are accurate thereby obviating the need to ask the question on the decennial census. But as discussed above, the Census Bureau estimates that between 28 and 34 percent of the citizenship self-responses on the persons that administrative records show are non-citizens were inaccurate. Because these stakeholder concerns were based on incorrect premises, they are not sufficient to change my decision.

This statement seems to imply that including a citizenship question on the 2020 Decennial Census will solve the potential problem of respondents misreporting their citizenship status as identified by Census Bureau researchers. However, this is no evidence in the administrative record that would indicate that a different result would occur if the ACS citizenship question were included on the 2020 Decennial Census questionnaire. That is, there is no evidence to suggest that the same misreporting for the ACS would not be present in the 2020 Decennial Census results. Instead, the Census Bureau research documented in the administrative record clearly indicates that the only viable means of eliminating the misreporting identified by Secretary Ross would be to use administrative records to meet the DOJ request for citizenship data.

V. Conclusion

I have carefully studied the administrative record upon which the Secretary of Commerce based his decision to add a question on citizenship to the 2020 Decennial Census. Based on my review, I have found no evidence of any support for certain key conclusions set forth in Secretary Ross's decision memorandum. The importance of the Decennial Census requires careful testing and evaluation before making changes that could have far lasting consequences of underrepresentation for many population groups and areas. No such research and testing was conducted to support Secretary Ross's decision. More troubling, I did not find any evidence in the administrative record, nor do I know of any research, that would indicate that inclusion of the citizenship question **will not** result in serious undercounts for the 2020 Census. Therefore, there is a high risk that we will see such undercounts if a citizenship question is included on the 2020 Census questionnaire.

I reserve the right to amend or supplement my opinions if additional information or materials become available. I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct to the best of my knowledge.

DATED this 7th Day of September, 2018



John Thompson

JOHN H. THOMPSON

BRIEF CAREER HISTORY

Extensive Senior Executive leadership in the non-profit and federal sectors, with experience in social science research and statistics, congressional advocacy, building coalitions, operational management, business development, stakeholder relations, innovation, and strategic vision.

Executive Director, Council of Professional Associations on Federal Statistics – July 2017 to August 2018

The Council of Professional Associations on Federal Statistics (COPAFS) was founded in 1981 to coordinate activities of a number of Associations, Organizations, and Businesses that rely on federal statistics to support good governance and economic growth. COPAFS now represents a growing body of stakeholders that support the production and use of high quality statistics. The Executive Director represents these stakeholders in realizing their mission to *Advance Excellence in Federal Statistics*. Activities include:

- Advocated on behalf of federal agencies. For example, COPAFS is a co-chair of the Friends of the Bureau of Labor Statistics, and the Friends of the National Center for Health Statistics;
 - Worked with stakeholder coalitions to support proper funding for the 2020 Census and the American Community Survey;
 - Ensured members of Congress, COPAFS members, and other stakeholders were informed of critical issues facing agencies that produce federal statistics;
 - Alerted members and stakeholders of breaking issues that needed immediate support and attention;
 - Organized and supported ongoing educational efforts for members of Congress and their staff on the value and importance of federal statistics both nationally and in their own states and districts;
 - Created and joined in powerful coalitions of organizations and businesses to advocate on behalf of federal agencies that produce statistics, building broad support across a wide spectrum of data users;
 - Built partnerships with foundations that help fund critical research in the statistical agencies and academia to ensure the on-going modernization of how statistical data are created and made available to the public and researchers, and to fund educational efforts;
 - Worked closely with the Chief Statistician of the United States and the statistical agencies to help inform and promote modernization efforts underway and assist agencies in keeping abreast of new stakeholder data needs; and
 - Hosted events to demonstrate the importance of federal statistics such as the 2018 Federal Committee on Statistical Methodology Research and Policy Conference.
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John H. Thompson
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Director, United States Census Bureau – August 2013 to June 2017

Appointed by the President as Director of the largest federal statistical agency, with a staff of over 5,000 headquarters employees and approximately 10,000 to 15,000 staff spread across the United States in six regional offices and a major production facility in Indiana, with an annual budget exceeding \$1 billion. Key accomplishments include:

- Worked successfully with the executive and legislative branches of the federal government, including the White House, the Office of Management and Budget, Cabinet officials, and members of Congress and congressional staff, to accomplish a major transformation of the Census Bureau into a forward-looking 21st century statistical agency. Testified at 6 congressional hearings on the Census Bureau;
- Provided a conceptual vision and lead a redesign of the 2020 decennial census that is estimated to save \$5 billion through effective use of operations research-driven reengineering of field operations, innovative use of technology, and partnership with key stakeholders;
- Lead outreach to key stakeholders including representatives of state local and tribal governments; advocacy organizations; professional associations, business groups, various media; and academic researchers;
- Put in place a robust research program to support mission critical activities, such as linking administrative records, disclosure avoidance methods, economic studies, statistical research, survey methodology, big data, and data dissemination;
- Lead efforts to maintain congressional support and funding for the American Community Survey, a critical data asset of the federal government, including mobilizing a diverse group of key stakeholders to effectively advocate in support of the survey, personally visiting almost all of the House of Representatives and Senate members of the Census Bureau appropriations and oversight committees, and establishing a program of research directly related to the concerns that had been raised;
- Improved economic statistics through research on using alternatives to direct survey data collection to produce statistics that are timelier and have increased granularity, and carrying out three initiatives to advance the release of principal economic indicators on trade, retail sales and services, which allowed the Bureau of Economic Analysis to significantly reduce revisions to Gross Domestic Product (GDP) estimates;
- Recruited outstanding research staff including new senior leadership for Research and Methodology, the Director of a newly established big data center, and seven former Presidential Innovation Fellows; and
- Improved data dissemination to the public, including development of a platform to deliver data in ways that will meet the rapidly evolving demands of a growing body of users. In addition, in order to meet immediate targeted demands two new tools were released: City SDK (Software Development Kit) to allow easy developer access; and Census Business Builder a tool that combines small area demographic and economic data in a way that is easily accessible for entrepreneurs and small business owners.

John H. Thompson
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President and Executive Vice President, NORC at the University of Chicago – July 2002 to August 2013

NORC is a national non-profit organization that conducts high quality social science research in the public interest. As President, I had responsibility for all NORC corporate activities and for the quality of all NORC research efforts. I provided vision for NORC to establish the organization as a leader in the social science research industry. My accomplishments included:

- Strengthened the organization's high-quality, diverse staff;
- Broadened the scope of the collaborations between NORC and the University of Chicago;
- Realized nearly 50 percent growth in revenue and greatly expanding NORC's portfolio of business and research programs; and
- Provided leadership in the social science research community - selected to be a Fellow of the American Statistical Association (ASA), elected to serve a term as Chair of the Social Statistics Section of the ASA, and chaired the 2009 ASA Committee on Fellows. Also elected as a member of the Committee on National Statistics, serving on two National Academy of Sciences panels addressing 2010 and 2020 Census concerns.

As Executive Vice President of Survey Operations (2002 – 2008), I provided oversight and direction to the Economics, Labor Force, and Demography Research Department, the Statistics and Methodology Department, and Survey Operations for field and telephone data collection. My major accomplishments included:

- Provided leadership and guidance for a major corporate initiative, the National Immunization Survey, which is conducted on behalf of the Centers for Disease Control and Prevention, and is the largest telephone survey in the United States conducted via random digit dialing for scientific purposes.
 - Significantly increased the productivity and cost effectiveness of NORC's overall data collection activities;
 - Successfully utilized skills in directing large project start-ups, and in managing large complex operations, directing the project through the completion of the first contract phase, which included the first year of data collection and the delivery of the first data set; and
 - All survey operations were completed on schedule, and within budget including the delivery of an extremely complex data set, and a public use file.
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Principal Associate Director and Associate Director for Decennial Census Programs, United States Census Bureau – 1998 to July 2002

Served as the senior career executive responsible for all aspects of the 2000 Decennial Census. This was the largest peacetime mobilization undertaken by the U.S. government, with a budget of \$6.5 billion, establishment of over 500 field offices, a temporary workforce that peaked at over 500,000, and establishment of telephone capacity to receive over 5 million calls over a period of one month. I was also chairman and director of the Executive Steering Committee for Accuracy & Coverage Evaluation Policy for the 2000 Census. This Committee was charged with making a recommendation as to whether or not to adjust the 2000 Census redistricting data for coverage errors, an issue fraught with political disagreement and controversy. This work was widely recognized as superb – with the Committee’s recommendation supported by numerous reviews, including the National Academy of Sciences Panel on evaluating Census 2000.

EDUCATION

M.S.	Virginia Polytechnic Institute and State University, 1975 Mathematics Graduate course work in statistics - George Washington University 1977-1981
B.S.	Virginia Polytechnic Institute and State University, 1973 Mathematics

PROFESSIONAL SERVICE AND ASSOCIATIONS

American Statistical Association, 1975 to Present

Chair, Social Statistics Section – 2011

Chair, ASA Committee on Fellows - 2009

National Academy of Sciences,

Member of the Committee on National Statistics – 2011 - 2013

Member of the Panel on the Design of the 2010 Census Program of Evaluations and Experiments

Member of the Panel to Review the 2010 Census

HONORS AND AWARDS

Virginia Tech College of Science Hall of Distinction inaugural class, 2013

Presidential Rank Award of Meritorious Executive, 2001

Department of Commerce, Gold Medal, U.S. Bureau of the Census, 2000

Elected Fellow of the American Statistical Association, 2000

Department of Commerce, Silver Medal, U.S. Bureau of the Census, 1998

Department of Commerce, Bronze Medal, U.S. Bureau of the Census, 1988

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PAPERS AND PUBLICATIONS

- 2012 Thompson, John H. (Panel Member). "Panel Discussion: Considering Changing Sectors in the Research Industry?: Advice From Those Who Have Done It!" AAPOR 67th Annual Conference, Orlando, Florida, May 19, 2012
- 2012 Thompson, John H. (Discussant). "Future is Now: Realignment of Current Survey Management and Operations at the Census Bureau". Population Association of America 2012 Annual Meeting, San Francisco, California, May 4, 2012.
- 2012 Thompson, John H. (Discussant). "Use of Administrative Records in the 2020 Census." Federal Committee on Statistical Methodology, Washington, DC., January 10, 2012
- 2011 Weinberg, Daniel H. and Thompson, John H., "Organization and Administration of the 2010 U.S. Census." In Margo J. Anderson, Constance F. Citro, and Joseph J. Salvo (eds.) *Encyclopedia of the U.S. Census*, Second Edition, CQ Press., July 2011
- 2010 Thompson, John H., "Challenges, Innovation and Quality for the 21st Century" Keynote Speech at the 2010 FCSM Statistical Policy Seminar, Washington, DC, December 14, 2010.
- 2010 Thompson, John H., "The Future of Survey Research: Opportunities and Challenges" Paper presented at the Applied Demography Conference, San Antonio, Texas., January 11, 2010 and at the Population Association of America 2010 Annual meeting, Dallas, Texas, April 15, 2010.
- 2008 Thompson, John H. (Panel Member). "Panel Discussion: The American Community Survey: Promise, Products and Perspectives." Population Association of America Annual Meeting, New Orleans, Louisiana, April 17, 2008.
- 2006 Thompson, John H. (Discussant). "Census 2010: A New Census for the 21st Century." Population Association of America Annual Meeting, Los Angeles, California, March 30, 2006.
- 2004 Thompson, John H., "Interviewer Falsification of Survey Data." Paper presented at the Joint Meetings of the American Statistical Association, Toronto, Canada, August 11, 2004.
- 2003 Thompson, John H., "Is Interviewer Falsification Scientific Misconduct?" Roundtable paper presented at the American Association for Public Opinion Research 58th Annual Conference, Nashville, Tennessee, May 16, 2003.
- 2002 Thompson, John H. (Discussant). "Eliminating the 2010 Census Long Form? – Current Status of the American Community Survey." Population Association of America Annual Meeting, Atlanta, Georgia, May 9, 2002.
- 2001 Thompson, John H., "Decision on Release of Statistically Corrected Redistricting Data." Invited paper presented at the Joint Meetings of the American Statistical Association, Atlanta Georgia, August 6, 2001.

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- 1999 Thompson, John H., "Census 2000 – Innovations and New Technology." Paper presented at the Economic Commission for Europe's Conference of European Statisticians Meeting, Geneva, Switzerland, February 15-17, 1999.
- 1998 Thompson, John H. and Robert E. Fay, "Census 2000: The Statistical Issues." Paper presented at the Joint Meetings of the American Statistical Association, Dallas, Texas, August 9-13, 1998.
- 1996 Thompson, John H. and Karen Mills, "Census 2000 Content: Tradeoffs on Cost, Quality, and Quantity." Paper presented at the Annual Meeting of the Population Association of America, New Orleans, Louisiana, May 9-11, 1996.
- 1995 Thompson, John H., Mary H. Mulry, Susan M. Miskura, "Census 2000: Statistical Issues in Reengineering the Decennial Census." Paper presented at the Annual Meeting of the American Statistical Association, Orlando, Florida, August 13-17, 1995.
- 1992 Fay, Robert E. and John H. Thompson, "The 1990 Post-Enumeration Survey: Statistical Lessons in, Hindsight." Paper presented at the Annual Research Conference, March 22-25, 1992, Arlington, Virginia.
- 1989 Edson, Robert G. and John H. Thompson, "1990 Decennial Census Coverage Improvement Program." Paper presented at the Annual Winter Meetings of the American Statistical Association, San Diego, California, January, 1989.
- 1988 Navarro, Alfredo, John H. Thompson, and Linda Flores-Baez, "Results of Data Switching Simulation." Paper presented to the Census Advisory Committees at the Joint Advisory Committee Meetings, Oxon Hill, Maryland, April, 1988.
- 1987 Griffin, Richard A. and John H. Thompson, "Confidentiality Techniques for the 1990 Census." Paper presented to the Census Advisory Committees at the Joint Advisory Committee Meetings, Oxon Hill, Maryland, October, 1987.
- U.S. Bureau of the Census, "Programs to Improve Coverage in the 1980 Census," by John H. Thompson. Evaluation and Research Reports, PHC80-E3.
- 1986 Thompson, John H. and David Franklin, "Test Census Results and Applications for the 1990 Planning." Paper presented at the Census Bureau Second Annual Research Conference, Reston, Virginia, March, 1986.
- 1984 Miskura, Susan M., John H. Thompson, Henry F. Woltman, "Uses of Sampling for the Census Count." Paper presented at the Annual Meeting of the American Statistical Association, Philadelphia, Pennsylvania, August, 1984.
- Fan, Milton C., Martha L. Sutt, and John H. Thompson, "Evaluation of the 1980 Census Precanvass Coverage Improvement Program." Paper presented at the Annual Meeting of the American Statistical Association, Philadelphia, Pennsylvania, August, 1984.
- Keeley, Catherine and John H. Thompson, "The 1980 Census Nonhousehold Sources Program." Paper presented at the Annual Meeting of the American Statistical Association, Philadelphia, Pennsylvania, August, 1984.
- 1983 Miskura, Susan M. and John H. Thompson, "1980 Census Findings and Their Implications for 1990 Census Planning." Presented at the Joint Statistical Meetings, Toronto, Canada, August, 1983.

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- Taeuber, Cynthia and John H. Thompson, "1980 Census Data: The Quality of the Data and Some Anomalies." Paper presented at the Annual Meeting of the Population Association of America, April, 1983.
- 1982 Fan, Milton C., John H. Thompson, Jay Kim, and Henry F. Woltman, "Sample Design, Estimation and Presentation of Sampling Errors for the 1980 Census Early Publications National Sample." Paper presented at the Annual Meetings of the American Statistical Association, Chicago, Illinois, August, 1982.
- 1981 Woltman, Henry F., Susan M. Miskura, John H. Thompson, and Peter A. Bounpane, "1980 Census Weighting and Variance Estimation Studies, Design and Methodology." Paper presented at the Annual Meetings of the American Statistical Association, Detroit, Michigan, August, 1981.
- Kim, Jay, John H. Thompson, Henry F. Woltman, and Stephen M. Vajs, "Empirical Results from the 1980 Census Sample Estimation Study." Paper presented at the Annual Meetings of the American Statistical Association, Detroit, Michigan, August, 1981.
- Fan, Milton, C., John H. Thompson, and Susan M. Miskura, "1980 Census Variance Estimation Procedure." Paper presented at the Annual Meetings of the American Statistical Association, Detroit, Michigan, August, 1981.
- Thompson, John H., "Convergence Properties of the Iterative 1980 Census Estimator." Paper presented at the Annual Meetings of the American Statistical Association, Detroit, Michigan, August, 1981.
- 1978 Thompson, John H., "The Nonhousehold Sources Program." Paper presented at the Annual Meetings of the American Statistical Association, San Diego, California, August, 1978.

PRIOR EXPERT TESTIMONY

I have not testified as an expert at trial or by deposition in any case during the last four years.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

NEW YORK IMMIGRATION
COALITION, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
COMMERCE; and WILBUR L. ROSS,
JR., in his official capacity as Secretary
of Commerce, *et al.*

Defendants.

Civil Action No. 1:18-cv-05025

RULE 26(A)(2)(B)
EXPERT REPORT AND
DECLARATION OF D. Sunshine
Hillygus, PhD

I. Background and Qualifications

I am Professor of Political Science and Public Policy at Duke University, where I teach undergraduate and graduate level courses on the topics of public opinion, political behavior, political communication, and survey methodology. I earned a Ph.D. in political science from Stanford University in 2003. From 2003-2009, I was a faculty member at Harvard University in the Department of Government. In 2009, I joined the faculty at Duke University as an associate professor and was promoted to full professor in 2015. A copy of my curriculum vitae is attached. I am being compensated at a rate of \$375 per hour.

Relevant to the subject of this report, I am co-author of *The Hard Count: The political and social challenges of census mobilization* (2006, Russell Sage Foundation). From 2012-2018, I served as a member of the Census Scientific Advisory Committee (CSAC), a committee that advises the U.S. Census Bureau (Bureau) on the uses of scientific developments in statistical data collection, survey methodology, geospatial and statistical analysis, econometrics, cognitive psychology, business operations, and computer science as they pertain to the full range of Census Bureau programs and activities, including census tests, policies, and operations.¹ I have also published many academic articles in respected scientific journals, including *Public Opinion Quarterly*, *Journal of Survey Statistics and Methodology*, *Statistical Science*, *Political Analysis*, and *Annals of Applied Statistics*, among others. My survey and methodological research has been funded by the National Science Foundation. I serve on the Board of the American National Election Study and on the editorial boards of several academic journals. I am currently director of the Initiative on Survey Methodology at Duke University and was founding director of the Program on Survey Research at Harvard University.

I previously served as an expert witness in *League of Women Voters of North Carolina, et al. v. North Carolina, et al.*, Civil Action No. 1:13-CV-00660-TDS-JEP (M.D.N.C.).

II. Summary of Opinions

I have been retained to evaluate the decision to add a citizenship question to the 2020 decennial census. In particular, I was asked to assess various assertions in a March 26, 2018 memorandum signed by U.S. Commerce Secretary Wilbur Ross regarding: (i) existing evidence concerning the effect of adding a citizenship question to the 2020 census on response rates to the census and the undercounting of subpopulations such as Hispanics and noncitizens; and (ii) the adequacy of testing the 2020 census questionnaire featuring the proposed citizenship question.

¹ For more information about CSAC, see <https://www.census.gov/about/cac/sac.html>. CSAC advises the Census Director on the full range of Bureau programs and activities including communications, decennial, demographic, economic, field operations, geographic, information technology, and statistics. The committee consists of a chair and twenty additional members, representing academia, private enterprise, professional associations, and nonprofit organizations.

To formulate an expert opinion in this case, I reviewed a variety of materials from academic, governmental, legal, and media sources. These materials included U.S. Census Bureau reports and analyses and scientific research on survey methodology. I also relied on my own experiences and familiarity with survey practices and standards and Census Bureau programs and activities.

To summarize:

1. Notwithstanding Secretary Ross’s assertion that there is no “definitive, empirical support”² for the belief that adding a citizenship question could reduce response rates, I find compelling evidence that inclusion of a citizenship question will depress participation in the decennial census, exacerbate the differential undercount of noncitizen and Hispanic households, lower response quality, and create negative attitudes about the Bureau. This evidence includes scientific research examining survey participation and respondent burden with respect to sensitive survey questions generally; evidence concerning attitudes and survey behavior of Hispanic and non-citizens respondents specifically; and, perhaps most critically, internal Census Bureau analyses concerning survey response patterns among Hispanics as compared to non-Hispanic Whites (“Whites”), and among noncitizens as compared to citizens.
2. Given the sensitivity of the citizenship question, survey methodology best practices and U.S. Census Bureau guidelines and processes would dictate thorough testing and evaluation of a decision to add the citizenship question to the 2020 census questionnaire *before* implementation, to ensure that the change will not reduce response rates, exacerbate differential undercounts, or impact data quality in other ways.³ That did not occur here. Secretary Ross’s assertion that the citizenship question has been “well tested”⁴ through its use on a different Census Bureau survey—the American Community Survey (or “ACS”)—is incorrect, as it ignores critical differences between the ACS and decennial census questionnaires, including the comparative context and sequencing of questions on the two instruments. For reasons I discuss below, these differences limit the relevance and validity of prior testing of the citizenship question on the ACS for understanding how its inclusion on decennial census questionnaire could affect differential undercounts, response rates, and other indicators of data quality.

² 18-CV-2921 ECF 189-1, Memorandum from W. Ross on Reinstatement of a Citizenship Question on the 2020 Decennial Census (“Ross Memo”) (March 26, 2018), at AR-001316.

³ According to U.S. Census Bureau information quality standards, data quality includes the objectivity, utility, and integrity of the information. Common empirical markers of data quality are *unit response rates*—that is, the percentage who take the survey; *item nonresponse*—the percentage who skip a specific question; *break-offs*—the percentage who leave the survey before completing it; *response accuracy*—the percentage responding truthfully. Unacceptably low response rates and measures of reliability or validity are indicators of poor data quality. See [U.S. Census Bureau Statistical Quality Standards, \(July 2013\), www.census.gov/content/dam/Census/about/about-the-bureau/policies_and_notices/quality/statistical-quality-standards/Quality_Standards.pdf](https://www.census.gov/content/dam/Census/about/about-the-bureau/policies_and_notices/quality/statistical-quality-standards/Quality_Standards.pdf), pp. i-ii.

⁴ Ross Memo (March 26, 2018), at AR-001314.

3. Additionally, I conclude that the decline in nonresponse rates caused by the addition of the citizenship question is not likely to be fully addressed through increased outreach or nonresponse follow-up (“NRFU”) efforts. Although the Census Bureau has procedures for enumerating households that do not initially self-respond to the decennial census questionnaire, there is no empirical evidence to suggest that such efforts will be adequate to prevent decreased response rates among Hispanics and noncitizens from translating into an increased undercount of these subgroups. In fact, there is compelling evidence that NRFU will be less successful in addressing census non-response among these subpopulations.

4. Beyond jeopardizing the accuracy and completeness of the decennial count, the addition of a citizenship question threatens to undermine the utility and integrity of the census data, in violation of government-wide information quality guidelines.⁵

III. Background on the U.S. Census

The Use of Census Data: The U.S. Constitution requires a count of every person living in the United States every 10 years for the purpose of reapportioning seats in the U.S. House of Representatives. While the most fundamental use of the decennial census is to determine the number of seats a state gets in Congress and to redraw congressional districts and all other political boundaries within a state, the total population count has many other uses. Census numbers are used to allocate billions of dollars in federal program funds to states, counties, and cities. The census is the primary source of statistical data about the U.S. population, providing detailed information necessary for the functioning of government, communities, and industry. Communities use census data to make decisions about where to build roads, schools, and hospitals. Businesses use census data to decide where to invest resources. Social scientists use census data to conduct scientific research about society, economics, and politics. Census numbers provide the benchmark against which every other data collection about the population is evaluated and adjusted and sets the sample frame for surveys throughout the federal statistical system. Thus, political and economic stakes are high for this once-per-decade population count.

The Undercount: Although the U.S. Census Bureau has the goal to “count everyone once, only once, and in the right place,”⁶ scientific measurements of census accuracy since 1940 have shown a persistent and disproportionate undercount of some population subgroups, including racial and ethnic minorities, renters, young children, and immigrants. The Bureau calls these subgroups hard-to-count (“HTC”) populations and has invested considerable research and resources into improving their enumeration.⁷ HTC populations are more likely to be missed by

⁵ U.S. Census Bureau, *Information Quality Guidelines*.

<https://www.census.gov/about/policies/quality/guidelines.html>.

⁶ <https://www.census.gov/programs-surveys/decennial-census/about/why.html>.

⁷ For example, a recent GAO report notes that 14 of 35 of the operations for the 2020 decennial count were designed, in part, to improve enumeration of HTC populations. U.S. Government Accountability

the decennial count (and other government surveys) because they are hard-to-locate, hard-to-contact, hard-to-interview, or hard-to-persuade.⁸ Although researchers have extensively documented and researched the differential undercount—and developed statistical corrections—adjusted numbers are not currently used for apportioning Congress.⁹ It is thus critical to carefully consider potential threats to the accuracy and fairness of the decennial count and conduct extensive testing and evaluation to mitigate risks at each stage of the data collection process.

At the same time that the decennial count undercounts some segments of the population, the decennial has also overcounted Whites in the 2000 and 2010 censuses, largely as a result of double counting those with second homes or those with college students away from home.¹⁰ The *differential undercount* refers to the difference between the undercount rate of a minority group and that of Whites. The *net undercount* refers to the difference between the gross undercount (the number of people who should have been counted in the Census but were not) and the gross overcount (the number of people who should not have been counted, either because they were counted more than once or should not have been counted at all). An independent post-enumeration survey found that the 2010 decennial count had a net overcount of only 0.01 percentage points, but an undercount of 1.54 percentage points of Hispanics (nearly 500,000 individuals) and an over-count of Whites of 0.83 percentage points, resulting in a differential undercount of Hispanics of 2.37 percentage points.¹¹

Impact of Undercount on Apportionment, Redistricting, and Funding: This differential undercount has implications for political power and funding because of the geographic distributions of these HTC subgroups. The undercounted segments of the population are concentrated in a few states—Texas, Florida, Arizona, and New York—and even within particular counties in those states.¹² More than half of New York’s 3.6 million Hispanic residents

Office (July 2018) “Actions Needed to Address Challenge to Enumerating Hard-to-Count Groups, GAO-18-599, p. 19. <https://www.gao.gov/assets/700/693450.pdf>.

⁸ Roger Tourangeau, Brad Edwards, Timothy Johnson, Kirk Wolter, and Nancy Bates (2014), *Hard to Survey Populations*. Cambridge: Cambridge University Press.

⁹ *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999).

¹⁰ Coverage in the decennial census is measured by comparing the census counts to independent estimates of the population developed through demographic analysis or a post-enumeration survey. Reasons that Non-Hispanic Whites may be overcounted include that they are more likely to have multiple residences (e.g., ownership of more than one home, university students counted at academic and parents’ residences, etc.).

¹¹ The undercount of Hispanic children is even more severe. Demographic analyses estimated 7.5% of Hispanic children under the age of 5 were undercounted in the 2010 Census. O’Hare, W.P. (2014). “Assessing Net Coverage Error for Young Children in the 2010 U.S. Decennial Census.” Center for Survey Measurement Study Series (Survey Methodology #2014-02). U.S. Census Bureau, <http://www.census.gov/srd/papers/pdf/ssm2014-02.pdf>.

¹² See <https://www.censushardtcountmaps2020.us/>.

live in “hard-to-count” census tracts, highlighting the potential impact of an exacerbated undercount of this population.¹³

Even before the addition of the citizenship question, the Bureau faced many challenges to achieving a fair and accurate decennial census.¹⁴ Response rates for all surveys and censuses, including Census Bureau surveys, have declined in recent years. Although the decennial census is different from a typical survey in that it is mandatory, it is not immune from the general decline in response rates afflicting surveys and censuses around the world.¹⁵ Completion of the decennial census and the American Community Survey (ACS) are required by law, but the Bureau is a statistical agency, not an enforcement agency, and has publicly confirmed that nobody had been fined for failing to participate.¹⁶ Thus, despite being mandatory, response rate is a foremost concern given its implications for the cost, quality, and fairness of the count. In particular, the self-response rate is often the primary quantity of interest and study because the data collected by self-response are more accurate and less expensive than that collected through the Non-Response Follow-up (NRFU).¹⁷

IV. The Effect of Adding a Citizenship Question on Response Rates to the 2020 Decennial Census

In assessing whether the inclusion of a citizenship question will exacerbate the differential undercount and the quality of the data collected through the decennial Census, the first issue to consider is whether the inclusion of the question will affect participation rates in the census. In his decision memo, Secretary Ross asserted that “[t]he reinstatement of a citizenship question will not decrease the response rate of residents who already decided not to respond.”¹⁸ This contravenes scientific understanding of the survey participation decision. Survey methodology research shows that it is too simplistic to think about an individual as either an inherent responder or an inherent non-responder; the decision to participate is influenced by factors beyond an individual’s personal characteristics, including the survey

¹³ See <http://civilrightsdocs.info/pdf/census/2020/Table1a-States-Number-Hispanics-HTC.pdf>.

¹⁴ The 2020 Census Operation Plan acknowledges that threats to the decennial count from declining response rates, distrust in government, a more diverse and mobile population, informal and complex living arrangements, and technological and information changes. U.S. Census Bureau (2017), *2020 Census Operation Plan: A New Design for the 21st Census*. V.3. <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan3.pdf>.

¹⁵ J. Czajka and A. Beyler (2016), *Declining Response Rates in Federal Surveys: Trends and Implications* Washington, DC: Mathematica Policy Research.

¹⁶ W. Gardner Selby (2014), “Americans must answer U.S. Census Bureau survey by law, though agency hasn’t prosecuted since 1970,” *Politifact.com* <https://www.politifact.com/texas/statements/2014/jan/09/us-census-bureau/americans-must-answer-us-census-bureau-survey-law-/>.

¹⁷ R. Jarmin Dep., dated Aug. 20, 2018 at 308: 15-17; J. David Brown, et al., “Understanding Quality of Alternative Citizenship Data Sources for the 2020 Census,” Center for Economic Studies, U.S. Census Bureau Working Paper 18-38. (Aug. 6, 2018), at COM_DIS00009873.

¹⁸ Ross Memo (March 26, 2018), at AR-001317.

design features, the sociopolitical climate, and the actions of the field staff.¹⁹ This scientific understanding of survey participation is apparent throughout the Bureau's standards, practices, and research products.²⁰

The likely impact of a citizenship question can be evaluated from this conceptual framework of the survey participation decision. A large body of scientific literature on survey methodology—including hundreds of books and articles in scientific journals—has examined the impact of various design and implementation decisions on survey participation and data quality. These studies often use randomized control trials to compare different ways the survey design can deter or promote participation. Design features include a wide range of characteristics including: mode of survey, question wording, question order, survey sponsor, financial incentives.²¹

These survey design features—along with the perceived response burden and the sociopolitical climate—help to determine whether or not an individual will respond to a survey.²² Of particular relevance to the assessing the impact of an addition of a citizenship question, concerns about confidentiality are an indicator of response burden and can depress survey participation and reduce data quality. Moreover, confidentiality concerns vary in the population, related to the risk of harm from disclosure.²³

For the 2020 decennial census, this scientific framework for thinking about survey participation would thus predict that the subgroups in the population disproportionately concerned about the confidentiality of the citizenship question will be less like to respond, more likely to skip the individual question, and more likely to give an inaccurate response. (As discussed in Section IV.B, the Census Bureau's research confirms that non-citizens and Hispanics are less likely to respond to the survey if it includes a citizenship question, more likely to skip a citizenship question, and more likely to give an inaccurate response to a citizenship question.)

Secretary Ross claims that there is no "definitive, empirical support" for the belief that adding a citizenship question could reduce response rates, but a review of the scientific literature examining survey participation—together with internal Census Bureau analyses—offer

¹⁹ See, for instance, Robert Groves, F. Fowler Jr, M Couper, J. Lepkowski, E. Singer, and R. Tourangeau (2009), *Survey Methodology (2nd)*. Hoboken: John Wiley and Sons.

²⁰ As one example, see BK Atrostic, N. Bates, and A. Silberstein (2001), "Nonresponse in US government household surveys: consistent measures, recent trends, and new insights," *Journal of Official Statistics* 17(2), p.209.

²¹ As an example of the type of design decisions that can affect response, research consistently finds that financial incentives can significantly increase survey participation. Incentives are obviously not a relevant factor for the decennial census, but this example highlights the way that the survey design decisions can shape the respondent participation. It also illustrates just one of the reasons it is problematic to draw inferences from the experience of Nielsen (AR-001276).

²² See, for instance, Groves (2009).

²³ Roger Tourangeau and Ting Yan (2007), "Sensitive questions in surveys," *Psychological bulletin* 133, no. 5: 859.

compelling evidence that the addition of the citizenship question will reduce response rates. As explained in a classic Survey Methodology textbook, “There are some ubiquitous correlates of the tendency to refuse a survey request...When the key variables of the survey are related to these attributes, *we can anticipate nonresponse biases in the respondent-based estimates.*”²⁴ Although no predictive estimate can ever be “definitive,” a review of the various factors related to survey participation all consistently point to the same conclusion: the addition of a citizenship question is likely to lower response rates and data quality among non-citizens and Hispanic households.

A. Background on Factors Affecting Survey Participation Rates

Numerous factors affect an individual’s decision to participate in a survey. Below, I discuss factors most relevant to the inclusion of a citizenship question on the decennial census.

i. Respondent Burden

Among the most important factors related to an individual’s decision to participate is the burden of the survey. It is well-recognized in the scientific literature and by the Bureau that increased response burden is associated with lower response rates and diminished data quality.²⁵ Response burden depends on the length, complexity, intrusiveness, and sensitivity of the questions asked. In a classic work on the topic, survey methodologist Norman Bradburn explains that response burden includes not only the time and effort required to take a survey, but also the “amount of stress experienced by the respondent.”²⁶ The Bureau recognizes this broad conception of response burden. For example, in his January 19 memo to Secretary Ross, Dr. John Abowd, Chief Scientist and Associate Director for Research and Methodology of the Census Bureau, explained that “[s]urvey methodologists consider burden to include both the direct time costs of responding and the indirect costs arising from nonresponse due to perceived sensitivity of the topic.”²⁷

Highlighting the importance of response burden to the federal statistical system, the Paperwork Reduction Act (PRA) of 1995 requires federal agencies to certify to the OMB that “efforts have been made to reduce the burden of the collection.”²⁸ The 2010 Census tagline “Just 10 questions” highlighted the ease of completing the decennial questionnaire. Concerns regarding

²⁴ Groves, et al. (2009), pp. 200-201, emphasis added.

²⁵ Groves, et al. (2009).

²⁶ Norman Bradburn (1978), “Respondent burden,” *In Proceedings of the Survey Research Methods Section of the American Statistical Association* (Vol. 35, p. 40). Alexandria, VA: American Statistical Association, p. 36.

²⁷ 18-CV-2921 ECF 189-1, Memorandum from J. Abowd on Technical Review of the Dep. of Justice Request to Add Citizenship Question to the 2020 Census (Jan. 19, 2018), at AR 001281.

²⁸ United States Office of Personnel Management (April 2001), Paperwork Reduction Act (PRA) Guide. V. 2.0, <https://www.opm.gov/about-us/open-government/digital-government-strategy/fitara/paperwork-reduction-act-guide.pdf>.

the response burden of the American Community Survey—the sample survey that replaced the census long-form—have prompted an extensive research program and several changes at the Bureau, including the creation of a respondent advocate position, a reduction in the number of contact attempts in Census surveys, the development of a “Why We Ask” brochure, and a number of questionnaire content changes.

In his memo, Secretary Ross defined response burden exclusively in terms of the time it takes to answer survey questions, writing: “A second concern that stakeholders advanced is that recipients are generally less likely to respond to a survey that contained more questions than one that contained fewer.”²⁹ However, response burden is not simply the amount of time that will be spent on a survey. Secretary Ross’ memo failed to recognize that survey burden also depends on the complexity, intrusiveness, and sensitivity of a questionnaire.

Indeed, Census Bureau research clearly shows that the inclusion of sensitive questions on a questionnaire is related to perceived respondent burden.³⁰ Sensitive questions are those viewed as intrusive, those asking about socially undesirable attitudes or behaviors, and those where there is a perceived consequence for disclosure.³¹ Extensive empirical research shows that sensitive questions can result in increased burden, which can impact data quality in a number of ways, including:³²

- decreasing *unit response rates*—that is, the percentage who take the survey;
- increasing *item nonresponse*—the percentage who skip a specific question;
- increasing *break-offs*—the percentage who leave the survey before completing it;
- decreasing *response accuracy*—the percentage responding truthfully; and
- increasing negative evaluations of surveys generally.

Moreover, the perceived sensitivity of a question varies across respondents, resulting in a differential impact on survey participation.³³

In sum, the burden of a survey is one of the key factors that determines if an individual participates in a survey and it is related to the sensitivity of the questionnaire.

²⁹ Ross Memo (March 26, 2018), at AR-001318.

³⁰ See, for example, National Research Council (2013), *Benefits, Burdens, and Prospects of the American Community Survey: Summary of a Workshop*. D.L. Cork, Rapporteur. Committee on National Statistics, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press. Also S. Fricker, T. Yan, and S. Tsai (2014), “Response burden: What predicts it and who is burdened out,” In *JSM proceedings* pp. 4568-4577.

³¹ Roger Tourangeau, L. Rips, and K. Rasinski (2000), *The psychology of survey response*. Cambridge University Press.

³² Groves et al. (2009).

³³ Roger Tourangeau and Ting Yan. (2007). “Sensitive questions in surveys.” *Psychological bulletin* 133, no. 5: 859.

ii. Privacy and Confidentiality Concerns

Confidentiality concerns are a key component of perceived respondent burden and extensive empirical research shows confidentiality concerns to be related to lower survey response rates and reduced data quality.³⁴

Although privacy and confidentiality concerns are sometimes considered synonymous, they are different concepts with distinct implications for census participation. Privacy concerns refer to the government's right to ask a question. Confidentiality concerns refer to fears about the disclosure of the information. Kenneth Prewitt, former Director of the Census Bureau, says that protecting privacy is akin to don't ask, whereas protecting confidentiality is about don't tell.³⁵ He explains that "[t]he citizen saying 'I won't answer that question because it is none of your business' is sending a different message from... 'I won't answer because I don't trust the government not to use my answers against me.'"³⁶ Concerns about the addition of a citizenship question are primarily an issue of confidentiality.

Previous empirical research demonstrates that confidentiality concerns affect participation in surveys of all types, including the decennial census.³⁷ For example, one study found that 73.5 percent of those with low confidence in the confidentiality of the U.S. Census Bureau reported mailing back their 1990 census form, compared with 86.1 percent of those with high confidence.³⁸ Using measures of actual census form returns, rather than self-reports, another study found that confidentiality concerns predicted lower 1990 census participation, even after accounting for privacy attitudes and other factors related to participation.³⁹ A similar conclusion was reached in the analysis of the actual returns to the 2000 census—people with higher levels of concern about the confidentiality of the census data were significantly less likely to return their census forms.⁴⁰

³⁴ For example, Eleanor Singer, Nancy Mathiowetz, and Mick Couper (1993), The impact of privacy and confidentiality concerns on survey participation the case of the 1990 US Census. *Public Opinion Quarterly*, 57(4), pp.465-482.

³⁵ Kenneth Prewitt (2011), "Why It Matters to Distinguish between Privacy and Confidentiality," *Journal of Privacy and Confidentiality*, 3(2).

³⁶ Prewitt (2011), pp. 42.

³⁷ For review, see T.S. Mayer (2002), "Privacy and confidentiality research and the us census bureau recommendations based on a review of the literature," *Research Report Series*, U.S. Census Bureau, Feb. 7.

³⁸ RE Fay, N Bates, and J. Moore (1991), "Lower mail response in the 1990 census: A preliminary interpretation," *In Proceedings of the Annual Research Conference*. Washington DC: Census Bureau, pp. 3-32.

³⁹ Singer, Mathiowetz, and Couper (1993).

⁴⁰ Eleanor Singer, J. Van Hoewyk, and R. Neugebauer (2003), "Attitudes and behavior: The impact of privacy and confidentiality concerns on participation in the 2000 census," *Public Opinion Quarterly*, 67(3), pp.368-384.

The Bureau acknowledges the relevance of confidentiality concerns to the quality of the census. The 2020 Operational Plan states: “The accuracy and usefulness of the data collected for the 2020 Census are dependent upon the ability to obtain information from the public, which is influenced partly by the public’s perception of how well their privacy and confidentiality concerns are being addressed...If a substantial segment of the public is not convinced that the Census Bureau can safeguard their response data against data breaches and unauthorized use, then response rates may be lower than projected, leading to an increase in cases for follow-up and cost increases.”⁴¹

To monitor confidentiality concerns, the Bureau has been conducting Census Barriers, Attitudes, and Motivators Studies (CBAMS).⁴² As of the date of this report, the 2018 CBAMS results—following the announcement of the addition of a citizenship question—have been completed, but not have not yet been publicly released.

Thus, the Census Bureau recognizes that confidentiality concerns are related to survey burden and represent a threat to survey participation and data quality.

B. Evidence that the Citizenship Question Will Depress Census Participation among Hispanics and Noncitizens

In his memo, Secretary Ross claims that a citizenship question “is no additional imposition” on citizens.⁴³ That assertion contravenes scientific understanding of response burden and question sensitivity. Citizenship status is undisputedly a sensitive question that increases survey burden—and, as explained below, there is substantial evidence that the addition of the citizenship question will impose burdens on at least some subgroups of citizens, particularly Hispanics. Secretary Ross’s further claim that there is no “definitive, empirical support” for the belief that adding a citizenship question could reduce response rates among subgroups such as noncitizens is also incorrect. Indeed, a review of the scientific literature examining survey participation—together with the Census Bureau’s own internal analyses regarding the possible effect of the inclusion of the citizenship question on Census response rates—consistently indicate that adding the citizenship question will depress participation in the 2020 census, particularly among noncitizens and Hispanics.⁴⁴

⁴¹ U.S. Census Bureau (2017).

⁴² Studies were previously conducted before and after the 2010 decennial, in 2008 and 2011.

⁴³ Ross Memo (March 26, 2018), at AR-001317.

⁴⁴ There are two reasons to separately consider the categories of noncitizens and Hispanics. First, citizenship cannot always be fully determined—because a significant percentage of noncitizens are Hispanic (Bond et al., 2014), the Hispanic category captures noncitizens who would otherwise be missed or allows for analysis that could not otherwise be conducted. A second, and perhaps more important, reason for considering Hispanics, is based on the evidence reviewed that even Hispanic American citizens are likely to be impacted.

i. Evidence that the Citizenship Question Will Reduce Participation in the Census among Hispanics

Census Bureau Data Stewardship Policies identify citizenship as a “sensitive topic.”⁴⁵ In fact, of the questions planned for the decennial short form, *only* the citizenship question has this sensitive designation.

In his deposition, the chief scientist of the Census Bureau, Dr. John Abowd, affirmed that a citizenship question would be considered sensitive for Hispanic respondents.⁴⁶ He also links that assessment to the perceived burden of the survey. He explains that he disagrees with Secretary Ross that a citizenship question “is no additional imposition;” he also recalls that the original memo used the word “burden” rather than “imposition,” but he advised such a claim could not be supported given the broad definition of survey burden used by survey methodologists.⁴⁷

Critically, the available evidence indicates that there is a differential concern over a citizenship question between Hispanics and Whites, concerns have grown in recent years, and it has a negative impact on survey participation.

Perhaps most significantly, various internal Census Bureau analyses of patterns of response to the ACS indicate that a citizenship question, specifically, will decrease response rates and the data quality among Hispanic respondents. The ACS is a mandatory sample survey administered to approximately two percent of the population annually. The ACS replaced the decennial long-form in 2005 after a decade of testing.⁴⁸ Unlike the decennial census questionnaire distributed to the entire population, the ACS contains a question concerning citizenship.

As reported Dr. Abowd’s January 19 memo, internet item nonresponse rates to the citizenship question on the 2016 ACS—that is, the percentage who skipped the citizenship question—were 15.5% for Hispanics compared to just 6.2% for Whites.⁴⁹ Critically, this differential in item non-response does not appear to be simply a function of higher non-response rates on survey questions generally among Hispanics as compared to Whites, as the item nonresponse rate for the citizenship question was higher than for the other questions to be asked on the 2020 decennial census. For example, Bureau research finds that, among Hispanics, item nonresponse on citizenship increased between 2013 and 2016, while it actually decreased on sex.⁵⁰

⁴⁵ For example, see the Data Stewardship Executive Policy Committee, *DS-16 Checklist for a Survey’s Handling of Sensitive Topics and Very Sensitive Topics in Dependent Interviewing*, https://www2.census.gov/foia/ds_policies/ds016_checklist.pdf.

⁴⁶ J. Abowd Dep., dated Aug. 15, 2018, at 205:13.

⁴⁷ J. Abowd Dep., dated Aug. 15, 2018, at 172:8.

⁴⁸ The sampling design of the ACS allows for 5-year national estimates to be calculated.

⁴⁹ Abowd Memo (Jan. 19, 2018), at AR-001280.

⁵⁰ Brown et al. (Aug. 6, 2018), at COM_DIS00009841.

Analysis of “break-offs” in the 2016 internet ACS self-responses—that is, an analysis of individuals who begin the survey but then discontinue answering questions—similarly shows that Hispanic respondents were more likely to break-off during the survey than Whites (17.6% compared to 9.5%), but Hispanic respondents were nine times as likely as Whites to break-off at the citizenship question.⁵¹ Dr. Abowd testified that “survey methodologists at the Census Bureau think that these break-off rates are very important indicators of sensitive questions”—this analysis clearly indicates the differential sensitivity of this item for Hispanics, and thus, the likely differential impacts from the addition of this question on the decennial.⁵²

Comparable analyses for the 2017 ACS—the first data collection of the Trump administration—have not yet been released, but there is qualitative research that indicates increased concerns, particularly among immigrants,⁵³ in confidentiality can be expected since the 2016 presidential campaign. For example:

- In September 2017, the Census’ Center for Survey Measurement (CSM) sent a memorandum to the Associate Directorate for Research and Methodology titled “Respondent Confidentiality Concerns.”⁵⁴ The memo documented “a ‘new phenomenon’ in the field and reported that respondents’ fears, particularly among immigrant respondents, have increased markedly this year.”
- In a research presentation at the American Association of Public Opinion Research, Census researchers Mikelyn Meyers and Patricia Goerman explained that respondents were “spontaneously expressing concerns about confidentiality during multilingual pretesting projects conducted in 2017 – Respondents referenced legal residency status, immigration, and certain current events like changes to the DACA program.”
- In a study of qualitative interviews to do language testing, Census researchers have said immigrants they interviewed spontaneously raised topics like the travel ban and the dissolution of Deferred Action for Childhood Arrivals, a program that has protected from deportation young immigrants brought to the country as children without legal status.

⁵¹ Calculated using AR- 0009692. Similarly, Hispanics were ten times as likely as Whites to break-off at the year of entry item. Because the provided numbers were calculated such that the numerator was the breakoff at each questions and the denominator is the total of times that question was reached, we are unable to estimate the cumulative break-off differential associated with these sensitive items.

⁵² J. Abowd Dep., dated Aug. 15, 2018, at 102:20-22.

⁵³ I note that the survey research in these bullet points pertains to immigrants rather than Hispanics specifically—but Hispanics are more likely than Whites to be immigrants and to live in a household with immigrants (Bond et al. 2014).

⁵⁴ U.S. Census Bureau (September 20, 2017), Center for Survey Measurement, Respondent Confidentiality Concerns, *Memorandum for Associate Directorate for Research and Methodology*, <https://www2.census.gov/cac/nac/meetings/2017-11/Memo-Regarding-Respondent-Confidentiality-Concerns.pdf>.

- In a presentation to the National Advisory Committee, Mikelyn Meyers discussed an “unprecedented groundswell in confidentiality and data-sharing concerns, particularly among immigrants or those who live with immigrants, may present a barrier to participation in the 2020 census.”⁵⁵

Evidence of these differential concerns among Hispanics can also be seen in the 2011 CBAMS, which measures attitudes towards and knowledge of the Census, potential motivators and barriers to participation, assessments of census messages, and demographics. A cluster analysis identified five distinct attitudinal segments or mindsets within the population, including 14% labeled “Suspicious,” which is described as the segment that has “the lowest self-reported intent to respond to the census ... and are the most likely to believe that the census can harm them.” Hispanics make up a disproportionate share of this mindset, making up 20% in this segment compared to their 14% share in the sample overall.⁵⁶ It is also telling that all of the CBAMS surveys—including that for 2020—ask only place of birth but not citizenship status, so they are unable to explicitly examine variation in attitudes by citizenship status.⁵⁷ Only the 2020 CBAMS focus groups, which continued after the announcement of the citizenship question, includes explicit discussion of the confidentiality concerns as they relate to a citizenship question on the 2020 decennial.⁵⁸ As noted, the Census Bureau has not released the most recent CBAMS results.

These findings are also apparent in public opinion polling data, which similarly suggests that Hispanics will be disproportionately concerned about the confidentiality of the citizenship question. For example:

- A UCLA Luskin Institution Survey of Los Angeles County in 2017 found that 56% of Latinos report being worried about the deportation of themselves or a friend or family member, compared to only 19% of Whites.
- In a national poll of Hispanics following the 2016 election, the Pew Research Center found that 47% of all Hispanics have “a lot or some” worry that they, a family member, or a close friend could be deported. The numbers were even higher for foreign-born Hispanics: 52% for foreign-born U.S. citizens, and 66% for non-citizens.⁵⁹

⁵⁵ Mikelyn Meyers (Nov. 2, 2017), U.S. Census Bureau, Respondent Confidentiality Concerns and Possible Effects on Response Rates and Data Quality for the 2020 Census, p. 15.

<https://www2.census.gov/cac/nac/meetings/2017-11/Meyers-NAC-Confidentiality-Presentation.pdf>

⁵⁶ Nancy Bates, Monica J. Wroblewski, and Joanne Pascale (2012), “Public Attitudes Toward the Use of Administrative Records in the U.S. Census: Does Question Frame Matter?” *Survey Methodology* #2012-04, Center for Survey Measurement, U.S. Census Bureau;

<https://www.census.gov/srd/papers/pdf/rsm2012-04.pdf>

⁵⁷ U.S. Census Bureau, 2020 Census Planning Survey, form CM-Q14 (11-07).

⁵⁸ J. Abowd Dep., dated Aug. 15, 2018, at 209:6-15.

⁵⁹ Mark Hugo Lopez and Molly Rohal (February 2, 2017), “Latinos and the New Trump Administration: Growing Share say situation of U.S. Hispanics is Worsening,” Pew Research Center.

Academic research has found confidentiality concerns to have an impact on other civic behaviors. For example:

- Hispanics disproportionately responded to the 2011 Alabama Taxpayer and Citizen Protection Act, which required schools to ask parents or guardians of students to submit their children's birth certificates or to notify the schools of children's citizenship when enrolling them. Despite the mandatory attendance laws for school-age children and disclosure protections (schools were to report only aggregate numbers of enrolled noncitizens), the Alabama Department of Education estimated that 2,285 Hispanic students—7% didn't attend classes — about double the usual absentee rate.⁶⁰
- Health advocacy organizations report that the number of legal immigrants from Latin America enrolled in federally subsidized insurance plans and using public health services has declined since Trump's election.⁶¹
- Empirical research documents both direct effects—e.g., non-citizen parents failing to sign up citizen children for healthcare for fear of revealing themselves, as well as indirect effects, whereby the effects are observed among those who are not even eligible for deportation.⁶²
- For example, a 2018 study finds significant reductions in food stamp and ACA take-up among citizen Hispanic Americans, even though they are not themselves at risk of deportation. These spillover effects were higher in mixed-status households, areas with a higher incidence of detainments issued for low-level arrests, and areas with greater increases in deportation fear.⁶³

In sum, there is a wealth of evidence suggesting that a citizenship question on the census will depress response rates among Hispanics—including Hispanic citizens.

http://assets.pewresearch.org/wp-content/uploads/sites/7/2017/02/24094450/Latinos_Trump_FULLREPORT.pdf.

⁶⁰ J. Richard Cohen (April 17, 2018), "We already know the citizenship question will hurt the census. Alabama tried it," *The Washington Post*. https://www.washingtonpost.com/opinions/we-already-know-the-citizenship-question-will-hurt-the-census-alabama-tried-it/2018/04/17/395c8cca-41ba-11e8-ad8f-27a8c409298b_story.html?utm_term=.840cb003dfea. The law was subsequently overturned by the courts.

⁶¹ Kelly Kennedy (Jan 22, 2018), "Deportation fears have legal immigrants avoiding health care, Associated Press. <https://apnews.com/9f893855e49143baad9c96816ec8f731> .

⁶² M. Alsan and C. Yang (2018), "Fear and the Safety Net: Evidence from Secure Communities (No. w24731)," *National Bureau of Economic Research* <http://www.nber.org/papers/w24731.pdf> ; Catalina Amuedo-Dorantes, Esther Arenas-Arroyo, and Almudena Sevilla (2018), "Immigration enforcement and economic resources of children with likely unauthorized parents." *Journal of Public Economics* 158: 63-78; ED Vargas and VD Ybarra (2017), "US citizen children of undocumented parents: the link between state immigration policy and the health of Latino children," *Journal of immigrant and minority health*, 19(4), pp.913-920; ED Vargas and MA Pirog (2016), "Mixed-Status Families and WIC Uptake: The Effects of Risk of Deportation on Program Use," *Social science quarterly*, 97(3), pp.555-572.

⁶³ Alsan and Yang (2018).

ii. Evidence that the Citizenship Question Will Reduce Participation in the Census among Immigrants and Noncitizens

Concerns about confidentiality, and the potential impacts on survey participation, should be most consequential for those facing the greatest disclosure risk—non-citizen households.

In a white paper released in August 2018, the Bureau attempts to assess the impact of the citizenship question using existing response patterns to the ACS compared to administrative records with citizenship status.⁶⁴ The authors conclude that “Hispanics, nonrelatives, and noncitizens are particularly sensitive to answering the citizenship question in the ACS, and that sensitivity has increased in recent years.” The paper included analyses of “unit non-response”—that is, the failure to respond to a survey at all—comparing the difference between noncitizen households and citizen households on the 2010 decennial census to the 2010 and 2016 ACS. The analyses estimate that the presence of a citizenship question is predicted to reduce response rates among noncitizen household response rates, relative to citizen households, from between 5.1 to 11.9 percentage points, depending on the surveys compared and modeling assumptions.⁶⁵ Looking across these estimates, Dr. Abowd predicts that the addition of a citizenship question will reduce non-response rates to the census among noncitizen households by 5.8 percentage points, relative to citizen households. Notably, this estimate is based on the decennial 2010 and 2016 ACS data, and does not account for recent changes in the political context that, as explained below, appear to have rendered questions about citizenship even more sensitive. Similarly, census tracts with the highest concentration of non-citizen households have lower internet self-response rates compared to those with the lowest concentration of noncitizens; those response rates have decreased over time and “show a sharper drop between 2015 and 2016.”⁶⁶

Based on this analysis, Dr. Abowd concluded that it is “a reasonable inference that a question on citizenship would lead to some decline in overall self-response because it would make the 2020 Census modestly more burdensome in the direct sense, and potentially much more burdensome in the indirect sense that it would lead to a larger decline in self-response for noncitizen households.”⁶⁷

⁶⁴ The administrative records used were the Census Numident from the Social Security Administration. Brown et al. (Aug. 6, 2018).

⁶⁵ Brown et al. (Aug. 6, 2018), at COM_DIS00009867, COM_DIS00009868, COM_DIS00009871. Models vary depending on the surveys used, the 2010 decennial census compared to the 2010 ACS or 2016 ACS, and the assumptions made about cases with missing citizenship values in the administrative records, the use of ACS weights, and the use of controls for other ACS variables.

⁶⁶ Brown et al. (Aug. 6, 2018), at COM_DIS00009844.

⁶⁷ Abowd Memo (Jan. 19, 2018), at AR 001281.

**iii. Evidence that the Census Bureau's Analysis of the Effect of the
Citizenship Question on Reducing Response Rates Is Conservative**

The Bureau's analysis regarding the effect of the citizenship question on response rates—including Dr. Abowd's estimate of an increase in noncitizen and citizen differential self-response rate of 5.8 percentage points—offers convincing evidence that adding a citizenship question will reduce the accuracy and fairness of the 2020 Census count. But I conclude that it is too conservative of an estimate; there are several reasons to expect an even larger differential nonresponse rate.

First, the analysis was based on a dataset that individually linked ACS responses with administrative records, but each of these files are more likely to be missing non-citizen and Hispanic households, exacerbating potential coverage bias in the resulting estimates. That is, those who could be successfully linked to administrative records and answered the ACS are likely different from those who did not. Regarding the ACS, Bureau research has found that “coverage factors are particularly high for male Hispanics suggesting that, among the foreign-born population, this group has the highest rate of undercoverage in the ACS.”⁶⁸ Regarding the administrative records, both Dr. Abowd (Census Bureau chief scientist) and Dr. Jarmin (current Census Bureau Acting Director) have acknowledged that they are less likely to be available and accurate for HTC populations.⁶⁹ Regarding the matched analysis, the analysts acknowledge that the “missing data are higher for administrative records (AR) than the ACS, and both sources' rates are higher for minorities and nonrelatives.”⁷⁰ As just one indication of the direction of this bias, the item nonresponse rate in the matched 2016 ACS sample was under 2% compared to an item nonresponse rate for the citizenship question in the full 2016 ACS of 6%.⁷¹ In other words, the estimates were calculated on a sample of respondents who have a higher propensity to respond compared to those not in the sample. The authors of the August 2018 white paper acknowledge as much in discussing the use of ACS weights: “the methods used to adjust the ACS weights for survey nonresponse and to allocate citizenship status for item nonresponse assume that the citizenship status distribution of the sampled non-respondents is statistically the same as that of respondents with similar related characteristics...our unit and item nonresponse analysis in Section 3.1 casts serious doubt on this assumption.”⁷² As the authors

⁶⁸ EB Jensen, R. Bhaskar and M. Scopilliti (2015), Demographic analysis 2010: Estimates of coverage of the foreign-born population in the American Community Survey. Population Division, US Census Bureau, Working Paper (103), pp. 15. <https://www.census.gov/content/dam/Census/library/working-papers/2015/demo/POP-twps0103.pdf>.

⁶⁹ R. Jarmin Dep., at 286: 16-20.

⁷⁰ Brown et al., (Aug. 6, 2018) at COM_DIS00009848.

⁷¹ The place of birth item that proceeds the citizenship question had an item nonresponse rate of 9.1% and the year of naturalization of 22.5%. Brown et al., (Aug. 6, 2018) at COM_DIS00009840 (Matched ACS) and COM_DIS00009896 (Full ACS).

⁷² COM_DIS00009850. Other modeling decisions are also likely to bias downward the estimate: the assumption that foreign born individuals with missing citizenship status in the administrative records are all U.S. citizens, the inclusion of English language ability in the Blinder-Oaxaca Decomposition, the failure

conclude, “the estimated effect...is conservative” and “a preferable test would be a randomized control trial (RCT).”⁷³

Second, as discussed in more detail in the next section, the design and prominence of the citizenship question in the decennial short form compared to the ACS could amplify the differential impact of the question for Hispanics and non-citizens relative to Whites.

Third, the analysis is restricted to non-citizen compared to citizen households, whereas I have outlined reasons to expect the scope and impact on a broader segment of the population of immigrants and Hispanic citizens, who are often geographically clustered with noncitizen households considered in the Bureau analysis. While the Census Bureau’s data does not present information that allows one to examine the same empirical patterns as we can for Hispanics, survey methodology research would predict similar effects for other geographically-concentrated immigrant communities. Also likely to bias downward the estimates is the decision to consider a baseline of only citizen households, rather than White citizen households.

Finally, a change in survey climate between 2020 compared to 2010 is likely to exacerbate the sensitivity of the citizenship question. It is widely recognized by public opinion experts—and the Bureau—that the sociopolitical climate is another factor that can affect census participation.⁷⁴ As Dr. Abowd explained in his deposition: “The conduct of the census depends a lot on its design and successful execution. It also depends on the macro environment in which it’s conducted.”⁷⁵ The 2020 count approaches at a time of heightened fears about deportation of undocumented immigrants and vivid examples of anti-immigrant sentiment within the public and from the Trump administration. There are, of course, many examples of anti-immigrant statements from the president.⁷⁶ Policy proposals to build a border wall, to ban immigrants from predominantly Muslim countries, to end the Deferred Action for Childhood Arrivals (DACA) program, and the zero-tolerance policy separating immigrant children from parents indicates this sentiment are not simply empty rhetoric. For example, research has documented a spike in negative news coverage of Hispanics and immigrants in 2016 compared to the previous 30 years.⁷⁷

to account for attrition bias in the SIPP analysis, the use of all citizen households rather than White citizen households.

⁷³ Brown et al. (Aug. 6, 2018), at COM_DIS00009871.

⁷⁴ Groves et al. (2009); J. Abowd Dep., dated Aug. 15, 2018, at 222.

⁷⁵ J. Abowd Dep., dated Aug. 15, 2018, at 222: 21-22.

⁷⁶ Trump quotes include “These aren’t people, these are animals.” “When Mexico sends its people, they’re not sending their best...They’re bringing drugs. They’re bringing crime. They’re rapists.” He commented that illegal immigrants “infest our Country.”

⁷⁷ Nicholas Valentino, James Newburg and Fabian Neuner (2018), “Dog Whistles to Bullhorns: Racial Rhetoric in Presidential Campaigns, 1984-2016” Presented at the 2018 Annual Meeting of the American Political Science Association, Boston, MA.

This anti-immigrant sentiment has stoked fears among immigrants and Hispanics. A Pew Research Center analysis finds that the percent of Hispanics who trust the government in Washington to “always” or “most of the time” do the right thing has declined since 2010, from 37% in 2010 to 23% in 2017.⁷⁸ Empirical research has also documented that local and state-level enforcement policies and practices finds spill-over effects in which Hispanic who are U.S. citizens report poorer psychosocial wellbeing from the anti-immigrant sentiment.⁷⁹

It is also important to recognize that the nature of the Secretary’s decision—without extensive planning and testing—is likely to shape the interpretation of or perceived intent of the survey, both of which can have an impact on if and how someone responds.⁸⁰ Research in previous censuses show that people are not aware of how the census data are used, with nearly half of those surveyed thought that names, addresses, and other information would be shared with other government agencies, increasing the likelihood that the decision process could impact response to the question addition.⁸¹ The Bureau views it as critical that their data collections are viewed as credible by the public. For example, in response to a GAO proposal for an innovative, anonymized approach for measuring aggregated levels of undocumented status (called the “three card” approach), the Acting Director James Holmes offered his opposition on the following basis: “A survey designed to provide estimates of the undocumented population, even if the respondent is asked to respond to a category including undocumented along with other immigration statuses (as in the case of the three-card method), would seriously risk compromising the Census Bureau’s ability to maintain the trust and cooperation of the public in carrying out its surveys and censuses, including most notably the 2000 decennial census of population and housing.”⁸² Adherence to survey methodology best practices and processes is one of the ways that the Bureau fosters trust, credibility, and cooperation. As explained in more detail below, the last-minute process for adding the citizenship question has not followed standard Census Bureau process or procedure and this fact is also likely to have a negative impact on response rates.

In sum, with regard to Secretary Ross’ observations, no prediction of future events can ever be “definitive,” as that is not a science-based standard. There is ample empirical support, as well as well-grounded science of survey methodology, which all consistently point to the same

⁷⁸ Pew Research Center (Dec. 14, 2017) Public Trust in Government: 1958-2017. <http://www.people-press.org/2017/12/14/public-trust-in-government-1958-2017/>.

⁷⁹ Lorraine Moya Salas, Cecilia Ayón, and Maria Gurrola (2013), “Estamos traumatizados: The effect of anti-immigrant sentiment and policies on the mental health of Mexican immigrant families.” *Journal of Community Psychology* 41, no. 8: 1005-1020; Quiroga Szkupinski DM Medina, and J. Glick (2014), “In the belly of the beast: Effects of anti-immigration policy on Latino community members,” *American Behavioral Scientist*, 58(13), p. 1723-1742.

⁸⁰ Tourangeau, Rips, Rasinski (2000).

⁸¹ Singer, Hoewyk, and Neugebauer (2003); Eleanor Singer et al. (2001). “Final Report on the 1999-2000 Surveys of Privacy Attitudes,” Washington, DC, US Bureau of the Census, Planning, Research and Evaluation Division, December 10.

⁸² U.S. General Accounting Office. (1999), An Innovative Technique for Estimating Sensitive Survey Items, p. 78, <https://www.gao.gov/new.items/gg00030.pdf>.

conclusion: the addition of a citizenship question is highly likely to reduce response rates and data quality among non-citizens and Hispanic households.

V. The Inadequacy of Pre-Testing of the 2020 Census Questionnaire with the Inclusion of the Citizenship Question

In explaining his decision to add a citizenship question, Secretary Ross wrote, “the Departments review found that limited empirical evidences exists about whether adding a citizenship question would decrease response rates materially.”⁸³ As explained above, this assertion is incorrect, as there is consistent evidence suggesting that the citizenship question will reduce response rates among subpopulations for whom the question is sensitive.

Perhaps more fundamentally, however, Secretary Ross’s conclusion contravenes survey methodology best practices and the standard practices of the Bureau. Secretary Ross appears to have set a standard that would require affirmative evidence of harm—without an explicit testing and evaluation program—before deciding *against* implementation of a change to the census. Scientifically appropriate methodological practices would require evidence that a proposed change to the questionnaire will *not* harm data quality *before* implementing that change. As the saying goes, “absence of evidence is not evidence of absence.” Per the “Census Bureau Standard: Pretesting Questionnaires and Related Materials for Surveys and Censuses,” the minimal standard explicitly states “if there is insufficient evidence about how well a question performs, the question must be subjected to some form of questionnaire pretest.”⁸⁴

More direct evidence about the impact of adding the citizenship question could have been developed if the decision process followed standard Census Bureau practices regarding pre-testing of survey questionnaires. As explained below, adequate pre-testing consistent with survey methodology best practices did not occur prior to the decision to include a citizenship question on the 2020 census.

A. Background on Scientifically Appropriate Pre-Testing of Survey Questionnaires

Pre-testing questions and survey instruments is an essential step in the survey process, as recognized in the survey methodology literature and by the Bureau.⁸⁵ Pretesting is necessary to evaluate the performance of a question and instrument, helping to determine whether components of the design might degrade data quality. Extensive survey methodology research—including work by the Bureau—demonstrates that even minor variations in the

⁸³ Ross Memo (March 26, 2018), at AR-001317.

⁸⁴ CZF Clark, R Tinari R Singh A Tupek H Hogan, RA Killion & T Wright (2003), *Census Bureau Standard: Pretesting Questionnaires and Related Materials for Surveys and Censuses*.

⁸⁵ T. DeMaio (2005), *Standards for Pretesting Questionnaires and Survey Related Materials for U.S. Census Bureau Surveys and Censuses*; Paul Biemer and Lars E. Lyberg (2003). *Introduction to survey quality*. Vol. 335. John Wiley & Sons.

design of a questionnaire can lead to unanticipated differences in response patterns.⁸⁶ Design features like mode, survey question order, wording, and instructions can have significant consequences for unit nonresponse, item nonresponse, and the honesty of responses provided.⁸⁷

Pre-testing is especially critical for questionnaires that include sensitive questions.⁸⁸ Importantly, a question cannot be understood in isolation of other design decisions (mode, question order, etc.). Research has shown, for instance, that respondents are more likely to give socially desirable answers in interviewer-administered surveys compared to self-administrated questionnaires. Research has also shown that, beyond the wording of a question, question order and context can shape perceptions of intent and burden, thus determining if a respondent breaks off (i.e., exits the survey without finishing) or refuses to answer.⁸⁹ Research specific to sensitive questions emphasizes the importance of embedding the sensitive question in a carefully constructed context to “reduce the focus on a specific behavior question.”⁹⁰

A variety of methodological approaches exist for evaluating individual questions and instruments, and the Bureau regularly uses these pretesting approaches in the survey development process.⁹¹ While all of the methods share the common goal of helping to maximize data quality, they vary in the types of problems they identify.

- Focus groups are typically used early in the questionnaire development process to gauge respondent understanding of a topic, including how they think about a topic and their opinions about question sensitivity.
- Expert reviews by survey methodologists are used to identify theoretical or practical considerations in the questionnaire development process.
- Cognitive interviews—in which a researcher probes a respondent about their thought processes as they complete the questionnaire—are used to evaluate the question-answering process, including question comprehension, interpretation of question, and the presumed intent of the question. Cognitive interviewing is typically an iterative process—

⁸⁶ For example, see CE Bennett and DH Griffin (2002), Race and Hispanic Origin Data: A Comparison of Results from the Census 2000 Supplementary Survey and Census. In 2002 Proceedings of the American Statistical Association, Section on Survey Research Methods. American Statistical Association.

⁸⁷ Groves et al. (2009).

⁸⁸ S. Presser, M. Couper, J. Lessler, E. Martin, J. Martin, J. Rothgeb, and E. Singer (2004), “Methods for testing and evaluating survey questions,” *Public opinion quarterly*, 68(1), pp.109-130.

⁸⁹ Frauke Kreuter, Stanley Presser, and Roger Tourangeau (2008), “Social Desirability Bias in CATI, IVR, and Web Surveys The Effects of Mode and Question Sensitivity.” *Public opinion quarterly* 72, no. 5: 847-865; Tourangeau and Yan 2007.

⁹⁰ Seymour Sudman, and Norman M. Bradburn (1982), “Asking Questions.” *San Francisco: Josey-Bass Inc. Publishers* (1982), p. 61.

⁹¹ Office of Management and Budget (Jan. 2016), Evaluating Survey Questions: An Inventory of Methods. Statistical Policy Working Paper 47. Statistical and Science Policy Office, Washington, D.C <https://www.bls.gov/osmr/spwp47.pdf>.

changes are made to the questionnaire and then new cognitive interviews are conducted to evaluate those changes.⁹²

- Field testing evaluates questionnaires in conditions as close as possible to that of the actual survey. Analyses of field test data often include examining a number of quality metrics such as item nonresponse, break-offs, response latency, “don’t know” responses, and straight-lining can be valuable in identifying data quality issues.
- When pretesting identifies quality issues or issues are anticipated, randomized experiments are used to make evidence-based decisions about the design.

As part of the Census Quality Standards, Sub-Requirement A2-3.3 requires that “Data collection instruments and supporting materials must be pretested with respondents to identify problems (e.g., problems related to content, order/context effects, skip instructions, formatting, navigation, and edits) and then refined, prior to implementation, based on the pretesting results.”⁹³

Evidence of these practices are evident in the August 2017 infographic titled “How a Question Becomes Part of the American Community Survey,” which states that “Adding or making a change to the American Community Survey involves extensive testing, review, and evaluation over a 5-year period. This ensures the change is necessary and will produce quality, useful information for the nation.”⁹⁴ These guidelines further explain that “When surveys or censuses are administered using multiple modes and meaningful changes to questions are made to accommodate the mode differences, all versions must be pretested...Data collection instruments in any languages other than English must be pretested in the languages that will be used to collect data during production. Pretesting supporting materials in these languages is not required but is recommended.”⁹⁵

B. Pre-Testing of the 2020 Census

With respect to the 2020 decennial census, pretesting and preparation began even before the 2010 decennial count was complete. In the decade before the decennial census, the Bureau conducts several large tests, contacting tens of thousands of addresses, to optimize the data collection procedures. These tests culminate with an end-to-end census test that is a comprehensive field test or dress rehearsal of the actual decennial census encompassing every stage of the census count. In a 2018 press release, the end-to-end test is described as “a critical part of preparations for the nation’s upcoming 2020 Census” and “The 2018 Census Test will

⁹² Beatty and Willis (2007).

⁹³ [U.S. Census Bureau Statistical Quality Standards, \(July 2013\),
https://www.census.gov/content/dam/Census/about/about-the-bureau/policies_and_notices/quality/statistical-quality-standards/Quality_Standards.pdf](https://www.census.gov/content/dam/Census/about/about-the-bureau/policies_and_notices/quality/statistical-quality-standards/Quality_Standards.pdf), p. 8,
<https://www.census.gov/about/policies/quality/standards/standarda2.html>.

⁹⁴ Guidelines for Designing Questionnaires for Administration in Different Modes, 207.

⁹⁵ Ibid.

help the Census Bureau validate its readiness for 2020 Census operations, procedures, systems and field infrastructure for the once-a-decade census.”⁹⁶

In preparing for the 2020 Census, the Bureau engaged in an extensive content review that included internal testing and evaluation, engagement with stakeholders, and consultation with experts. In presenting the 2020 Census topics to Congress (as required by March 31, 2017), the Bureau explained their content review: “To prepare for the 2020 Census, OMB and the Census Bureau embarked on a comprehensive review including chartering the Interagency Council on Statistical Policy (ICSP) Subcommittee on the ACS and conducting the 2014 ACS Content Review. This effort was designed to examine and confirm the value of each question on the ACS, and to confirm and update the statutory and regulatory authority for the questions with federal agencies. In 2016, the Bureau asked federal agencies to provide any updates to this documentation.”⁹⁷ No federal agency requested the addition of the citizenship question in response. And the 2017 presentation of topics did not mention the addition of citizenship on the decennial questionnaire.

There are two well-known examples of recent content evaluations which highlight the role of testing: the evaluation of a combined race and ethnicity question (not adopted) and revisions to the decennial relationship question to capture same-sex relationships (adopted). Both underwent multi-year testing, evaluation, and collaboration with experts and stakeholders. Specifically:

- Relationship response options were tested in the 2013 ACS Questionnaire Design Test (QDT), the Department of Housing and Urban Development’s 2013 American Housing Survey (AHS), the tests leading up to the 2014 panel of the Survey of Income and Program Participation (SIPP), and decennial tests—the 2012 National Census Test, 2014 Census Test, 2015 Optimizing Self-Response Test, 2015 National Content Test, 2016 National Content Test, 2017 Census Test, and 2018 End-to-End Census Test.
- Research on the combined race and ethnicity question started with the 2008 design of the 2010 Census Alternative Questionnaire Experiment (AQE) Research on Race and Hispanic Origin; the final report and recommendations were issued in February 2017 after careful analysis of the 2015 National Content Test, numerous public dialogues, and collaboration with other federal statistical agencies through a Federal Interagency Working Group for Research on Race and Ethnicity.

Even before the addition of the citizenship question, the Government Accountability Office had designated the 2020 decennial census as high risk and had emphasized the importance of testing and evaluation to mitigate risks to census accuracy and costs. The GAO advised that the

⁹⁶ <https://www.census.gov/programs-surveys/decennial-census/2018-census-test.html>.

⁹⁷ U.S. Census Bureau (March 2017) Subjects Planned for the 2020 Census and American Community Survey: Federal Legislative and Program Uses, <https://www.census.gov/library/publications/2017/dec/planned-subjects-2020-acs.html>.

Bureau “must also rigorously test individual census-taking activities to provide information on their feasibility and performance, their potential for achieving desired results, and the extent to which they are able to function together under full operational conditions.” The report concluded that “it will be imperative that the Bureau have systems and operations in place for the 2018 End-to-End Test.”⁹⁸ Similarly, another GAO report notes that the cancellation of the 2017 Census Test “represents a lost opportunity to test, refine, and integrate operations and systems, and it puts more pressure on the 2018 Test to demonstrate that enumeration activities will function as needed for 2020.”⁹⁹ The 2018 End-to-End Test did not include a citizenship question.

In sum, pretesting is a fundamental part of the survey development process and standard practice for census surveys. It not only helps to ensure that the design maximizes data quality, resulting in a fair and accurate count, it also signals the credibility and integrity of census decision making. As documented below, the addition of a citizenship question to the decennial questionnaire did not follow such a process.

C. The Addition of a Citizenship Question Without Adequate Pre-Testing and Consultation with Experts

It is fundamental principal of scientifically appropriate survey methodology practices and the standard practices of the Bureau that there must be thorough testing and evaluation of a decision to change a survey instrument to determine that the change will not harm the data quality before implementation. While it is theoretically and historically possible to ask sensitive questions on government surveys in a way that collects high quality data, doing so requires careful planning, testing, evaluation, consultation with experts and advisors, and engagement from stakeholders. From my review of the record, none of that has not occurred here.

There has been no pretesting of the 2020 Census questionnaire with the inclusion of the citizenship question. Particularly given the evidence that the citizenship question is sensitive for particular hard-to-count populations and could exacerbate the undercount, pre-testing in this context is critical.

Experts and stakeholders understand the importance of pretesting. For example

- Writing in opposition of the addition of a citizenship question, six former Census Directors (who served under Republican and Democratic presidents) wrote, “There is a well-proven multi-year process to suggest and test new questions. We strongly believe that adding an untested question on citizenship status at this late point in the decennial planning process

⁹⁸ U.S. General Accounting Office (2017), Progress on Many High-Risk Areas, While Substantial Efforts Needed on Others GAO-17-317: <https://www.gao.gov/products/GAO-17-317> p. 224.

⁹⁹ GAO-17-317, p. 226.

would put the accuracy of the enumeration and success of the census in all communities at grave risk.”

- The National Academics of Sciences, Engineering, and Medicine’s Committee on National Statistics (CNSTAT) Task Force on the 2020 Census concluded that “The late-stage insertion of a new and untested question in the 2020 census would almost certainly have damaging effects on the 2020 decennial census.”
- The CNSTAT Task Force further explains that “This endeavor risks undermining the credibility of the Census Bureau and the decennial census, the trust of its respondents, and the independence of the Census Bureau’s professional staff to develop, produce, and disseminate objective information while protecting the confidentiality of respondents”(9) and is inconsistent with “the proper performance of the functions” of The Bureau in part because “Adding a citizenship question without proper testing will, in our judgment, impair the quality of the 2020 Census as a whole.”
- The Census Bureau’s Scientific Advisory Committee (CSAC) issued the following statement: “We have concerns about the lack of adequate testing, about the implications for nonresponse (unit and item), implications for the cost, and implications for attitudes about the Census Bureau and concerns about confidentiality.”

i. Secretary Ross’s Reliance on ACS Testing

In his memo, Secretary Ross asserted that a citizenship question has already been “well tested” because it appeared on the American Community Survey.¹⁰⁰ That is incorrect, as the testing of the citizenship question on the ACS cannot be considered adequate pretesting for the 2020 census questionnaire featuring a citizenship question in accordance with scientifically appropriate survey methodology processes and standards. As explained in the CNSTAT statement noting its opposition to the addition, the experience of the ACS, “does not constitute sufficient evidence to argue that it is a tested and proven method of measurement for the 2020 census.”

To understand the inadequacy of the process by which the Commerce Department is choosing to add the citizenship question in what was already a stressed testing environment, it is useful to distinguish the pretesting of a *question* versus pretesting of a *questionnaire* or survey instrument on which the question is included. While the citizenship question has been asked on the ACS, the 2020 census *questionnaire* featuring a citizenship question has not been pretested. Such pretesting of the complete questionnaire is critical for survey quality.¹⁰¹ Indeed, following the Secretary’s request to add a citizenship question, the Bureau designed a

¹⁰⁰ Ross Memo (March 26, 2018), at AR-001314.

¹⁰¹ Presser et al. (2004).

randomized control trial field experiment—the most compelling method—to test the impact of question wording (ACS wording vs. Current Population Survey wording) and question order (inclusion vs. exclusion of lead-in nativity question) compared to a control group questionnaire without a citizenship question.¹⁰² Dr. Abowd was given a “no-go” on the experiment by the acting director and acting deputy director.¹⁰³

As noted, survey methodologists have shown that the question order and context—not just the question wording—is relevant to evaluating data quality, unit and item nonresponse. This point has been recognized by survey methodologists in the Bureau. The Bureau’s Statistical Quality Standards state that “an existing data collection instrument has substantive modifications” when “existing questions are revised or new questions added.”¹⁰⁴ As recognized in *The Census Bureau Standard: Pretesting Questionnaires and Related Materials for Surveys and Censuses*: “Seemingly minor changes in question wording or sequence sometimes can affect survey responses in important and unexpected ways. Similarly, any systematic change in the survey process (such as mode of interviewing, same design, edit routines, or field procedures) can also result in a change in survey estimates.”¹⁰⁵ Thus, adequate pre-testing requires pre-testing of a complete survey questionnaire before it is deployed, rather than simply testing individual questions from the survey.

The simple fact that a particular question has been asked on a previous Census Bureau survey, does not eliminate the need to pretest the revised questionnaire. For example, it surely would be inconceivable that the Bureau would not pretest if the Secretary had instead suggested adding the ACS question asking if “this person have difficulty dressing or bathing?”

Here, there are several key differences in both order and context between the ACS citizenship question and the proposed citizenship question on the decennial census. These differences point to likely bigger effects on differential nonresponse and data quality and, at minimum, demonstrate significant differences across the questionnaires that reveal the need for thorough testing and evaluation.

First, a citizenship question is one of several dozen questions in the ACS. On the decennial census a citizenship question will be one of just 11 questions. The relative prominence of a citizenship question on the census questionnaire as compared to its place on the ACS might be perceived by respondents as signaling the government’s interest in citizenship and legal status—which could, in turn, increase the salience of a citizenship question for respondents. As

¹⁰² J. Abowd Dep., dated Aug. 29, 2018, at 27-28. Brown et al. (2018) similarly note that “a preferable test would be a randomized control trial (RCT).”

¹⁰³ J. Abowd Dep., dated Aug. 29, 2018, at 105:2.

¹⁰⁴ [U.S. Census Bureau Statistical Quality Standards, \(July 2013\), https://www.census.gov/content/dam/Census/about/about-the-bureau/policies_and_notices/quality/statistical-quality-standards/Quality_Standards.pdf](https://www.census.gov/content/dam/Census/about/about-the-bureau/policies_and_notices/quality/statistical-quality-standards/Quality_Standards.pdf), p. 8.

¹⁰⁵ Census Bureau Standard: Pretesting Questionnaires and Related Materials for Surveys and Censuses, Pretest Standards. <https://www.census.gov/srd/pretest-standards.pdf>.

such, it could be more likely to activate confidentiality concerns compared to the question on the ACS. Pre-testing should have been used to determine if the placement and prominence of a citizenship question on the decennial census questionnaire influences the way in which the respondent interprets and evaluates the survey.

Second, the proposed citizenship question on the decennial census is different from that asked on the ACS and from that asked in the 1950 decennial. Citizenship status in the ACS is asked as a branched, follow-up to a question asking place of birth: “Where was this person born?”¹⁰⁶ Only those who were born outside the United States are asked about citizenship status in the ACS internet self-response. In contrast, as submitted to Congress, the decennial will ask about citizenship without a preceding question regarding place of birth—and it will be asked of all individuals. Although Secretary Ross uses the term “reinstatement,”¹⁰⁷ the proposed citizenship question is also different from that asked on the full population census questionnaire in 1950. In 1950, citizenship was asked—by an in-person enumerator—as a branched follow-up to place of birth. That is, the citizenship question was only asked of foreign-born respondents using the following questions: “What State (or foreign country) was he born in?” Followed by “[if foreign born] Is he naturalized? (Yes, No, or born abroad of American parents).”

The noted differences between the ACS and decennial census could shape perceptions about the question intent and burden. Survey methodology research shows that the perceived intent of a question will impact if and how someone responds, and is one of the reasons it is some important to evaluate through cognitive testing how respondents interpret a question.¹⁰⁸ In the ACS (and on the 1950 census), the placement of the citizenship question after a place of birth question might signal the government’s interest in patterns of migration—which might not trigger the same sensitivities as a free-standing question about citizenship status.

Third, there is a clear need to do pretesting and to do so in a way that evaluates differences across modes, another survey design factor that has well-documented implications for if and how individuals respond.¹⁰⁹ Pre-testing should have been used to determine if the order of a citizenship question on the decennial census questionnaire influences the way in which the respondent interprets and evaluates the question. By way of comparison, before adding a question regarding the year of a person’s naturalization to the ACS occurred only after pretesting, including cognitive interviews and a field test, and the recommendation of the National Academics, an organized panel of experts.¹¹⁰

¹⁰⁶ J. Abowd Dep., dated Aug. 29, 2018, at 17: 11-17.

¹⁰⁷ Ross Memo (March 26, 2018), at AR-001313, 001315, 001317, 001318, 001320.

¹⁰⁸ Tourangeau, Rips, Rasinski (2000).

¹⁰⁹ Elizabeth Martin, Jennifer Hunter Childs, Theresa DeMaio, Joan Hill, Courtney Reiser, Eleanor Gerber, Kathleen Styles, Don Dillman, *Guidelines for Designing Questionnaires for Administration in Different Modes* U.S. Census Bureau, Washington, DC 20233, <https://www.census.gov/srd/mode-guidelines.pdf>

¹¹⁰ “Cognitive interviews are integral to the process of changing survey questions. This type of

Fourth, the Secretary's direction to ask the question at the end of survey further departs from the way the question is asked in the American Community Survey. In his memo, Secretary Ross asserted that placing it at the end of the survey will "minimize any impact on decennial response rates,"¹¹¹ but there is no empirical basis for this statement, which reflects a basic misunderstanding about how the census questionnaire functions for households with more than one member. Respondents are directed to answer all of the questions on the census questionnaire sequentially for each member of their household; thus, respondents will see the citizenship question when they answer the census questionnaire for the first member of the household, and before answering questions about other members of the household (that is, unless the Secretary is proposing a fundamental redesign of the questionnaire from a person-based to a topic-based format).¹¹² On the paper form, respondents can see all of the questions before completing it and, on the Internet self-response form, they can also return to previous questions after seeing the citizenship question. Pretesting would help to understand the effect of placing the citizenship question at the end of the survey.

Fifth, even the respondent who understands that the question is being added for enforcement of the Voting Rights Act might reasonably question why it is necessary ask year of naturalization or to distinguish a U.S. citizen born in Puerto Rico or abroad. Indeed, the Bureau has asked a more simplified version of citizenship status in the Current Population Survey (CPS) that could be preferable in terms of utility and quality. Here again, pretesting could help to determine if the proposed question is the appropriate question to meet the data need.¹¹³ In fact, the RCT that was designed but not implemented, would have tested exactly this.¹¹⁴

Ultimately, cognitive interviews and field testing of the new questionnaire would have helped evaluate how the citizenship question is interpreted in the context of the decennial questionnaire. Even Secretary Ross has acknowledged the need to do testing: "The Census Bureau must test the wording of the new question. It is too late to add a question to the 2018

research is conducted to verify that the potential questions will be readily understood by the public in order to reduce response error. Two rounds of cognitive testing were conducted on the proposed place of birth, U.S. citizenship status, and year of arrival questions."

¹¹¹ Ross Memo (March 26, 2018), at AR-001320.

¹¹² In the first, person-based approach, a series of questions is asked in its entirety about the first person, then the same series is administered again about the next person, and so on (e.g., sex, age, date of birth, Hispanic origin, and race data are gathered for Person 1, then for Person 2, etc.). The alternative topic-based method collects data on a single topic for everyone in the household before moving on to the next topic (e.g., sex is asked for everyone in the household, then Hispanic origin, and so on). Per the Guidelines on: "Guideline 22. Whether an instrument is person- or topic-based should be decided based on evidence about data quality and ease of administration in each mode, and the comparability of data across modes."

¹¹³ S Sudman, N Bradburn, & N Schwarz (1996), *Thinking about answers: The application of cognitive processes to survey methodology*, Jossey-Bass, Inc., San Francisco.

¹¹⁴ J. Abowd Dep., dated Aug. 29, 2018, at 27-28. Brown et al. (2018) similarly note that "a preferable test would be a randomized control trial (RCT)."

End-to-End Census Test, so additional testing on a smaller scale would need to be developed and implemented as soon as possible.”¹¹⁵

As of writing, however, the Bureau confirms to have no such plans.¹¹⁶ Dr. Abowd testified that, with respect to “cognitive testing,” the 2020 census questionnaire was “not adequately tested with the citizenship question.”¹¹⁷ Dr. Jarmin admitted that field testing was not possible given the late decision of the Secretary.¹¹⁸ Moreover, based on reporting in the 2020 Operational Plan, there is not sufficient time to do even the minimum pretesting before 2020 to do comprehensive testing. For example, the 2020 Operational Plan stated: “Any changes to the finalized 2020 Census content will impact all non-English content. IF the final English content changes after April 2018, *THEN there will not be adequate time in the schedule to translate, design, and produce non-English questionnaires for the 2020 Census.*”¹¹⁹

The addition of a citizenship question also undermines the efficacy of the pretesting that was conducted. For example, without the citizenship question, the 2018 End-to-End test does not serve its intended purpose to test nearly all aspects of decennial census operations. The 2020 decennial questionnaire has not been tested in a macro-environment that resembles the actual decennial. The former directors of the Census wrote “Adding a citizenship question without a testing opportunity in a contemporary, census-like environment will invalidate the results and lessons learned from the End-to-End test. Key assumptions underlying estimates of self-response, staffing needs, local office sites, and communication strategies will no longer be sound...In addition, the Census Bureau would need to modify data capture and processing systems, language assistance and enumerator training material, and web-based instructions for completing the census in the time remaining before the 2020 Census states—all without the benefit of field testing.” Indeed, Secretary Ross’s announcement about the questionnaire change was made in the midst of 2018 self-response period, complicating interpretation of the End-to-End response rates.

In sum, the Census Bureau has not followed the appropriate survey design and evaluation process needed to minimize the survey burden. The Bureau failed to follow their own standard process or accepted survey methodology practices to collect additional evidence regarding the likely impact of the questionnaire change. The Bureau’s scientists actually designed a more direct test to more explicitly evaluate the impact of a citizenship question, but ultimately, a decision was made to not conduct such a test.¹²⁰ While Secretary Ross asserted that there is no “empirical” evidence about the impact of the question on response rates, additional empirical evidence about the impact of adding the citizenship question would have been available had the decision followed standard Census Bureau processes.

¹¹⁵ AR- 0009859.

¹¹⁶ J. Abowd Dep., dated Aug. 29, 2018, at 27: 6-9.

¹¹⁷ J. Abowd Dep., dated Aug. 29, 2018, at 142:18 – 143:4.

¹¹⁸ R. Jarmin Dep., dated Aug. 20, 2018 at 298: 9-13.

¹¹⁹ U.S Census Bureau, 2020 Operational Plan v3, p. 72.

¹²⁰ R. Jarmin Dep., dated Aug. 20, 2018 at 304: 4-10.

ii. The Absence of Consultation with Experts and Advisors

Another departure of standard process was the lack of consultation with experts and advisors. For the 2000 and 2010 decennials, the Bureau created a Census Advisory Committee to provide recommendations to the Director of the U.S. Census Bureau. Despite a federal register seeking nominations, the Bureau stopped plans to create a similar committee for 2020. The Bureau has two advisory committees: the National Advisory Committee on Racial, Ethnic and Other Populations (NAC) and the Census Scientific Advisory Committee (CSAC). Neither were consulted in the evaluation of the DOJ request and both have rebuked the Secretary's decision.

The refusal to consult with the Census Bureau's advisory committees has been an atypical process that has served to politicize the decennial count, jeopardized the credibility of the decision, and thus makes it more likely to have a negative impact. For example, following the announcement of Secretary Ross's decision, a #leaveitblank hashtag trended on Twitter. The 2020 Trump for President Campaign and the Republican National Committee are sending fundraising messages about the addition of a citizenship question the census. The email asks supporters to sign a petition to "defend the President" and the decision to add a citizenship question to the census; once someone inputs their information, they are prompted to donate money.¹²¹

VI. The Inadequacy of Plans to Address the Increase in Non-Response Rates among Noncitizens and Hispanics and Prevent an Increase in the Differential Undercount

A decreased willingness to respond to the census among hard-to-count populations due to the inclusion of the citizenship question will translate into an exacerbation of the differential undercount—unless the Census Bureau is able to address that unwillingness through two strategies that the Bureau employs to try to improve the accuracy and fairness of the census count: 1) outreach through partnerships and communications campaigns to encourage census participation, and 2) where individuals fail to respond to the census, through non-response follow up (NRFU) procedures, including the sending of census enumerators to obtain in-person responses from households that fail to respond to the census questionnaire. Here, however, there is no empirical basis to conclude that these strategies will adequately address the effect that including the citizenship question will have on the willingness of members of hard-to-count population to cooperate with the Census, and the empirical studies suggests that these strategies will not be effective.

¹²¹ See messaging online at <https://gop.com/census-survey/>; also see <https://www.cnn.com/2018/03/28/politics/trump-census-citizenship/index.html>.

a. Outreach

Both the 2000 and 2010 U.S. Censuses included a social marketing communications campaign to help encourage self-response. The 2020 Integrated Partnership and Communications campaign has plans to use tailored advertising, partnerships with local organizations, and targeted outreach to immigrant and faith-based organizations to encourage households to self-complete the decennial census. A primary goal of these efforts is to raise awareness and encourage participation “of those are less likely to response or are often missed.”¹²² Unfortunately, there is no evidence that these outreach efforts will counteract the decreased willingness of Hispanics and noncitizens to participate in the Census, and there are indications that these efforts could fall short.

First, the Bureau has not implemented its own plans for outreach around the 2020 census. Following the 2010 Census, the Communications Directorate immediately established a decades-long research plan to inform the 2020 Census communications campaign development. Unfortunately, the plans outlined in the 2020 Census Integrated Communications Plan were scaled back or eliminated due to funding shortfalls.

The Bureau has acknowledged the need to do additional testing after learning of increased confidentiality concerns among HTC segments of the population but has not followed through on those plans. As explained in a recent GAO report “During exchanges of information between the Bureau and its National Advisory Committee in 2017 and 2018, the Bureau proposed using additional focus groups with certain population groups, census interviewers, and trusted community messengers. These focus groups are intended to identify root causes and ways to overcome the confidentiality concerns increasingly being raised by respondents in the Bureau’s earlier testing by helping to inform messaging and outreach plans as well as staff support documents and training materials.”¹²³ The same report includes a footnote, “In technical comments in response to a draft of this report, Bureau officials told us that they do not have plans to conduct the additional proposed focus groups with census interviewers and trusted community messengers.”¹²⁴

Additionally, empirical research on the effectiveness of public information campaigns literature demonstrates the difficulty of having a meaningful impact on public attitudes and behaviors.¹²⁵ The current fragmented and complex information environment makes it more difficult to reach the public.

¹²² See <https://www2.census.gov/cac/nac/meetings/2017-04/2017-ipc-update.pdf>.

¹²³ U.S. Government Accountability Office (July 2018) “Actions Needed to Address Challenge to Enumerating Hard-to-Count Groups, GAO-18-599, p. 22 <https://www.gao.gov/products/GAO-18-599>.

¹²⁴ U.S. Government Accountability Office (July 2018) “Actions Needed to Address Challenge to Enumerating Hard-to-Count Groups, GAO-18-599, p. 22.

¹²⁵ E.g., Kalla, Joshua L., and David E. Broockman (2018), “The minimal persuasive effects of campaign contact in general elections: Evidence from 49 field experiments.” *American Political Science Review* 112, no. 1: 148-166; Hillygus et al. (2006), pp. 8-9.

Second, to the extent messaging campaigns are able to reach the public, they can have the perverse effect of exacerbating participatory inequalities by increasing differentially mobilizing the most advantaged in the population.¹²⁶ If the communication campaign differentially increases the cooperation of Whites, the outreach campaign risks exacerbating the differential count of racial and ethnic minorities. This is a distinct risk for the 2020 decennial because research indicates that confidentiality concerns, compared to other participatory barriers, are especially hard to overcome. For example, internal Census Bureau research found that those who were concerned about privacy could have their attitudes moved on the use of administrative records, whereas those concerned about confidentiality could not.¹²⁷ This finding is also consistent with survey methodology experimental research that has found assurances of confidentiality can sometimes be counterproductive, actually increasing respondent's concerns and increasing reluctance to respond.¹²⁸

These potential challenges point towards the need for additional testing of Census Communications and Outreach. Unfortunately, the current and planned efforts are inadequate for the task. The Gallup tracking poll commissioned by the Census Bureau is a generic attitudinal survey disconnected from the actual behavior of census participation, which has been found to be widely misinterpreted by respondents.¹²⁹ The CBAMS is limited in its ability to understand and solve confidentiality concerns associated with the citizenship question because it does not even collect citizenship status in the survey questionnaire.

In sum, there is simply no evidence that the Outreach effort will be effective at overcoming the predicted decline in self-response rates among non-citizen and Hispanic households.

b. Nonresponse Follow-Up ("NRFU")

Nonresponse Follow-up (NRFU) is the process by which the Census Bureau attempts to collect information from households that do not respond to the census questionnaire. To briefly review the planned NRFU process:

- Every non-responding household will be visited in-person by a census enumerator at least once.

¹²⁶ See review in Hillygus et al. (2006), pp.71-72.

¹²⁷ Nancy Bates, Monica J. Wroblewski, and Joanne Pascale. 2012. Public Attitudes Toward the Use of Administrative Records in the U.S. Census: Does Question Frame Matter? Survey Methodology #2012-04, Center for Survey Measurement, U.S. Census Bureau, <https://www.census.gov/srd/papers/pdf/rsm2012-04.pdf>.

¹²⁸ Singer, Hippler, and Schwarz (1992).

¹²⁹ Jennifer Hunter Childs (May 18, 2018). When Numbers Aren't Enough: Supplement Quantitative Data Collection with Qualitative Insights. Presentation at the American Association for Public Opinion Research, <https://www.census.gov/content/dam/Census/newsroom/press-kits/2018/aapor/aapor-presentation-insights.pdf>.

- If that initial visit does not result in a completed household, administrative records may be used to enumerate those households for which there is high quality administrative data about the household.
- For those households without administrative records, an enumerator will attempt recontact.
- After a third attempt to contact a household does not yield a respondent, a case will become “proxy-eligible.” A proxy is someone who is not a member of the household—such as a neighbor, landlord, Postal worker, or other knowledgeable person who can provide information about the unit and the people who live there. An enumerator will attempt three proxies after each non-interview for a proxy-eligible case.
- If these efforts fail, then a household becomes eligible for what is known as “whole-person imputation” or “whole household imputation,” in which the Bureau imputes a full set of characteristics, including age, sex, and race based on external information such as the characteristics of the neighborhood.¹³⁰

The Census Bureau predicts that the addition of a citizenship question will decrease self-response rates and therefore acknowledges that there will be an increase the workload for the NRFU. An important question here is whether and to what extent NRFU will be successful in enumerating households (and individuals within households) that do not respond to the census questionnaire because of the citizenship question. Dr. Abowd’s January 19 memo, for example, includes an estimate of the costs increase of including the citizenship question on the census, which assumes that 79% of non-citizen households in the NRFU operation will provide information (leaving 21% to receive proxy responses).¹³¹

While Dr. Abowd’s estimate is, in itself, troubling, his assumption that 79% of non-citizens who fail to respond to the census questionnaire because of the citizenship question will instead provide information to an enumerator seems overly-optimistic. Indeed, the Census Bureau’s internal analysis observed that “if a household declines to self-respond due to the citizenship question, we suspect it would also refuse to cooperate with an enumerator coming to their door, resulting in a need to use a proxy.”¹³²

I highlight several reasons to think NRFU will not fully mitigate the differential undercount of non-citizens and Hispanics in the decennial census.

First, even before the addition of the citizenship question, NRFU efforts could not eliminate the undercount in past censuses. The persistent undercounts in the 1990, 2000, and 2010 decennial counts indicate that NRFU efforts do not fully address patterns of differential self-

¹³⁰ U.S. Census Bureau (June 8, 2018), Proposed Information Collection, 2020 Census. Federal Register Notice. Vol. 83 (111), p. 26649.

¹³¹ Abowd Memo (Jan. 19, 2018), at AR-001282.

¹³² Brown et al. (Aug. 6, 2018), at COM_DIS00009874.

response.¹³³ Dr. Jarmin acknowledged in his deposition that NRFU is not equally successful across all groups, with lower rates of success among the hardest to count populations like noncitizens and racial and ethnic minorities.¹³⁴ Even more recent and ominous, the 2016 Census test found that the NRFU operation “proceeded according to the Bureau’s operational plans,” including the use of proxy respondents, but still resulted in 30% non-interview rates in Harris County, Texas and 20% non-interview rates Los Angeles County, California—the 2016 test sites selected because of their hard-to-count tracts.¹³⁵ A recent GAO reports that the Bureau has cancelled three coverage measurement operations from the scope of 2018 End-to-End test, so there will be less up-to-date information about a possible undercount.¹³⁶

Second, the same issues that are likely to depress self-response are also likely to have an impact on a respondent’s willingness to respond to an in-person enumerator. The Census Bureau’s ethnographic research has found that fear of deportation, cultural resistance to government compliance, language barriers, and complex households all contribute to the differential undercounts of racial and ethnic groups.¹³⁷ Bureau focus group research of field representative for the Census 2000 Supplemental Survey reported that respondents living in the country illegally were less likely to cooperate.¹³⁸ In estimating the impact of adding the citizenship question to the 2020 decennial, Bureau researchers noted that “it may not be possible to obtain an accurate enumeration no matter how many times an enumerator knowledge on their door.”¹³⁹

Third, the addition of an in-person interviewer during the NRFU process creates an additional challenge to the survey participation decision. Empirical research finds that respondents are less likely to answer sensitive questions in an interviewer-administered survey compared to a self-administered survey.¹⁴⁰ This effect could be exacerbated in the decennial NRFU compared to the ACS because decennial enumerators tend to have less experience than ACS

¹³³ Thomas Mule (2012), “Census coverage measurement estimation report: Summary of estimates of coverage for persons in the United States.” Washington, DC: US Census Bureau.

¹³⁴ R. Jarmin Dep., dated Aug. 20, 2018 at 284 :15-21.

¹³⁵ U.S. Government Accountability Office (Jan 2017) 2020 Census: Additional Actions Could Strengthen Field Data Collection Efforts. GAO-17-191. <https://www.gao.gov/assets/690/682308.pdf>, pp. 4-5.

¹³⁶ GAO-18-541T, at p. 8.

¹³⁷ De la Puente M (1993) Why are People Missed or Erroneously Enumerated in the Census – A Summary of Findings from Ethnographic Research. Proceedings of the 1993 Research Conference on Undercounted Ethnic Populations. Suitland, MD: US Census Bureau: 29-66; Terry, R.L., Schwede, L., King, R., Martinez, M. and Childs, J.H., 2017. Exploring Inconsistent Counts of Racial/Ethnic Minorities in a 2010 Census Ethnographic Evaluation. *Bulletin of Sociological Methodology/Bulletin de Méthodologie Sociologique*, 135(1), pp.32-49.

¹³⁸ Camarota, S., and Jeffrey Capizzano. “Assessing the quality of data collected on the foreign born: an evaluation of the American Community Survey (ACS).” Methodology and data Quality. COPAFS The Council of Professional Associations on Federal Statistics (2004).

¹³⁹ Brown et al. (Aug. 6, 2018), at COM_DIS00009875.

¹⁴⁰ Tourangeau and Yan (2007).

interviewers.¹⁴¹ The notion that in-person enumerators will be able to address increased non-response resulting from the addition of the citizenship question is premised on the assumption that individuals who are sensitive to the question and who do not answer it on a survey instrument will nevertheless be willing to do so during an in-person interview with a government employee—an assumption that is contrary to social science research and Census Bureau predictions.

Survey methodology research also shows that interviewer characteristics also shape the willingness of individuals to respond, and to respond accurately.¹⁴² For HTC neighborhoods, the Bureau historically tries to match the language and background of the enumerator to more effectively canvas the neighborhood. In previous censuses, the Bureau prioritized hiring multilingual enumerators, including non-citizens legally authorized to work in the U.S.¹⁴³ Similar efforts may prove difficult this time, for several reasons. For example, the Census Bureau has announced it will hire only U.S. citizens as enumerators for the 2020 census¹⁴⁴, a decision that would deprive the Bureau of a pool of potential enumerators likely to have the very language skills and cultural backgrounds critical to reaching the very populations deterred from census participation because of the citizenship question.

There are already indications that the Bureau will have a difficult time hiring enumerators. According to the 2020 Operational Plan, the Bureau will recruit, train, and manage more than 420,000 temporary employees to conduct the nonresponse follow-up from mid-May to mid-August. But there are clear staffing challenges compared to 2010. In terms to hiring staff, the labor market is tighter today than in 2010, so that it could be harder to find the needed workforce. A GAO report notes that “In early hiring for 2020, Bureau officials reported smaller than expected applicant pools, declined offers, and turnover.”¹⁴⁵ The planned partnership staff totals (1630 hires) are also lower than what was used in 2010 (2719 hires). A GAO report also notes that as of July 2018 the Bureau had not yet “provided information to show it had determined the underlying factors that led to the observed overstaffing in order to help prevent a repeat in 2020”(12).¹⁴⁶ Moreover, the staffing challenges noted by a recent GAO report could make it more difficult to achieve background matches between enumerators and

¹⁴¹ Brown et al. (Aug. 6, 2018), at COM_DIS00009862.

¹⁴² Thomas, Mangione, Thomas W., Floyd J. Fowler, and Thomas A. Louis (1992), "Question characteristics and interviewer effects." *JOURNAL OF OFFICIAL STATISTICS-STOCKHOLM*- 8: 293-293.

¹⁴³ https://www.washingtonpost.com/local/social-issues/non-citizens-wont-be-hired-as-census-takers-in-2020-staff-is-told/2018/01/30/b327c8d8-05ee-11e8-94e8-e8b8600ade23_story.html?utm_term=.dc8190a92449.

¹⁴⁴ See AR 0004253; Also, Tara Bahrapour (January 30 2018) “Non-citizens won’t be hired as census-takers in 2020, staff is told,” The Washington Post. https://www.washingtonpost.com/local/social-issues/non-citizens-wont-be-hired-as-census-takers-in-2020-staff-is-told/2018/01/30/b327c8d8-05ee-11e8-94e8-e8b8600ade23_story.html?utm_term=.dc8190a92449.

¹⁴⁵ U.S. Government Accountability Office (July 2018) “Actions Needed to Address Challenge to Enumerating Hard-to-Count Groups, GAO-18-599 <https://www.gao.gov/assets/700/693450.pdf>.

¹⁴⁶ Ibid.

census neighborhoods; and the absence of records and analysis regarding the 2010 NRFU suggest that the Bureau is unprepared for this problem if it arises.¹⁴⁷

Fourth, the macro-environment can also be expected to shape an individual's willingness to respond to NRFU. The NRFU operation will be occurring during a presidential election year. Several states will be in the midst of their primary elections. This macro-environment increases the likelihood that the decennial and NRFU operation will be politicized, as happened in the 2000 decennial. It creates competition for field staff hiring and the information environment. The 2000 decennial was the last census that coincided with a presidential campaign, with exactly these consequences.¹⁴⁸ For example, then-candidate George W. Bush said that he understood "why people don't want to give over that information to the government. If I had the long form, I'm not so sure I would do it either."¹⁴⁹

Fifth, NRFU efforts will not capture those households who were not in the Census Bureau's Master Address File (MAF). Recent research concludes that one reason for an undercount of noncitizen and Hispanic households is that they live in unusual or concealed housing units that are not in the MAF.¹⁵⁰ The 2020 decennial has been designed to allow those who might not be in the MAF to self-respond through the Non-ID processing option on the Internet, but the NRFU operations work from listed addresses. Non-ID processing allows individuals to self-respond online even if they do not receive (or do not have available) their census ID that will be mailed to the Census Master Address File (MAF). Non-ID processing will match those responses to the MAF, and in the event it is missing, will attempt to geocode it to the correct census block. Data from the Bureau and external researchers finds that the Master Address File is more likely to miss non-citizens and ethnic and racial minorities who are more likely to live in complex housing situations.¹⁵¹ Because any households not in MAF must be self-motivated to respond, the previously raised confidentiality concerns suggest these households will be less likely to do so.

Sixth, the quality of administrative records used to enumerate non-responding households is worse for HTC populations. If a household is not counted after one visit, administrative records will be used to enumerate those households where the administrative records are of sufficient quality. And, for the first time, the NRFU will use administrative records to identify vacant households and to fill in the responses if the administrative records are deemed to be of adequate quality. As the Bureau has acknowledged, however, the administrative records are less likely to be of sufficient quality for non-citizen households.¹⁵² A 2017 Urban Institute

¹⁴⁷ Ibid.

¹⁴⁸ Hillygus et al. (2006).

¹⁴⁹ Hillygus et al. (2006), p. 74.

¹⁵⁰ E. Kissam (2017). Differential undercount of Mexican immigrant families in the US Census. *Statistical Journal of the IAOS*, 33(3), pp.797-816. Community-based Address Canvassing pilots have identified significant additional housing units.

¹⁵¹ See <ftp://ftp.census.gov/cac/nac/meetings/2016-11/2016-04-latino-children.pdf>.

¹⁵² R. Jarmin Dep., dated Aug. 20, 2018 at 308 : 15-17. J; David Brown, et al., *Understanding Quality of Alternative Citizenship Data Sources for the 2020 Census*, Aug. 6, 2018.

Research Report concluded that “vulnerable and hard-to-reach subpopulations may be systematically underrepresented by the new procedures. These subpopulations may not have the same body or quality of administrative records as other groups.”¹⁵³ Because of the late proposal to include a citizenship question, it remains unclear how the use of administrative records might change in light of an addition of a citizenship question.

It is widely-documented that self-responses are, generally speaking, more accurate for purposes of enumeration than the data collected through such records.¹⁵⁴ Dr. Abowd explained this in his March 1st memo to Sec. Ross¹⁵⁵:

“inclusion of a citizenship question on the 2020 Census questionnaire is very likely to reduce the self-response rate, pushing more households into Nonresponse Follow-up (NRFU). Not only will this likely lead to more incorrect enumerations, but it is also expected to increase the number of persons who cannot be linked to the administrative data because the NRFU PII is lower quality than the self-response data. In the 2010 Decennial Census, the percentage of NRFU persons who could be linked to administrative data rate was 81.6 percent, compared to 96.7 percent for mail responses. Those refusing to self-respond due to the citizenship question are particularly likely to refuse to respond in NRFU as well, resulting in a proxy response. The NRFU linkage rates were far lower for proxy responses than self-response (33.8 percent vs. 93.0 percent, respectively).”

Seventh, for nonresponding households who cannot be enumerated by administrative records, the Census Bureau will try to enumerate such households through proxy responses—which, as acknowledged by Dr. Jarmin during his deposition, are much lower quality than self-responses.¹⁵⁶ Proxy respondents can be expected to increase erroneous enumerations, whole-person imputations, and census omissions.¹⁵⁷ For example, analyses of the 2010 census found that the correct enumeration rate was 27 percentage points lower for proxies than for self-responses.¹⁵⁸ It is well-known that proxies “may not provide complete and accurate information for the census enumeration.”¹⁵⁹ Moreover, we can expect that a neighbor might be worse equipped to provide information about citizenship than about characteristics like sex and race. Internal Bureau research finds, for instance, that item nonresponse on the citizenship

¹⁵³ 2017 Urban Institute Research Report, pp. 11.

¹⁵⁴ R. Jarmin Dep., dated Aug. 20, 2018 at 308: 15-17.

¹⁵⁵ 18-CV-2921 ECF 189-1, Memorandum from J. Abowd on Preliminary analysis of alternative D (combination of B and C) (March 1, 2018), at AR-001311.

¹⁵⁶ R. Jarmin Dep., dated Aug. 20, 2018 at 308: 15-17.

¹⁵⁷ https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2020-2017_04-undercount-children-analysis-coverage.pdf.

¹⁵⁸ Brown et al. (Aug. 6, 2018), at COM_DIS00009873.

¹⁵⁹ U.S. Census Bureau (2017d). Investigating the 2010 Undercount of Young Children – Analysis of Coverage Measurement Results. 2020 Census Program Memorandum series, pp. 19.

question is much higher when reporting is done by a nonrelative, compared to a relative.¹⁶⁰ As Bureau researchers acknowledge, “the imputation [of citizenship] will be challenging due to the fact that nonresponse is highly correlated with citizenship.”¹⁶¹

Last, the Census Bureau’s 2020 Census Operational Plans for Nonresponse Follow-up includes operational designs that do not account for the addition of the citizenship question. The 2020 Census operational plans—covering all operations required to execute the 2020 Census, starting with pre-census address and geographic feature updates and ending with census data product dissemination and coverage and quality measurement—have not yet been updated in light of the citizenship question addition. As noted by the GAO, the Bureau had removed three coverage measurement operations from the scope of the test, so it won’t be possible to evaluate the accuracy of the 2018 End-to-End test: “Without sufficient testing, operational problems can go undiscovered and the opportunity to improve operations will be lost, in part because the 2018 End-to-End Test is the last opportunity to demonstrate census technology and procedures across a range of geographic locations, housing types, and demographic groups.”¹⁶² Moreover, another GAO report highlights management issues in its efforts to count HTC groups—14 different operations in the decennial were designed to improve enumeration of HTC populations, but the decentralized nature of those operations creates management and integration challenges.¹⁶³

Ultimately, the Census Bureau estimates, projecting from the 2016 ACS, that including the addition of the citizenship question will increase NRFU erroneous enumerations and whole-person imputations. For all of the reasons discussed above, the addition of the citizenship question is also likely to increase omissions—individuals who should have been counted by the census but were not.

In sum, a review of the scientific literature, census documents, and deposition testimony to date reveals no evidence that the NRFU operations will adequately address the reduction in response rates among Hispanics and noncitizens, and thus prevent a resulting increase in the differential undercount among those groups. The operations in place to assure a complete, accurate, and fair census count in the face of differential self-response have been inadequately evaluated in light of the addition of a citizenship question and face significant challenges that make it hard to expect—in the absence of empirical evidence—that they will be able to mitigate the predicted differential undercount resulting in reduced self-response rates.

¹⁶⁰ Brown et al. (Aug. 6, 2018), at COM_DIS00009840.

¹⁶¹ COM_DIS00009876.

¹⁶² GAO-18-541T, 8.

¹⁶³ U.S. Government Accountability Office (July 2018) “Actions Needed to Address Challenge to Enumerating Hard-to-Count Groups, GAO-18-599 <https://www.gao.gov/assets/700/693450.pdf>.

VII. Data Quality: Utility and Integrity of Decennial Census with a Citizenship Questions

These guidelines require that all information collected and disseminated by the U.S. Census Bureau are designed to ensure and maximize the utility, objectivity, and integrity of the information. Utility or “fitness of use” refers to the “usefulness of the information for its intended users;” Objectivity means the information is “accurate, reliable, and unbiased, and is presented in an accurate, clear, complete, and unbiased manner;” Integrity refers to the security of the information—protection from unauthorized access or revision.¹⁶⁴ I conclude that the addition of the citizenship question will undermine all three of these data quality dimensions.

The previous discussion regarding census nonresponse is an indicator of the objectivity of the census data, just one component of the Bureau information quality standards. In addition, the addition of a citizenship question without adequate testing and evaluation also threatens the utility and integrity of census data, the other dimensions of information quality set forth in the information quality guidelines of the OMB and the U.S. Census Bureau Statistical Quality Standards.

The addition of the citizenship question will undermine the data quality of the decennial census. In his January 19th and March 1, 2018 Memos, Dr. Abowd admits this, noting there are “major potential quality disruptions” associated with adding a citizenship question.¹⁶⁵ But whereas my analysis thus far has focused on the accuracy and completeness (“objectivity”) of the count, the addition of a citizenship question also will potentially degrade the utility and integrity of the information. There is an inherent tension between the integrity and utility of census data that requires balancing—and that is informed by proper testing and evaluation. As privacy researchers note “a fundamental tension at the heart of every statistical agency’s mission” is the reality that reducing disclosure risk decreases the utility of the data.¹⁶⁶ Because of unanswered questions about how to protect the integrity of the data, it is currently not clear if the citizenship data collected from the citizenship question has any utility or is “fit for use” for the state purpose of DOJ enforcement of the Voting Rights Act. In other words, contrary to scientifically appropriate survey methodological practices, Secretary Ross has mandated the addition of a question to the decennial census without having first determined if the data collected can be actually used for the stated purpose.

Balancing Integrity and Utility In requiring that the disseminated information has “integrity,” the quality standards refer to the security of the information—the requirement to protect of information from unauthorized access or revision, to ensure that the information is not

¹⁶⁴ U.S. Census Bureau Statistical Quality Standards, (July 2013),

https://www.census.gov/content/dam/Census/about/about-the-bureau/policies_and_notices/quality/statistical-quality-standards/Quality_Standards.pdf, pp. i-ii.

¹⁶⁵ 18-CV-2921 ECF 189-1, Memorandum from J. Abowd on Technical Review of the Dep. of Justice Request to Add Citizenship Question to the 2020 Census (Jan. 19, 2018), at AR 001278.

¹⁶⁶ Doyle, P., Lane, J., Theeuwes, J. and Zayatz, L., 2001. Confidentiality, disclosure and data access. Amsterdam: Elsevier-North Holland, 274, pp.337-345.

compromised through corruption or falsification. Title 13 U.S. Code (9) prohibits the publication of data that can identify individuals. The Bureau often references this legal protection as a reassurance of confidentiality, implying that any perceptions of disclosure risk are misplaced or could be corrected through outreach.

Fundamentally, the addition of a citizenship question increases the disclosure risk of the decennial census. Data breaches happen; systems fail (especially when not adequately tested); and policies can be changed. Disclosure risk depends not only on the disclosure potential but also on the potential harm associated with the collected information.¹⁶⁷ The addition of a citizenship question thus increases the disclosure risk because there is greater potential harm associated with the disclosure of citizenship status compared to the disclosure of other demographic characteristics collected in the decennial. For non-citizen households, disclosure of citizenship status could result in deportation, job loss, fines, and/or imprisonment. The Bureau conducted and released a Privacy Impact Assessment for the decennial census in June 2018, but it did not reflect the addition of a citizenship question.¹⁶⁸

Beyond unintended data breaches, the addition of a citizenship question in fact increases the disclosure risks associated with published products from the decennial. Privacy research—including by Census Bureau researchers—has identified the potential database reconstruction based on the release of aggregate data statistics to be a significant disclosure risk.¹⁶⁹ Dr. Abowd admits that “Experiments have led to the declaration that reconstruction of Title 13-sensitive data is an issue, no longer a risk”¹⁷⁰ He concludes that “It may no longer be reasonable to assert that a product is empirically safe given best-practice disclosure limitation prior to its release”¹⁷¹

In order to prevent the possibility of tracing statistics back to a specific respondent, the Bureau goes through a process of “noise injection” to “alter the underlying statistical tabulations before publication.”¹⁷² In response to weaknesses in previous noise injection methods, the Bureau has been developing a system called differential privacy that offers more robust

¹⁶⁷ Chris Skinner (2012), “Statistical disclosure risk: Separating potential and harm.” *International Statistical Review* 80.3 (2012): 349-368.

¹⁶⁸ http://www.osec.doc.gov/opog/privacy/Census%20PIAs/CEN08_PIA_SAOP_Approved.pdf

¹⁶⁹ For example, I. Dinur. and K Nissim (2003), Revealing information while preserving privacy. *In Proceedings of the twenty-second ACM SIGMOD-SIGACT-SIGART symposium on Principles of database systems*, pp. 202-210. ACM.

¹⁷⁰ John Abowd (July 30, 2018) Staring-Down the Database Reconstruction Theorem. Presentation at Joint Statistical Meetings, Vancouver BC, Canada, <https://www.census.gov/content/dam/Census/newsroom/press-kits/2018/jsm/jsm-presentation-database-reconstruction.pdf>.

¹⁷¹ John Abowd (June 5, 2017) “Research Data Centers, Reproducible Science, and Confidentiality Protection: The Role of the 21st Century,” Statistical Agency Presentation to Summer DemSem, Sponsored by the Wisconsin Federal Statistical RDC.

¹⁷² Census blog post, Sept 4, 2018. https://www.census.gov/newsroom/blogs/research-matters/2018/08/protecting_the_conf0.html.

protections. Unfortunately, the processes and procedures were developed for a decennial census without a citizenship question (and were set to be implemented in full with the 2018 End-to-End Test).

Despite assurances that the Bureau would be more transparent about the procedures, Dr. Abowd acknowledges that decisions have not yet been made as to how the data can or will be used and released given the potential disclosure risks.¹⁷³ In fact, he cannot even say if the error margins around the block-level citizen voting-age population estimates will actually improve over the estimates that are currently available based on the ACS because the Bureau hasn't "set the parameters of the disclosure avoidance system."¹⁷⁴

Dr. Abowd explains that "this process is a delicate balancing act. Enough noise must be added to protect confidentiality, but too much noise could damage the statistic's fitness-for-use."¹⁷⁵ Without a clear understanding of how a citizenship question will be used to produce the requested information, it is impossible to evaluate both the utility and integrity of the data—critical components of the Census Bureau Quality Standards.

Beyond the reduced utility that comes from noise injections needed to reduce the disclosure risk, the addition of a citizenship question is also less timely than ACS data, which provide numbers every 5 years. In recommending against the addition of the citizenship question, the Bureau emphasized that "Not only is using administrative records potentially a more accurate measure of citizenship, it is also cost efficient. The Bureau already acquires SSA Numident information on a quarterly basis. To collect that information through self-report by adding a question to the decennial would require additional unnecessary costs and burden to the Bureau"¹⁷⁶

In sum, the addition of a citizenship question threatens the utility and integrity of the decennial count. The decision to burden the populace with a sensitive survey question of unclear utility, especially given the potential disclosure risks, violates basic survey data quality processes.

Looking Beyond the Decennial

In sum, high quality census numbers are essential for the economic and political health of the nation. Based on a review of the quantitative and qualitative research and evidence, the preponderance of the evidence suggests that it is highly likely that the addition of a citizenship question will exacerbate the disproportionate undercount of non-citizen households and Hispanics.

¹⁷³ J. Abowd Dep., dated Aug. 29, 2018, at 101.

¹⁷⁴ J. Abowd Dep., dated Aug. 29, 2018, at 101.

¹⁷⁵ Census blog post, Sept 4, 2018. https://www.census.gov/newsroom/blogs/research-matters/2018/08/protecting_the_conf0.html.

¹⁷⁶ Berning et al. Memo (Dec 22, 2017), AR 0005500.

Finally, the implications for data quality go beyond the decennial count. To the extent the addition of the citizenship question reduces the objectivity and integrity of the decennial count, it is also risks reducing overall trust in government statistics and thus participation in the surveys and censuses that collect those statistics. The Bureau has long recognized that trust is essential for individuals to be willing participants in government surveys. As such, the issues raised here have implications not only for the quality of the decennial count, but also for the quality of other government surveys.

I reserve the right to amend or supplement my opinions if additional information or materials become available.

I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct to the best of my knowledge.

DATED this 7th Day of September, 2018

A handwritten signature in black ink, appearing to read "D. Sunshine Hillygus", written over a horizontal line.

D. Sunshine Hillygus, PhD

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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

NEW YORK IMMIGRATION
COALITION, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
COMMERCE; and WILBUR L. ROSS,
JR., in his official capacity as Secretary
of Commerce, *et al.*

Defendants

Civil Action No. 1:18-cv-05025

STATE OF NEW YORK, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
COMMERCE; and WILBUR L. ROSS,
JR., in his official capacity as Secretary
of Commerce, *et al.*

Defendants

Civil Action No. 1:18-cv-2921

RULE 26(A)(2)(B) EXPERT REPORT AND DECLARATION OF LISA HANDLEY, PhD

I. Professional experience

I have over thirty years of experience as a voting rights and redistricting expert. I have advised scores of jurisdictions and other clients on minority voting rights and redistricting-related issues and have served as an expert in dozens of voting rights cases. My clients have included state and local jurisdictions, the U.S. Department of Justice, national civil rights organizations, and such international organizations as the United Nations.

I have been actively involved in researching, writing and teaching on subjects relating to voting rights, including minority representation, electoral system design and redistricting. I co-authored a book, *Minority Representation and the Quest for Voting Equality* (Cambridge University Press, 1992) and co-edited a volume, *Redistricting in Comparative Perspective* (Oxford University Press, 2008), on these subjects. In addition, my research on these topics has appeared in peer-reviewed journals such as *Journal of Politics*, *Legislative Studies Quarterly*, *American Politics Quarterly*, *Journal of Law and Politics*, and *Law and Policy*, as well as law reviews (e.g., *North Carolina Law Review*) and a number of edited books. I hold a Ph.D. in political science from The George Washington University.

I have been a principal of Frontier International Electoral Consulting since co-founding the company in 1998. Frontier IEC specializes in providing electoral assistance in transitional democracies and post-conflict countries. In addition, I am a Visiting Research Academic at Oxford Brookes University in Oxford, United Kingdom. Attached to this report is a copy of my *curriculum vitae*.

I have served as an expert witness in more than 25 voting rights cases, including six cases on behalf of the U.S. Department of Justice. A number of cases in which I have been accepted by courts as an expert have required me to ascertain the impact of various electoral systems or redistricting plans on minority voters in which at least one of the minority groups at issue in the jurisdiction was impacted by citizenship rates. For example, in the last dozen years, I have served as an expert in four cases that involved Voting Rights Act challenges in which Hispanic voting strength was of concern, three as an expert on behalf of the U.S. Department of Justice: *Perry v. Perez*, a Section 2 case challenging Texas congressional and state house districts; *State of Texas v. U.S.*, a Section 5 case regarding proposed congressional and state

legislative districts in Texas before the U.S. District Court of the District of Columbia; and *U.S. v. Village of Port Chester*, a Section 2 challenge brought by the U.S. Department of Justice on behalf of Hispanic voters in the Village of Port Chester, New York. (*Lopez v. Abbott*, a Section 2 challenge to the at-large method of electing Texas Supreme Court justices and appellate court judges, is the fourth case.)

In addition, since the most recent round of decennial redistricting commenced in 2011, I have served as a voting rights consultant for a number of jurisdictions concerned with the possible effects of redistricting plans, alternative voting systems, and other electoral reforms on Hispanic voting rights, including the Village of Port Chester (2017-2018),¹ New York City (2008, 2010 and 2018),² and Miami-Dade County (2011).³

II. Scope of inquiry

I was retained in July 2018 by plaintiffs in the New York Immigration Coalition and New York State Office of the Attorney General cases, and in August 2018 by plaintiffs in the City of San Jose case, against the Department of Commerce and others concerning the addition of a citizenship question to the 2020 decennial census questionnaire. They have asked me to provide my expert opinion on the effectiveness of current U.S. Census Bureau data resources for enforcing Section 2 of the Voting Rights Act (“VRA”) – in particular, in circumstances in which the

¹ A consent decree entered by the court in *U.S. v. Village of Port Chester* expired in June 2016 and, faced with the decision of whether to retain the current cumulative voting scheme or adopt another electoral system, the Port Chester Board of Trustees hired me to assist them with exploring alternative governance options and identifying the potential impact of these options on Hispanic voting strength.

² I was a voting rights consultant to the New York City Districting Commission in 2003 and 2013; I evaluated the likely impact of proposed Local Law 51 (the extension of term limits from two to three terms) on minority voters for the City Law Department in 2008-2009; and I analyzed the likely consequences for minority voters of the adoption of proposed changes to the City Charter for the New York City Charter Revision Commission in 2010 (when a reinstatement of a two-term limit on city offices and the adoption of the Instant Runoff Vote were considered) and in 2018 (when the adoption of Instant Runoff Voting was once again under consideration).

³ I was retained by the Miami-Dade Board of County Commissioners to conduct an analysis of voting patterns by race and ethnicity in recent Miami-Dade elections and, using this information, to provide guidance during the redistricting process to ensure that the redrawn commission districts did not dilute Hispanic voters in violation of the Voting Rights Act of 1965.

citizenship rate of the minority group impacts their ability to participate in the electoral process and elect candidates of their choice to office.⁴

I understand that in December 2017, Arthur Gary, General Counsel in the Justice Management Division of the U.S. Department of Justice, submitted a letter to the Census Bureau requesting a citizenship question on the decennial census to aid in the Department's Section 2 enforcement work. That letter argued that the information was needed to accurately determine whether the citizen voting age population of a particular minority group was sufficiently large to constitute a majority in a single-member district – contending the current citizenship data available from the American Community Survey (“ACS”) is inadequate for this task.

In my decades of experience as a voting rights expert – including several cases for the Department of Justice – my work has not been hampered in any way by the lack of citizenship information in the decennial census. It is therefore my opinion, held to a reasonable degree of professional certainty and based on my experience as an expert in VRA cases, that currently available census data, including the citizenship data derived from the Census Bureau's ACS, has proven to be perfectly sufficient to ascertain whether an electoral system or redistricting plan dilutes minority votes.

III. Section 2 of the Voting Rights Act and the use of census data

In *Thornburg v. Gingles*,⁵ the first U.S. Supreme Court case to consider the 1982 Amendments to the Voting Rights Act of 1965, the Court determined that minority plaintiffs had to satisfy three threshold factors to establish a violation of Section 2 of the VRA:

- 1) the minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district;
- 2) the minority group must be politically cohesive; and

⁴ I am being compensated at a rate of \$300 per hour for my work.

⁵ 478 U.S. 30 (1986).

- 3) the minority group must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate.

Social scientists such as myself typically conduct the analyses required to determine if a minority group residing within a given jurisdiction meets these three preconditions.

The first precondition that a minority group must satisfy – that it is sufficiently large to constitute a majority in a single-member district – is designed to demonstrate to the Court that it is possible to remedy the potential violation. This precondition is met by presenting the Court with an illustrative districting plan that includes at least one, for example, majority black voting age population district or majority Hispanic citizen voting age population district.

Evidence that the minority group is politically cohesive (the second precondition) is necessary to show that minority voters' shared political interests lead them to support the same candidates – if they are not politically cohesive there is no distinct minority interest to protect. If the white majority consistently votes against minority-preferred candidates and these candidates are usually defeated (the third precondition), then minority voters do not have an opportunity to elect their preferred candidates to office. An analysis of voting patterns by race/ethnicity is required to show that minorities satisfy the second and third *Gingles* preconditions. Because the race/ethnicity of the voter is not, of course, obtainable from the ballot, a statistical analysis must be conducted using data from a database that incorporates election results by precinct with the demographic composition of these precincts.

In most if not all Section 2 cases, plaintiffs use data collected and reported by the Census Bureau to determine if there are a sufficient number of geographically concentrated minorities to satisfy the first *Gingles* precondition. In addition, census data may be used to conduct an analysis of voting patterns by race/ethnicity in the absence of registration or turnout data by race/ethnicity.

If a court finds that a jurisdiction is violating Section 2 of the Voting Rights Act, census data may be informative in fashioning an effective remedy. However, creating a district that offers minority voters an opportunity to elect candidates of their choice requires more than census data; it requires a district-specific, functional analysis that also takes into account the

registration and turnout rates of minorities and whites, the degree of minority cohesion, and the amount of white crossover votes for minority-preferred candidates that might generally be expected in the specific area of the proposed remedial district.⁶

IV. Drawing illustrative districts to ascertain whether the minority group is sufficiently large

The first precondition that a minority group must satisfy to establish a violation of Section 2 of the VRA is that it is sufficiently large and geographically compact enough to form a majority in at least one single-member district. In *Bartlett v. Strickland*,⁷ the U.S. Supreme Court interpreted this to mean that black voters had to demonstrate that it was possible to draw a single-member district that was at least 50 percent black in voting age population. As noted in the recent letter signed by Arthur Gary of the Department of Justice (the “Gary Letter”), some federal courts have indicated that citizenship rates are relevant to ascertaining whether certain minority plaintiffs (for example, Hispanics) satisfy this precondition of *Gingles*.⁸ Thus, expert analysis often focuses on whether a single-member district can be created that is, for example, at least 50 percent Hispanic in *citizen* voting age population. Notably, the majority of the cases cited in the Gary letter were decided decades before the current proposal to add a citizenship question to the decennial census enumeration questionnaire.⁹ Hence, sample survey data from census questionnaires other than the decennial census has always served as

⁶ For an in-depth discussion of this district-specific, functional approach to creating effective minority districts, see Bernard Grofman, Lisa Handley and David Lublin, “Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence,” 79 N.C. L. Rev. 1383 (2001).

⁷ 556 U.S. 1 (2009).

⁸ See Letter from Arthur E. Gary, General Counsel, Justice Management Division, U.S. Department of Justice to Dr. Ron Jarmin, Performing the Non-Exclusive Functions and Duties of the Director, U.S. Census Bureau (December 12, 2017) (citing *Reyes v. City of Farmers Branch*, 586 F.3d 1019, 1023-24 (5th Cir. 2009); *Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1567-69 (11th Cir. 1997); *Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989), *overruled in part on other grounds by Townsend v. Holman Consulting Corp.*, 914 F.2d 1136 (9th Cir. 1990); *LULAC v. Perry*, 548 U.S. 399, 423-442 (2006)).

⁹ See *Reyes*, 586 F.3d at 1023-24; *Barnett*, 141 F.3d at 704; *Negron*, 113 F.3d at 1567-69; *Romero*, 883 F.2d at 1426; *LULAC*, 548 U.S. at 423-442.

the source for citizenship information for purposes of VRA enforcement, and has always sufficed for that purpose.

Sources of citizenship data Because the decennial census enumeration questionnaire distributed to the entire population has not collected data on citizenship since 1950 – before the passage of the VRA – voting rights experts have relied upon other sources of census data to demonstrate that a minority group is large enough to comprise a majority of the citizen voting age population in at least one single-member district. Between 1970 and 2000, citizenship data was available from the census “long form.”¹⁰ The census long form was given to only a sample of the population; for example, in 2000 it was given to approximately one in every six households. Even though the information collected was based on a sample survey rather than a complete enumeration, the margins of errors associated with each of the estimates were not reported by the Bureau.

In 2005, the American Community Survey (ACS) was introduced to collect citizenship data, as well as other demographic, housing, social and economic data. The ACS essentially replaced the census long form but is conducted on a rolling annual basis, which means that it offers the advantage of more recent data than the decennial data collection. Because the annual sample size is smaller, however, estimates for areas with populations of less than 65,000 are pooled in five-year increments to increase their reliability. Cumulating to five-year pooled estimates yields approximately a one-in-every-eight-household sample. Like data from the census long form, ACS estimates, including citizenship estimates, are only reported down to the census block group level; data from the decennial census enumeration is reported down to the census block level. Unlike with estimates from the census long form, margins of errors are reported for each of the ACS estimates. (Margins of error provide a measure of the sampling error associated with each estimate.)

¹⁰ The decennial census enumeration data is collected via what used to be called the short form, which in 2000 contained six population subjects and one housing subject. This form is sent out to and supposed to be filled out by every household. The 2000 census long form included the same seven subjects, as well as an additional 27 subjects. The long form was sent out to one in every six households in lieu of the short form. In 2010, there was only one form, containing 10 questions, and it was sent to every household.

Examples of citizenship data incorporated into the district drawing process To explain how Census Bureau survey data regarding citizenship is used in the context of voting rights cases and analyses, I provide several examples from my work below. As the discussion illustrates, the absence of citizenship data has not hampered my work as a redistricting or voting rights expert in any way.

Statewide Redistricting. I recently served as an expert for the plaintiffs in *Lopez v. Abbott*,¹¹ a challenge by Hispanic voters to the at-large method of electing justices to the Supreme Court of Texas and judges to the Texas Court of Criminal Appeals that is still pending before the court. To demonstrate that Hispanics satisfy the first prong of *Gingles*, I drew two illustrative districting plans, one with nine districts and the other with eight districts,¹² to establish that two compact majority Hispanic citizen voting age population districts could easily be created. The current forms of data available from the decennial census and ACS were sufficient for me to perform this analysis. Figure 1 provides a map of the illustrative nine-district plan and Tables 1 and 2 contain the corresponding district demographics for this nine-district plan.

The total population and voting age population data reported in Table 1 are derived from the 2010 decennial census. Although the illustrative districts were drawn in 2017, I used 2010 census data rather than more recent population estimates in order to reflect what the population in each district would have been at the time of the decennial census.

¹¹ Civil Action No. 2:16-CV-303 (S.D. Tex.).

¹² There are nine justices on the Texas Supreme Court and nine judges on the Texas Court of Criminal Appeals; all 18 justices/judges are elected statewide. I created two illustrative plans: a nine-district plan in which all nine justices/judges would be elected from single-member districts and an eight-district plan in which eight justices/judges would be elected from single-member districts and the chief justice/presiding judge would be elected statewide.

Figure 1: Illustrative Nine-District Plan for State of Texas

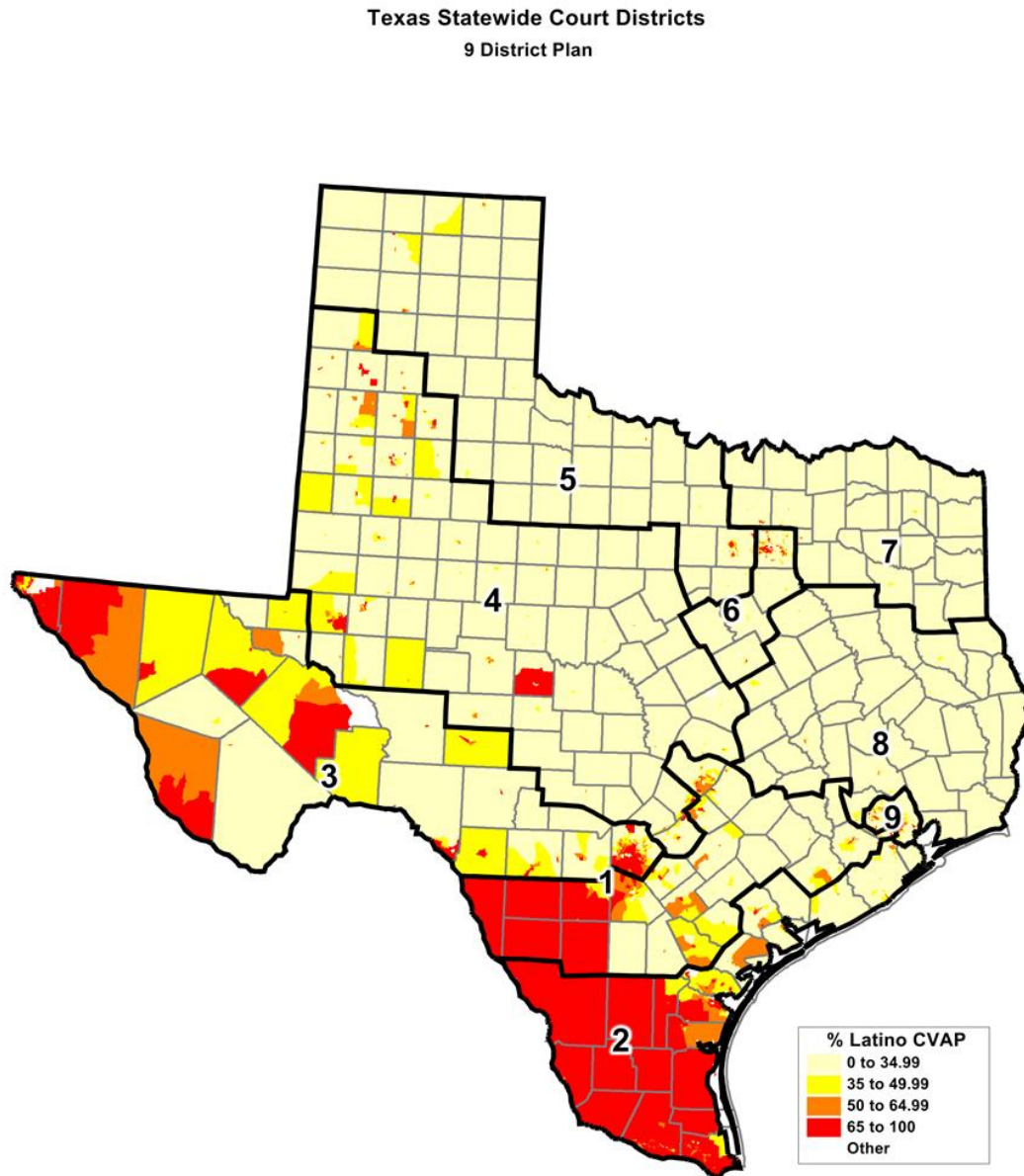


Table 1: Population and Voting Age Population for the Illustrative Nine-District Plan

District	Total Population	Deviation from Ideal District Size	Percent Population Deviation	Voting Age Population	Hispanic Voting Age Population	Percent Hispanic Voting Age Population
1	2,749,632	-44,319	-1.59	2,011,631	664,378	33.03
2	2,825,027	31,076	1.11	1,960,159	1,260,806	64.32
3	2,747,341	-46,610	-1.67	1,980,689	1,228,267	62.01
4	2,774,913	-19,038	-.68	2,050,265	535,162	26.10
5	2,817,613	23,662	.85	2,053,330	422,610	20.58
6	2,805,956	12,005	.43	2,035,942	631,206	31.00
7	2,829,861	35,910	1.29	2,073,068	258,036	12.45
8	2,831,790	37,839	1.35	2,098,473	360,729	17.19
9	2,763,428	-30,523	-1.09	2,016,180	781,950	38.78

Table 2: Citizen Voting Age Population for the Illustrative Nine-District Plan

District	Citizen Voting Age Population	Hispanic Citizen Voting Age Population	Percent Hispanic Citizen Voting Age Population
1	1,633,090	426,320	26.11
2	1,593,403	951,096	59.69
3	1,701,369	1,007,115	59.19
4	1,877,721	437,823	23.32
5	1,787,681	267,183	14.95
6	1,577,169	320,965	20.35
7	1,839,054	151,604	8.24
8	1,839,494	222,759	12.11
9	1,500,925	428,937	28.58

Because the decennial census does not collect data on citizenship, the total citizen voting age population (CVAP) and Hispanic citizen voting age population (HCVAP) reported in Table 2 are derived from ACS data (for the 253 counties not split by district boundaries) or a combination of decennial census and ACS data (for Harris County). In order to align in time

with the total and voting age population data from the 2010 decennial census in Table 1, the CVAP figures in Table 2 have been calculated to reflect the district CVAP in 2010, using five-year pooled ACS estimates.

The five-year pooled ACS estimates for each county that was not divided by district boundaries (253 of the 254 counties in Texas were wholly contained within single districts in the illustrative plan) were simply summed to reflect the configurations of the illustrative districts.¹³ In other words, for my purposes, ACS citizenship data at the county level was sufficient to account for 253 of 254 Texas counties in the illustrative map.

The population of Harris County, however, was too large to include within a single district and was divided across three districts.¹⁴ This required citizenship data at a smaller level of geographic specificity than the county. To produce CVAP and HCVAP figures for the portions of the county assigned to different districts in the illustrative districting plan, CVAP and HCVAP estimates for all census blocks in Harris County were produced and then summed to reflect each of the portions. The lack of citizenship data at the block level did not impede this analysis, however, because I was able to adopt one of several available estimation procedures to derive this information. Under my direction, the Hispanic citizenship ratio (i.e., the percentage of voting age Hispanics who are citizens) for each census tract in Harris County was calculated by dividing the census tract HCVAP by the census tract Hispanic voting age population (HVAP), as reported in the five-year pooled ACS data. The citizenship ratio for each census tract was then applied to the 2010 HVAP (as reported in the 2010 decennial census) of each of the census blocks falling within the given tract. These calculations generated estimates of the 2010 HCVAP for all of the census blocks in Harris County.¹⁵ These census-block HCVAP estimates were then summed to reflect the portion of Harris County included within the given district.

¹³ U.S. Census Bureau, American Community Survey 5-Year dataset for 2009-2013.

¹⁴ Harris County had to be split because it exceeds the ideal population size in both the eight and nine district plans. The ideal district size, calculated by dividing the total population of the state by the number of districts to be created, is 2,793,951 in a nine-district plan and 3,143,195 in an eight-district plan. Harris County had a population of 4,092,459 in 2010.

¹⁵ For a description of the estimation procedure I used, see Jorge Chapa, Ana Henderson, Aggie Jooyoon Noah, Werner Schink and Robert Kengle, "Redistricting: Estimating Citizen Voting Age Population"

The defendants in *Lopez* did not attack the district CVAP or HCVAP numbers I presented in my report and in trial testimony. While the judge has not rendered a decision in this case to date, other recent Texas decisions have accepted the use of ACS data for the purpose of satisfying the first prong of *Gingles*. For example, in *Rodriguez v. Harris County*, the Court found ACS data “sufficiently probative on the issue of citizen voting age population,” indicating that “ACS data is perhaps the best measure of citizen voting age data currently available; it is collected by the Census Bureau and the Census Bureau’s publication of and reliance on ACS data ‘suggests that the Bureau considers ACS data reliable and intends for it to be relied upon in decisions such as Voting Rights Act compliance.’ ”¹⁶

Local Redistricting. Because the illustrative judicial districts I created for Texas in *Lopez* were large, very little drawing at the census block level was required and therefore few inferences about the citizenship population at the block level had to be made. But even when drawing illustrative districts in small jurisdictions, courts have not hesitated to accept citizenship estimates.

Taking an example from my own work at the local level, I served as a voting rights expert for the U.S. Department of Justice in the Section 2 challenge to Port Chester, New York’s at-large method of electing its Board of Trustees in *United States v. Village of Port Chester*.¹⁷ Because Port Chester is geographically quite compact (2.5 square miles), illustrative plans presented to the court had to be drawn at the census block level. The demographic expert for the Department drew two illustrative single-member districting plans, both of which included a majority Hispanic CVAP district. To determine the citizen composition of these illustrative districts, he relied on data derived from the 2000 census long form.

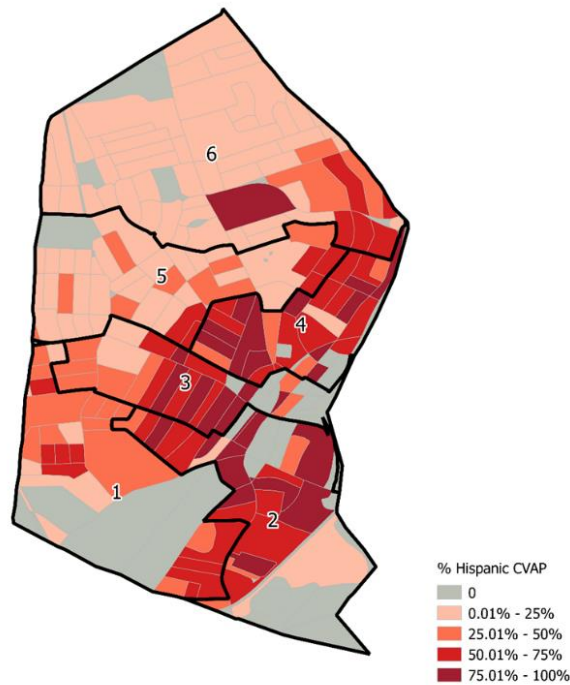
Research Brief, The Chief Justice Earl Warren Institute on Law and Social Policy, University of California, Berkeley Law School, Sept. 2011.

¹⁶ 964 F. Supp. 2d 686, 727-28 (S.D. Tex. 2013). See also *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 687-89 (S.D. Tex. 2017) and *Benavidez v. Irving Independent School District*, No. 3:13-CV-0087-D, 2014 WL 4055366, at *17 (N.D. Tex. 2014).

¹⁷ *United States v. Village of Port Chester*, No. 06 Civ. 15173(SCR), 2008 WL 190502 (S.D.N.Y. 2008).

The Court accepted the illustrative plans as evidence that Hispanics were sufficiently large and geographically compact in the Village of Port Chester to constitute a majority of the CVAP in a single-member district. The Court also determined that Hispanic voters satisfied the second and third *Gingles* preconditions and that the at-large system for electing the Board of Trustees violated Section 2 of the Voting Rights Act. As a consequence of a consent order entered by court in 2009, the Village of Port Chester adopted a cumulative voting system (rather than a single-member district system) to provide Hispanic voters with the ability to elect their preferred candidates to office.

When the consent decree expired in June 2016, the Board of Trustees hired me to assist them in determining whether to retain the cumulative voting system or to adopt an alternative electoral system. The Hispanic population had grown since the 2006 litigation and, as part of my mandate, I drew several illustrative single-member districting plans to determine how many compact majority HCVAP districts it was now possible to create in Port Chester. The HCVAP percentages I reported for each district were produced using the same HCVAP/HVAP ratio estimation procedure described above for Harris County, Texas. The illustrative six-district plan (Figure 2) and the corresponding district demographics for this plan (Table 3) are found below. The percentages in Table 3 reflect 2010 HCVAP percentages to align with the 2010 total population figures reported in the table. Because of the marked increase in the Hispanic population since 2010 (as reported in ACS data), the HCVAP percentages for the majority Hispanic districts in the illustrative plan are likely to be substantially higher. Once again, the citizenship data provided by the ACS was sufficient for my work, even when drawing districts for a small municipality like Port Chester.

Figure 2: Illustrative Six-District Plan for Village of Port Chester**Table 3: Total population and citizen voting age population for illustrative six-district plan**

District	Total Population	Deviation from Ideal District Size	Percent Population Deviation	Citizen Voting Age Population Estimate	Hispanic Citizen Voting Age Population Estimate	Percent Hispanic Citizen Voting Age Population
1	4840	12	.25	2087	832	39.87
2	4770	-58	-1.20	1749	1166	66.69
3	4924	96	1.99	2031	875	43.08
4	4805	-23	-.48	1699	1088	64.05
5	4767	-61	-1.26	2356	630	26.74
6	4861	33	.68	2861	406	14.18

V. Evaluating potential remedial districting plans

Courts have accepted illustrative plans showing that at least one majority-minority district can be drawn as evidence that a minority group satisfies the first prong of *Gingles*. But fashioning an effective *remedy* for a Section 2 violation requires more than simply drawing, for example, a 50 percent black VAP or Hispanic CVAP district. Creating a district that offers minority voters a realistic opportunity to elect candidates of their choice requires a district-specific, functional analysis – one that takes into account not only population concentrations and citizenship rates, but also the participation rates and voting patterns of white and minority voters. Drawing minority districts informed by a district-specific, functional analysis avoids creating districts that either fail to provide minorities with an effective opportunity to elect their preferred candidates, on the one hand, or pack minority voters into a district unnecessarily, on the other hand.

While citizenship rates are incorporated into a functional approach, an analysis of voting patterns by race and ethnicity plays the essential role in the evaluation. An analysis of voting patterns allows me to ascertain the relative participation rates of minorities and whites, the degree of minority cohesion, and the expected amount of white “crossover” votes for minority-preferred candidates in the specific geographic area of the proposed remedial district.¹⁸ Because

¹⁸ The voting patterns of white and minority voters must be estimated using statistical techniques because direct information about how individuals have voted is simply not available – the race of the voter is not, of course, obtainable from the secret ballot. Regardless of the statistical technique used, a database that matches precinct election results with the demographic composition of the electorate of these precincts must be constructed to conduct the analysis. The best data to use for this purpose is voter turnout data by race/ethnicity or, if this is not available, voter registration data by race/ethnicity. However, only a handful of southern states collect this information and report it at the election precinct level. In jurisdictions that do not collect this data, VAP by race and Hispanic origin as reported by the decennial census is often used as a proxy for the demographic composition of the electorate in each precinct. However, this data can be problematic if there have been dramatic shifts in the racial or ethnic composition of the precincts in the jurisdiction over the course of the decade. If there have been sizeable changes, relying on the decennial census results for an election that occurred more than a couple of years before or after the census will produce an inaccurate indication of the demographic composition of the electorate in each of the precincts and therefore inaccurate estimates of voting patterns by race and ethnicity. Using demographic data from ACS, including citizenship rates if citizenship is an issue, provides a better indication of the demographic composition of the precincts over shorter periods of time (at intervals less than 10 years). For example, because of the rapidly increasing minority population in Eastpointe, Michigan, I used estimates of the CVAP by race and ethnicity by precinct based on the ACS to conduct a racial bloc voting analysis on behalf of the U.S. Department of

this approach focuses on turnout rates and voting behavior, citizenship rates are taken into account only indirectly. The lack of citizenship data in the decennial census has not impacted this functional approach in any way.

This type of district-specific, functional analysis was the approach used by the Department of Justice when reviewing proposed redistricting plans under Section 5 of the Voting Rights Act. According to Department guidelines:

In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district. As noted above, census data alone may not provide sufficient indicia of electoral behavior to make the requisite determination.¹⁹

For example, I employed a district-specific, functional approach on behalf of the Department of Justice in *Texas v. United States*,²⁰ a lawsuit filed by the state of Texas seeking judicial preclearance under Section 5 of the VRA of the congressional and state house districts proposed by the state in 2011. Following the release of the 2010 census data, the State of Texas redrew Congressional District 23 to include a comparable percentage of HCVAP (58.4 percent HCVAP prior to redistricting and 58.5 percent HCVAP after redrawing), but replaced Hispanic citizens who were likely to turn out to vote with Hispanic citizens who were less likely to vote. This meant that Congressional District 23 as proposed would no longer provide Hispanic voters with the opportunity to elect candidates of choice.

I presented an illustrative map to the Court to demonstrate that Congressional District 23 could easily be modified so that it would continue to provide Hispanic voters with an opportunity to elect Hispanic-preferred candidates. I relied on an analysis of the electoral behavior of white and minority voters to make my assessments of the effectiveness of

Justice in voting rights litigation currently underway in the jurisdiction. (*United States v. City of Eastpointe*, No. 4:17-CV-10079 (E.D. Mich.)).

¹⁹ 76 F.R. 7649, 7471 (Feb. 9, 2011).

²⁰ 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated on other grounds*, 570 U.S. 928 (2013).

Congressional District 23 in the existing plan, the plan proposed by the State of Texas, and my illustrative plan.

Although there is no longer an operative coverage formula under Section 4 of the VRA, meaning that the Department no longer undertakes Section 5 preclearance reviews for jurisdictions (unless they have specifically been “bailed-in” to preclearance coverage under Section 3(c) of the VRA),²¹ I continue to use a district-specific, functional approach rather than relying solely on VAP or CVAP to evaluate the effectiveness of both existing and proposed districts in the context of my consulting work and as an expert witness in Section 2 litigation, including in my work on behalf of the Department of Justice. Only a functional analysis can determine if minority voters will be provided with an effective opportunity to participate in the political process and to elect representatives of their choice. As noted above, the lack of decennial census CVAP data has not hindered my analysis using this approach.

VI. Flaws in census data

While currently available census citizenship data is not flawless, it is sufficient for determining if a jurisdiction is diluting minority voting strength in violation of Section 2 of the VRA. It is important to note that “flawless” census data does not exist. Citizenship data derived from the ACS is based on a sample, and as such, is subject to margins of error. Decennial census data is not subject to sampling error because it is an enumeration rather than a sample, but it does have errors associated with it – errors that I understand could be magnified if a question about citizenship is included in the enumeration questionnaire.²² Furthermore,

²¹ As stated on the U.S. Department of Justice website: On June 25, 2013, the United States Supreme Court held that it is unconstitutional to use the coverage formula in Section 4(b) of the Voting Rights Act to determine which jurisdictions are subject to the preclearance requirement of Section 5 of the Voting Rights Act, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). The effect of the *Shelby County* decision is that the jurisdictions identified by the coverage formula in Section 4(b) no longer need to seek preclearance for the new voting changes, unless they are covered by a separate court order entered under Section 3(c) of the Voting Rights Act. See <https://www.justice.gov/crt/about-section-5-voting-rights-act>.

²² See, for example, J. David Brown, Misty L. Heggeness, Suzanne M. Dorinksi, Lawrence Warren and Moises Yi, “Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census,” U.S. Census Bureau, CES 18-38, August 2018, at

because of confidentiality concerns, citizenship data reported in the decennial census will have to go through a disclosure avoidance process that will by necessity introduce further errors into CVAP data produced at the block level, and, according to the Chief Scientist at the Bureau, it is questionable whether redistricting offices and the Department of Justice will ultimately be able to use the census block CVAP data effectively.²³

There are three broad sources of error associated with existing decennial census enumeration data. First, there are *coverage errors*. These arise when persons are incorrectly excluded or included, or are duplicated in the count.²⁴ Second, there are *geographic errors*. These happen when an address was placed in the wrong census geographic location or when there is a misunderstanding of the census residence rules (e.g., the person counted was assigned to the wrong residence from among several part-time residences). Third, there are *demographic errors*. These occur when a person's demographic characteristics have been incorrectly reported, recorded or imputed.

The Census Bureau has documented these errors in the decennial enumeration through the use of survey data. Based on the post-2010 enumeration survey,²⁵ conducted by the Bureau to provide a measure of the accuracy of the 2010 decennial census, the Bureau estimates that "among the 300.7 million people who live in housing units, about 94.7 percent were counted correctly, 3.3 percent were counted erroneously, 1.6 percent provided only a

<https://apps.npr.org/documents/document.html?id=4797159-Understanding-the-Quality-of-Alternative>.

²³ Deposition of Dr. John Abowd, Chief Scientist, U.S. Census Bureau, August 29, 2018, at 54-56, 100-01.

²⁴ Persons included in the count who should not have been are those who were not residents of the U.S. on census day (e.g., babies born after census day or persons who died before census day, temporary visitors to the U.S., and fabricated persons). Examples of duplicate counts are persons with more than one residence who were counted at more than one residence (e.g., college students, retirees with two homes).

²⁵ The post-enumeration survey (PES) draws samples of census block clusters and compares the information collected to the census enumeration data for the same geographic clusters.

census count and had their demographic characteristics imputed, and .4 percent needed more extensive imputation after all census follow-up efforts were attempted.”²⁶

In addition to enumeration errors, the Census Bureau estimated there were 16.0 million omissions in the 2010 census (although the Bureau indicates that 6.0 million of these people were likely to have been counted in the census but could not be verified in the post-enumeration survey).²⁷ Omissions are not random – certain segments of the population, including blacks and Hispanics, are more likely not to be counted in the decennial census than others. For example, the Census Bureau reports that the 2010 census under-counted 2.1 percent of the black population and 1.5 percent of the Hispanic population; the non-Hispanic white population, on the other hand, was over-counted by .8 percent.²⁸

Citizenship data collected through the decennial census will be subject to these same types of errors. Indeed, some of these errors could be magnified, as there are reasons to believe that including a question about citizenship on the decennial census form in 2020 will exacerbate the undercount of at least some minority groups.²⁹

The reliability of citizenship information based on information collected through the decennial census, especially at small levels of geography such as the census block, faces at least one additional challenge. As mentioned above, the Census Bureau uses disclosure avoidance procedures to modify or remove data that puts confidential information at risk of disclosure. Thus, while it may appear that census data is providing information about a specific individual or group of individuals who reside within a given census block, the Census Bureau has taken

²⁶ See News Release, “Census Bureau Releases Estimates of Undercount and Overcount in the 2010 Census” (May 22, 2012), https://www.census.gov/newsroom/releases/archives/2010_census/cb12-95.html.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See, for example, D’Vera Cohn, “What to know about the citizenship question the Census Bureau is planning to ask in 2020,” Pew Research Center, March 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/>.

steps to disguise or suppress the actual characteristics associated with that individual or group through either data swapping or the use of synthetic data.³⁰ While disclosure avoidance techniques have less impact on larger geographic areas since the data swapping often occurs within neighboring areas, these techniques have a distinctly greater effect at the census block level.

A disclosure avoidance system will have to be put in place to protect citizenship information collected during the 2020 decennial enumeration. According to the deposition testimony of Dr. John Abowd, Chief Scientist at the Census Bureau, the Bureau has not yet set the parameters for the 2020 disclosure avoidance system.³¹ Furthermore, the Bureau has not determined if, once disclosure avoidance is implemented, the error margins associated with block level CVAP data based on the 2020 decennial enumeration will be any smaller than the error margins associated with the ACS block group level citizenship data currently relied on for purposes of VRA enforcement. Dr. Abowd indicated that he did not know if the error margins that would ultimately be associated with the block level CVAP data based on information collected through the decennial enumeration will “still allow redistricting offices and the Department of Justice to use the data effectively.”³²

VII. Conclusion

The lack of citizenship information in the decennial census has not hampered my work as a voting rights expert in any way. Based on my experience and expertise as an expert in voting rights litigation, I conclude that the citizenship estimates currently available in the ACS have been adequate for demonstrating that the Hispanic population is sufficiently large to constitute a majority of the citizen voting age population in an illustrative single-member

³⁰ Data swapping is done by exchanging records for the purposes of confidentiality: a sample of households is selected and matched on a set of key variables with households in neighboring geographic areas that have similar characteristics (e.g., same number of adults and children) and these records are then swapped. Synthetic data uses statistical modeling to generate contrived household characteristics in order to avoid the disclosure of confidential information.

³¹ *See supra*, note 23.

³² Deposition of Dr. John Abowd, Chief Scientist, U.S. Census Bureau, August 29, 2018, at 101.

district for the purposes of satisfying the first precondition of *Gingles*. This has been true for the cases in which I have participated, including three in which I served as an expert for the Department of Justice.

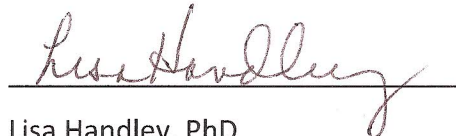
Moreover, in fashioning a remedy or assessing a proposed minority district, the district-specific, functional analysis I use, while indirectly incorporating citizenship rates, relies on minority and white participation rates and voting patterns. In fact, as the example of Congressional District 23 in Texas above demonstrates, an assessment based on the percentage HCVAP alone can be misleading to the determination of whether a district will provide minority voters with an opportunity to elect candidates of their choice to office.

Finally, no census data set is flawless. Citizenship data collected through the decennial enumeration will feature the same errors found in the decennial census data in general, and including a citizenship question may even exacerbate some of these errors. Perhaps more importantly, the Bureau has indicated that disclosure avoidance may render the block level citizenship data no more reliable than the block group level citizenship data reported by the ACS.

I reserve the right to amend or supplement my opinions if additional information or materials become available.

I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct to the best of my knowledge.

DATED this 7th Day of September, 2018



Lisa Handley, PhD

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Professional Experience

Dr. Handley has over thirty years of experience in the areas of redistricting and voting rights, both as a practitioner and an academician, and is recognized nationally (as well as internationally) as an expert on these subjects. She has advised numerous jurisdictions and other clients on redistricting and has served as an expert in dozens of redistricting and voting rights court cases. Her clients have included the U.S. Department of Justice and scores of state and local jurisdictions, as well as redistricting commissions and civil rights organizations. Internationally, Dr. Handley has provided electoral assistance in more than a dozen countries, serving as a consultant on issues of democratic governance – including voting rights, electoral system design and electoral boundary delimitation (redistricting) – for the United Nations, the United Nations Development Fund (UNDP), IFES, and International IDEA. In addition, Dr. Handley served as Chairman of the Electoral Boundaries Commission in the Cayman Islands.

Dr. Handley has been actively involved in research, writing and teaching on the subjects of voting rights and redistricting. She has written a book, Minority Representation and the Quest for Voting Equality (Cambridge University Press, 1992) and numerous articles, as well as edited a volume (Redistricting in Comparative Perspective, Oxford University Press, 2008) on these subjects. She has taught political science and methodology courses at several universities, most recently George Washington University. Dr. Handley is a Visiting Research Academic at Oxford Brookes University in the United Kingdom.

Dr. Handley is the President of Frontier International Consulting, a consulting firm that specializes in providing electoral assistance in transitional and post-conflict democracies. She also works as an independent election consultant for such international organizations as the United Nations.

Education

Ph.D. The George Washington University, Political Science, 1991

Present Employment

President, Frontier International Electoral Consulting LLC (since co-founding company in September of 1998).

Senior International Consultant, provides electoral assistance to such international clients as the UN, UNDP and IFES on electoral district delimitation, electoral system design and minority voting rights.

U.S. Clients since 2000

US Department of Justice (expert witness testimony in several Section 2 and Section 5 cases)

Alaska: Alaska Redistricting Board (redistricting consultation, expert witness testimony)

Arizona: Arizona Independent Redistricting Board (redistricting consultation, expert witness)

Arkansas: expert witness for Plaintiffs in Jeffers v. Beebe

Colorado: Colorado Redistricting Board (redistricting consultation)

Connecticut: State Senate and State House of Representatives (redistricting consultation)

Florida: State Senate (redistricting consultation)

Illinois: State Senate (redistricting litigation consultation)

Kansas: State Senate and House Legislative Services (redistricting consultation)

Louisiana: Louisiana Legislative Black Caucus (expert witness testimony)

Massachusetts: State Senate (redistricting consultation)

Maryland: Attorney General (redistricting consultation, expert witness testimony)

Miami-Dade County, Florida: County Attorney (redistricting consultation)

Nassau County, New York: Redistricting Commission (redistricting consulting)

New Mexico: State House (redistricting consultation, expert witness testimony)

New York: State Assembly (redistricting consultation)

New York City: Redistricting Commission and Charter Commission (redistricting consultation and Section 5 submission assistance)

New York State Court: Expert to the Special Master (drew congressional lines for state court)

Ohio: State Democratic Party (redistricting litigation support, expert witness testimony)

Pennsylvania: Senate Democratic Caucus (redistricting consultation)

Rhode Island: State Senate and State House (litigation support, expert witness testimony)

Texas: Lieutenant Governor (redistricting litigation/expert witness testimony)

Vermont: Secretary of State (redistricting consultation)

Wisconsin: State Senate (redistricting litigation consultation)

International Clients since 2000

United Nations

- Afghanistan – electoral system design and district delimitation expert
- Bangladesh (UNDP) – redistricting expert
- Sierra Leone (UNDP) – redistricting expert
- Liberia (UNMIL, UN peacekeeping mission) – redistricting expert
- Democratic Republic of the Congo (MONUC, UN peacekeeping mission) – election feasibility mission, electoral system design and redistricting expert
- Kenya (UN) – electoral system design and redistricting expert
- Haiti (UN) – election feasibility mission, electoral system design and redistricting expert
- Lead Writer on the topic of boundary delimitation (redistricting) for ACE (Administration and Cost of Elections Project)

International Foundation for Election Systems (IFES)

- Afghanistan – district delimitation expert
- Sudan – redistricting expert
- Kosovo – electoral system design and redistricting expert
- Nigeria – redistricting expert
- Nepal – redistricting expert
- Georgia – electoral system design and district delimitation expert
- Yemen – redistricting expert
- Lebanon – electoral system design and redistricting expert
- Myanmar – electoral system design and redistricting expert
- Ukraine – electoral system design and redistricting expert
- Pakistan – consultant for developing redistricting software
- Principal consultant for the Delimitation Equity Project – conducted research, wrote reference manual and developed training curriculum
- Writer on electoral boundary delimitation (redistricting), Elections Standards Project
- Training – developed training curriculum and conducted training workshops on electoral boundary delimitation (redistricting) in Azerbaijan and Jamaica

International Institute for Democracy and Electoral Assistance (International IDEA):

- Consultant on electoral dispute resolution systems
- Technology consultant on use of GIS for electoral district delimitation
- Training – developed training material and conducted training workshop on electoral boundary delimitation (redistricting) for African election officials (Mauritius)
- Curriculum development – boundary delimitation curriculum for the BRIDGE Project
- Project coordinator for the ACE project

Other international clients have included The Cayman Islands; the Australian Election Commission; the Boundary Commission of British Columbia, Canada; and the Global Justice Project for Iraq.

Previous Employment

Project Coordinator and Lead Writer on Boundary Delimitation, Administration and Cost of Elections (ACE) Project. As Project Coordinator (1998 – 2000) of the ACE Project, Dr. Handley served as a liaison between the three partner international organizations – the United Nations, the International Foundation for Election Systems and International IDEA – and was responsible for the overall project management of ACE, a web-based global encyclopedia of election administration. She also served as Lead Writer on Boundary Delimitation for ACE.

Research Director and Statistical Analyst, Election Data Services, Inc. (1984 to 1998). Election Data Services (E.D.S.) is a Washington D.C. political consulting firm specialising in election administration. Dr. Handley's work at E.D.S. focused on providing redistricting and voting rights consulting and litigation support to scores of state and local jurisdictions.

Adjunct Professor (1986 to 1998). Dr. Handley has taught political science and methodology courses (both at the graduate and undergraduate level) at George Washington University, the University of Virginia, and the University of California at Irvine. She has served as a guest lecture at Harvard, Princeton, Georgetown, American University, George Mason University and Oxford Brookes University in the UK.

Grants

National Science Foundation Grant (2000-2001): Co-investigator (with Bernard Grofman) on a comparative redistricting project, which included hosting an international conference on "Redistricting in a Comparative Perspective" and producing an edited volume based on the papers presented at the conference.

Publications

Books:

Does Torture Prevention Work? Liverpool University Press, 2016 (served as editor and author, with Richard Carver)

Comparative Redistricting in Perspective, Oxford University Press, 2008 (first editor, with Bernard Grofman).

Delimitation Equity Project: Resource Guide, Center for Transitional and Post-Conflict Governance at IFES and USAID publication, 2006 (lead author).

Minority Representation and the Quest for Voting Equality, Cambridge University Press, 1992 (with Bernard Grofman and Richard Niemi).

Academic Articles:

"Has the Voting Rights Act Outlived its Usefulness: In a Word, "No," Legislative Studies Quarterly, volume 34 (4), November 2009 (with David Lublin, Thomas Brunell and Bernard Grofman).

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"Role of the Courts in the Electoral Boundary Delimitation Process," in *International Election Remedies*, John Hardin Young (ed.), Chicago: American Bar Association Press, 2017.

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"Delimiting Electoral Boundaries in Post-Conflict Settings," in Comparative Redistricting in Perspective, edited by Lisa Handley and Bernard Grofman, Oxford: Oxford University Press, 2008.

"A Comparative Survey of Structures and Criteria for Boundary Delimitation," in Comparative Redistricting in Perspective, edited by Lisa Handley and Bernard Grofman, Oxford: Oxford University Press, 2008.

"Drawing Effective Minority Districts: A Conceptual Model," in Voting Rights and Minority Representation, edited by David Bositis, published by the Joint Center for Political and Economic Studies, Washington DC, and University Press of America, New York, 2006.

"Electing Minority-Preferred Candidates to Legislative Office: The Relationship Between Minority Percentages in Districts and the Election of Minority-Preferred Candidates," in Race and Redistricting in the 1990s, edited by Bernard Grofman; New York: Agathon Press, 1998 (with Bernard Grofman and Wayne Arden).

"Estimating the Impact of Voting-Rights-Related Districting on Democratic Strength in the U.S. House of Representatives," in Race and Redistricting in the 1990s, edited by Bernard Grofman; New York: Agathon Press, 1998 (with Bernard Grofman).

"Voting Rights in the 1990s: An Overview," in Race and Redistricting in the 1990s, edited by Bernard Grofman; New York: Agathon Press, 1998 (with Bernard Grofman and Wayne Arden).

"Racial Context, the 1968 Wallace Vote and Southern Presidential Dealignment: Evidence from North Carolina and Elsewhere," in Spatial and Contextual Models in Political Research, edited by Munroe Eagles; Taylor and Francis Publishing Co., 1995 (with Bernard Grofman).

"The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations," in The Quiet Revolution: The Impact of the Voting Rights Act in the South, 1965-1990, eds. Chandler Davidson and Bernard Grofman, Princeton University Press, 1994 (with Bernard Grofman).

"Preconditions for Black and Hispanic Congressional Success," in United States Electoral Systems: Their Impact on Women and Minorities, eds. Wilma Rule and Joseph Zimmerman, Greenwood Press, 1992 (with Bernard Grofman).

Electronic Publication:

"Boundary Delimitation" Topic Area for the Administration and Cost of Elections (ACE) Project, 1998. Published by the ACE Project on the ACE website (www.aceproject.org).

Additional Writings of Note:

Amicus brief presented to the US Supreme Court in Gill v. Whitford, Brief of Political Science Professors as Amici Curiae, 2017 (one of more than a political scientists to sign brief)

Amicus brief presented to the US Supreme Court in Shelby County v. Holder, Brief of Historians and Social Scientists as Amici Curiae, 2013 (one of several dozen historians and social scientists to sign brief)

Amicus brief presented to the US Supreme Court in Bartlett v. Strickland, 2008 (with Nathaniel Persily, Bernard Grofman, Bruce Cain, and Theodore Arrington).

Court Cases since 2005

U.S. v. City of Eastpointe (ongoing) – City of Eastpointe, Michigan, at-large city council

Alabama NAACP v. State of Alabama (ongoing) – Alabama statewide judicial elections

Lopez v. Abbott (ongoing) – Texas statewide judicial elections

Personhaballah v. Alcorn (2016) – Virginia congressional districts

Perez v. Abbott (2012, decided 2017) – Texas congressional and state house districts

Jeffers v. Beebe (2012) – Arkansas state senate district

State of Texas v. U.S. (2011-2012) – Texas congressional and state house districts

In RE 2011 Redistricting Cases (2011-2012) – Alaska state legislative districts

U.S. v. Euclid City School Board (2008-9) – City of Euclid, Ohio at-large school board

U.S. v. City of Euclid (2006-7) – City of Euclid, Ohio council districts

U.S. v. Village of Port Chester (2006-7) – Village of Port Chester, New York at-large city council

DECLARATION OF TIMOTHY F. MELLETT

TIMOTHY F. MELLETT, pursuant to the provisions of 28 U.S.C. § 1746, declares as follows:

1. I am a Deputy Chief in the Voting Section of the Civil Rights Division of the United States Department of Justice. I have worked as an attorney in the Voting Section since 1996, and I have been a Deputy Chief since 2008. I have been involved in numerous lawsuits brought by the Department of Justice under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, which prohibits voting practices and procedures that discriminate on the basis of race, color, or membership in a language minority group. I also have been involved in a number of cases previously litigated by the Department of Justice under Section 5 of the Voting Rights Act, 52 U.S.C. § 10304.
2. To help meet its burden of proving vote dilution claims under Section 2 in court, the Department typically hires external experts to prepare reports for the litigation analyzing the preconditions to establishing a Section 2 vote dilution claim, as set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986). The first *Gingles* precondition is whether the racial or language minority group is sufficiently numerous and compact to form a majority in a single-member district (which typically involves creating an illustrative districting map). The remaining preconditions involve whether there is racially polarized voting in elections in the jurisdiction (the second precondition is whether the minority group is politically cohesive and the third precondition is whether the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate). The Department also typically hired external experts to prepare reports when it litigated declaratory judgment cases under Section 5 of the Voting Rights Act.
3. The purpose of this declaration is to provide background regarding Dr. Lisa Handley's work with the United States, including the confidential information provided to Dr. Handley

and the confidential communications with her in her capacity as an expert for the United States. In six different cases under the Voting Rights Act in the last dozen years, the Department has hired Dr. Lisa Handley as its external expert. Five of these cases were litigated by the United States under Section 2 of the Voting Rights Act, and one was litigated under Section 5 of the Voting Rights Act: *United States v. City of Eastpointe*, No. 2:17-cv-10079 (E.D. Mich.) (Section 2); *Texas v. United States*, No. 1:11-cv-1303 (D.D.C.) (Section 5); *Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex.) (Section 2); *United States v. Village of Port Chester*, No. 1:06-cv-15173 (S.D.N.Y.) (Section 2); *United States v. Euclid City School District Board of Education*, No. 1:08-cv-2832 (N.D. Ohio) (Section 2); and, *United States v. City of Euclid*, No. 1:06-cv-1652 (N.D. Ohio) (Section 2). I have worked with Dr. Handley as the United States' expert in five of these cases: *Eastpointe*, *Perez*, *Texas*, *Port Chester* and *Euclid City School District*. In the sixth case, *City of Euclid*, I am familiar with Dr. Handley's work with the United States, though I did not work on that case.

City of Eastpointe

4. In early 2017, the United States, through the Voting Section of the Civil Rights Division of the United States Department of Justice, brought a lawsuit under Section 2 of the Voting Rights Act against the City of Eastpointe and city officials in *United States v. City of Eastpointe*. The United States' complaint alleges that the at-large method of election used by the City of Eastpointe for electing members of its city council results in vote dilution in violation of Section 2. The litigation remains pending, and the parties are currently awaiting the district court's decision on the City of Eastpointe's motion for summary judgment. If summary judgment is denied, the case may be set for trial. I am the supervising attorney for the United States on *City of Eastpointe*.

5. The Department of Justice has retained Dr. Lisa Handley as one of the United States' experts in *United States v. City of Eastpointe*. Dr. Handley signed a Confidentiality Agreement and Security Certification with the United States that prohibits her from "reveal[ing], divulg[ing], or publiciz[ing]" any matters dealt with" in her capacity as an expert retained by the Department of Justice in this case. Confidentiality Agreement for *United States v. City of Eastpointe*, ¶ I.A (executed April 4, 2017) (Ex. 1); *see also id.* ¶ IV.B (disclosure of public record materials permissible but excluding "work product of the Division" from permissible disclosures).
6. Dr. Handley has prepared three expert reports (an initial report and two rebuttal reports) for the Department of Justice in *City of Eastpointe*. Dr. Handley's initial expert report discusses the three *Gingles* preconditions to establishing a Section 2 vote dilution claim. Dr. Handley crafted an illustrative redistricting plan for the city council for Eastpointe to satisfy the first *Gingles* precondition, and she conducted an analysis of the racial bloc voting in Eastpointe, to satisfy the second and third *Gingles* preconditions.
7. An illustrative plan for the City of Eastpointe was drawn by an employee of the Department of Justice on the Department's internal Geographic Information System (GIS) mapping program at Dr. Handley's direction. In devising the illustrative redistricting plan for Eastpointe, citizen voting-age population ("CVAP") data from the multi-year American Community Survey ("ACS") was used as well as total population and voting-age population ("VAP") data from the decennial Census. This illustrative plan shows that the black population in Eastpointe is sufficiently large and geographically compact to constitute a majority in a single-member district, which satisfies the first *Gingles* precondition to a Section 2 claim. In Dr. Handley's August 4, 2017 report for the Eastpointe case, she explains

that the smallest level for which the ACS releases CVAP data by race is the census block group and that the data must be allocated down to the block level for mapping purposes. The United States engaged in confidential communications with Dr. Handley about the disaggregation methods used to allocate ACS CVAP data to the census block level.

8. Regarding the second and third *Gingles* preconditions, Dr. Handley analyzed voting patterns in Eastpointe to determine whether racial bloc voting exists in the city. While the total votes cast for each candidate in elections are available for each voting precinct in a jurisdiction like Eastpointe, experts must choose how to determine or estimate the racial characteristics of the voters who cast those ballots, in order to estimate levels of racial bloc voting. The most accurate way to estimate voters' preferences is to look at the voters who cast a ballot in the election. While Michigan maintains records of the voters who participated in each election, Michigan does not gather or maintain data regarding the race of voters, unlike some states.
9. Where voter turnout data by race cannot be used to help estimate racial bloc voting, experts have relied on other estimates of racial data, such as the racial share of the CVAP or VAP residing in each voting precinct in a jurisdiction.
10. CVAP data from the ACS is a survey estimate available only for larger areas, such as census block groups and tracts, whereas VAP data from the decennial census is available as an enumeration in each census block. On the other hand, CVAP data from the ACS is available on an updated basis across the decade and incorporates citizenship data, whereas VAP data from the decennial census does not take into account demographic changes across a decade or potentially disparate rates of citizenship between racial groups. The United

States engaged in confidential communications with Dr. Handley about the various strengths and limitations of these data.

11. Given the limitations involved in using demographic data for voting precincts as an estimate for the set of voters who participated in a particular election, in *City of Eastpointe*, Dr. Handley used Bayesian Improved Surname Geocoding (“BISG”) as the method to estimate the racial composition of the group of individuals who cast ballots in each precinct. BISG relies on two data points about each individual: surname and residential address. Both surname and residential address provide some information about the likelihood of each individual’s race, and BISG uses Bayes’ rule (a statistical principle) to provide a more likely estimate of the cumulative racial composition of the group. Dr. Handley and the United States engaged in numerous confidential communications about the use of this method.
12. Regarding the estimation of the surname data point in BISG, the 2010 Census has tabulated the race and ethnicity of all individuals with each particular surname, and the Census Bureau has determined the probability that an individual with a given surname is a member of certain racial or ethnic groups. *See* U.S. Census Bureau, *Frequently Occurring Surnames from the 2010 Census*, at https://www.census.gov/topics/population/genealogy/data/2010_surnames.html
13. Regarding the residential address data point in BISG, each voter’s address is assigned to a census block group or tract. Then, ACS data is used to determine the racial and ethnic characteristics of the residents of this block group or tract. In using this process, the United States again engaged in confidential communications with Dr. Handley about this method, including in discussion of drafts of her report.

14. On September 7, 2018, the Department of Justice received an expert report by Dr. Handley on behalf of plaintiffs in *New York Immigration Coalition v. U.S. Department of Commerce* (S.D.N.Y.), a case in which the defendants are officers and agencies of the United States. Dr. Handley did not inform me or others in the Voting Section that she intended to offer an opinion in the *New York Immigration Coalition* case, or that she intended to use her work for the United States in the *City of Eastpointe* and other Voting Rights Act cases discussed in this declaration in a report in the *New York Immigration Coalition* case.
15. Upon review of that report, it appears that Dr. Handley has used her work as an expert on behalf of the United States in the *City of Eastpointe*, as well as other cases discussed below, to testify against the United States in *New York Immigration Coalition*. In particular, Dr. Handley's report cited the estimation of "CVAP by race and ethnicity by precinct based on the [American Community Survey] to conduct a racial bloc voting analysis on behalf of the U.S. Department of Justice in voting rights litigation currently underway" in *City of Eastpointe*. N.Y. Immigration Coal. Rep. 15-16, n. 18 compared to Eastpointe Rep. 7 ("substituting 2010 VAP by race with black and white CVAP based on the ACS . . . [b]ut it does not solve the problem of differential turnout rates across racial groups").
16. Dr. Handley has received numerous confidential communications and voluminous confidential information from Department of Justice attorneys and staff regarding CVAP data related to her work in the *City of Eastpointe* case. Cross-examination in the *New York Immigration Coalition* case regarding the various methods of allocating CVAP data to the block level, and their strengths and limitations, almost certainly would require divulging confidential communications with the United States in *City of Eastpointe*. Likewise, cross-examination on the decisions made regarding her racial bloc voting analysis in her work on

City of Eastpointe would also almost certainly require divulging privileged information and confidential communications with the United States.

Texas Redistricting Cases

17. Dr. Handley also references her work in *Texas v. United States* and *Perez v. Perry*, which are cases regarding statewide redistricting in the State of Texas after the 2010 Census. In *Texas v. United States*, Texas sought preclearance under Section 5 of the Voting Rights Act for the 2011 redistricting plans for Congress, State House and State Senate. In *Perez v. Perry*, the United States and private plaintiffs challenged Texas's 2011 congressional and state house redistricting plans under Section 2 of the Voting Rights Act, among other claims. The United States initially participated as amicus in *Perez* and later intervened as a plaintiff. *Perez* remains pending in the district court, on remand from the Supreme Court. I have been the supervising attorney for the United States in both matters.
18. Dr. Handley has served as an expert for the United States in both cases. Dr. Handley signed confidentiality agreements related to her work in both matters, which are the same in substance as the one she signed in relation to *City of Eastpointe*. See Confidentiality Agreement for *Texas v. United States* (executed August 10, 2011) (Ex. 2) and Confidentiality Agreement for *Perez v. Perry* (executed April 23, 2014) (Ex. 3).
19. In Dr. Handley's report in *New York Immigration Coalition*, she discusses a district-specific, functional approach to election analysis and represents that in her analysis in *Texas v. United States*, citizenship rates are taken into account only indirectly. She explains that her analysis there follows the functional approach suggested by the United States and that looking at citizenship rates is therefore unnecessary. N.Y. Immigration Coal. Rep. 16-17.

20. The development of the functional approach in the Texas redistricting cases in fact begins by looking at population. In her expert reports in *Texas v. United States*, Dr. Handley acknowledges that her analysis in that Section 5 case starts with the demographic composition of the districts under the State's prior plans, known as benchmark districts.
21. Dr. Handley's district-specific, functional analysis in *Texas v. United States* used indices to evaluate the ability of minority voters to elect their candidate of choice. The endogenous index addressed whether minority voters were able to elect a preferred candidate for the office at issue (e.g., congressional representative), and the exogenous index concerned whether minority voters in statewide and other elections were able to elect their candidates of choice. Dr. Handley then looked at reconstituted elections in the proposed redistricting plan to gauge whether the ability to elect increased, decreased, or stayed the same. Dr. Handley developed the indices in confidential consultation with the Department to evaluate the benchmark and proposed redistricting plans under Section 5. Cross-examination regarding these points would almost certainly require divulging confidential communications.
22. Dr. Handley also used a district-specific functional analysis in the Section 2 litigation in *Perez*, although her role involved examining only one congressional district (CD 23) in a rebuttal report to an expert for the State of Texas. Dr. Handley looked at whether the district would be able to elect a candidate of choice of Hispanic voters in the proposed redistricting plan compared to the benchmark plan. Dr. Handley also looked at voter turnout in areas removed from the benchmark plan and turnout in the proposed redistricting plan. Cross-examination regarding these points would almost certainly require divulging confidential communications.

23. When the United States was an amicus in *Perez*, the United States also provided the court with one of Dr. Handley's expert reports from *Texas v. United States* as well as illustrative plans designed by Dr. Handley to show a viable remedy in CD 23. The development of illustrative maps for CD 23 also involved confidential communications with the United States.

Village of Port Chester

24. In the expert report in *New York Immigration Coalition*, Dr. Handley also references her expert work in *United States v. Village of Port Chester*, where the Department challenged the method of election for the village board under Section 2 of the Voting Rights Act. N.Y. Immigration Coal. Rep. at 11-12. I was a trial attorney for the United States on *Village of Port Chester*.
25. Dr. Handley conducted a racial bloc voting analysis in *Village of Port Chester*. Dr. Handley notes in her expert report in that case that she was unable to derive reliable estimates for Hispanic voters in Port Chester using voting age and citizen voting age population data. Therefore, Dr. Handley had to look at a smaller subset of elections for which Port Chester had available voter registration data. Dr. Handley also did not perform an analysis of the first *Gingles* precondition for the United States in that matter; nor did she prepare an illustrative districting plan for the United States in that case.
26. The United States filed its complaint in *Village of Port Chester* in 2006, and Dr. Handley's work for the United States in that case was performed prior to the availability of ACS data.

Euclid Cases

27. Dr. Handley has been an expert for the United States in two additional cases—*United States v. City of Euclid* and *United States v. Euclid City School District*. In both cases, the United States challenged at-large methods of election as diluting the opportunity for black voters to elect their candidates of choice, in violation of Section 2 of the Voting Rights Act. I was the supervising attorney in *Euclid City School District*, and I am generally familiar with the United States' work on the *City of Euclid*, although I did not work on that case.
28. In *City of Euclid*, Dr. Handley reviewed an illustrative map drawn by GIS specialist at the Department of Justice in determining that the map established the first *Gingles* precondition. In *Euclid City School District*, Dr. Handley designed illustrative maps for a remedy using the GIS system on a computer at the Department of Justice and with the help of a GIS specialist at the Department. Dr. Handley used VAP data to draw the districts because citizenship rates were not an issue in that case.
29. The United States filed *City of Euclid* in 2006 and *Euclid City School District* in 2008. Dr. Handley did not use ACS data, which was not yet available, in her work for the United States in *City of Euclid* or *Euclid City School District*.
30. In *City of Euclid*, Dr. Handley also did a racial bloc voting analysis relying on VAP data allocated to precincts by a GIS specialist at the Department of Justice for elections occurring from 1995-2000. For elections occurring after 2000, Dr. Handley used the VAP allocation by NODIS, a source of redistricting data for the State of Ohio. Although Dr. Handley primarily relied in *Euclid City School District* case on the racial bloc voting report she had

prepared for the *City of Euclid*, she also did a similar racial bloc voting analysis for two school board contests.

Conclusion

31. Given Dr. Handley's reliance upon the work she performed for the United States in the voting rights cases described above in the course of rendering her opinions in *New York Immigration Coalition*, it is hard to envision how the Department could effectively cross-examine Dr. Handley about the bases for her opinions regarding that work without risking of disclosure of confidential information.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 26, 2018
Washington, District of Columbia


TIMOTHY F. MELLETT

Exhibit 1

Exhibit 1

U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION

CONFIDENTIALITY AGREEMENT AND SECURITY CERTIFICATION
FOR CONSULTANT OR EXPERT WITNESS

I, Lisa R. Handley, solemnly swear (or affirm) that I understand the high standards of trustworthiness and integrity required of me with regard to materials and information which may come to my attention in connection with Department of Justice case/matter Eastpointe, MI, Section 2 case DJ 166-37-13, while I am employed as a contractor with the Civil Rights Division.

This contract has been designated to include the following information:

- ☐ Sensitive and/or Personally Identifiable Information (PII) and therefore contractor must meet all the requirements identified below.
- ☒ Non-sensitive and Non-PII data, and therefore is not subject to Section II, Security of Systems and Data. Section I, Non-Disclosure of Confidential Information and Section IV, Amendment is applicable.

I. Non-Disclosure of Confidential Information

- A. Except, as necessary, to the performance of my duties under this contract, I will not:
1. Reveal, divulge or publicize any matters dealt with under this contract.
 2. Disseminate any oral or written information or electronic data obtained as a result of execution of this contract, except those disclosures specifically authorized in writing by the Civil Rights Division Attorney.
 3. Remove any document, whether in paper or electronic format, from the place of contract performance, except as approved, in advance by the Civil Rights Division Attorney whose name appears below.
- B. I understand that should I make any unauthorized disclosure(s) of confidential information, the terms of the Default Clause contained in FAR 52.249-8 (48 C.F.R.), incorporated herein by reference, may be invoked and that I will be considered to be in breach of this contract.

II. Security of Systems and Data, Including PII

- A. I understand that the work to be performed under this contract requires the handling of data that originated within the Civil Right Division, data that the contractor manages or acquires for the Division, and/or data that is acquired in order to perform the contract and concerns Division programs or personnel.

For all systems handling such data, other than DOJ provided computers or other electronic devices, I shall comply with all security requirements applicable to Department of Justice systems, including but not limited to all Executive Branch system security requirements (e.g., requirements imposed by Office of Management and Budget [OMB] and National Institute of Standards and Technology [NIST]), DOJ IT Security Standards, and DOJ Order 2640.2F. In addition, upon

The term "personally identifiable information," as defined by OMB, means any information about an individual maintained by an agency, including, but not limited to, education, financial transactions, medical history, and criminal or employment history and information which can be used to distinguish or trace an individual's identity, such as their name, social security number, date and place of birth, mother's maiden name, biometric records, etc., including any other personal information which is linked or linkable to an individual.

request, I shall provide Civil Rights Division access to and information regarding my policies and procedures for deleting all electronic data provided to me by the Civil Rights Division from my computer systems at the end of the contract period.

To the extent that I process or use confidential Division-provided data on a non-government laptop or other media storage device, I hereby certify that I have complied with the following requirements:

- 1) Laptop(s) employ encryption using a NIST Federal Information Processing Standard (FIPS) Pub 140-2, Security Requirements for Cryptographic Modules, approved product;
- 2) The contract has developed and implemented a process to ensure that security and other applications software is kept up-to-date;
- 3) Mobile computing devices will utilize anti-viral software and a host-based firewall mechanism.
- 4) Log all computer-readable data extracts from databases holding sensitive information and verify to the Department that each extract including sensitive data has been erased within 90 days or its use is still required. All DOJ information is sensitive information unless designated as non-sensitive by the Department;
- 5) Contractor-owned removable media, such as removable hard drives, flash drives, CDs, and floppy disks, containing DOJ data, shall not be removed from DOJ facilities unless encrypted using a NIST FIPS 140-2 approved product;
- 6) When data is no longer needed, all removable media and laptop hard drives shall be processed (sanitized, degaussed, or destroyed) in accordance with security requirements applicable to DOJ;
- 7) Contracting firms shall keep an accurate inventory of devices used on DOJ contracts;
- 8) Rules of behavior must be signed by users. These rules shall address at a minimum: authorized and official use; prohibition against unauthorized users; and protection of sensitive data and personally identifiable information;
- 9) All DOJ data will be removed from contractor-owned laptops upon termination of contractor work. This removal must be accomplished in accordance with DOJ IT Security Standard requirements. Certification of data removal will be performed by the contractor's project manager and a letter confirming certification will be delivered to the Contracting Officer (CO) within 15 days or termination of contractor work.

- B. By acceptance of, or performance on, this contract, I agree that, with respect to the data identified in paragraph IIa, in the event of any actual or suspected breach of such data (*i.e.*, loss of control, compromise, unauthorized disclosure, access for an unauthorized purpose, or other unauthorized access, whether physical or electronic), I shall immediately (and in no event later than within one hour of discovery) report the breach to the Division's Contracting Officer (CO) at 202-514-2222 and the contracting officer's technical representative (COTR) listed in the Statement of Work.

If the data breach occurs outside of regular business hours and neither the CO nor COTR can be reached, I will call the DOJ Computer Emergency Readiness Team (DOJCERT) at 1-866-US4-CERT (1-866-874-2378) within one hour of discovery of the breach. I will also notify the CO as soon as possible during regular business hours.

I further certify that I have a security policy in place that contains procedures to promptly notify any individual whose personally identifiable information (as defined by OMB) was, or is reasonably believed to have been, breached. Any notification shall be coordinated with the CO and COTR, and shall not proceed until the Division has made a determination that notification would not impede a law enforcement investigation or jeopardize national security. The method and content of any notification shall be coordinated with, and be subject to the approval of, the Division. I assume full responsibility for taking corrective action consistent with the

Department's, Incident Response Procedures for Data Breaches Involving Personally Identifiable Information (v1.6, August 7, 2008), which may include offering credit monitoring when appropriate.

The security requirements set forth in this Section II, apply to all subcontractors who perform work in connection with this contract. For each subcontractor, I will certify that I have required the subcontractor to adhere to all such requirements. I understand that I will be responsible for any breach by a subcontractor of any of the provisions set forth in this clause.

III. Return of Division Equipment/Materials

In an effort to assist contractors in meeting the IT security requirements outlined in this agreement, the Civil Rights Division may, on a loaner basis, provide either of the following piece of equipment: laptop, hard drive, flash drive. Request for loaner equipment should be made in writing to the CO or COTR listed in the Statement of Work or on the order.

☐ Place a check in the box if you will using DOJ issued equipment to comply with security guidelines.

I understand that all materials provided by the Civil Rights Division, including any copies, notes or working papers derived or produced there from, are the property of the United States Government. In addition, I understand that all electronic data, whether saved on a Division-provided or non-government laptop or any other media storage device, is the property of the United States Government. If required to do so, by the Division's Contracting Officer or Trial Attorney, I will promptly surrender such materials and derived copies, notes and/or working papers which are in my custody or control.

I understand that my failure to surrender such materials promptly, or my conversion of such materials to a use not called for by the contract (e.g. delivery or emailing a document, or a copy thereof, or notes contain information taken from the document to someone not working on this contract), may be a violation of 18 U.S.C.-§641 (theft of Government property) and may subject me to fines (up to \$10,000) and imprisonment (up to 10 years). Following my return of all Division property and deletion of electronic data on my computer systems, I will certify to the Division my compliance with this paragraph.

IV. Amendment; application of contract provisions

- A. In accordance with contract provision, this Agreement may be formally modified or changed by the Division in those instances in which the courts (e.g. civil investigative demands), or specific circumstances dictate such a modification change.
- B. The above clauses are not meant to apply to materials which are matters of public record or available to interested parties upon request from the Division; but are intended to apply to privileged documents and internal memoranda and other work product of the Division.
- C. This Agreement does not preclude me from quoting my research, work product and trial testimony occasioned by my status in Departmental litigation in subsequent academic research and teaching activities, as long as that research, etc. is not based on confidential information.

Date 4/4/17

Wanda Handley
Signature of Contractor

Date 4/4/17

5-11-17
Signature of Division Attorney

Exhibit 2

Exhibit 2

U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION

CONFIDENTIALITY AGREEMENT AND SECURITY CERTIFICATION
FOR CONSULTANT OR EXPERT WITNESS

I, Lisa Handley solemnly swear (or affirm) that I understand the high standards of trustworthiness and integrity required of me with regard to materials and information which may come to my attention in connection with Department of Justice case/matter State of Texas v. United States, C.A. No. 1:11-cv-01303 while I am employed as a contractor with the Civil Rights Division.

This contract has been designated to include the following information:

- ☐ Sensitive and/or Personally Identifiable Information (PII) and therefore contractor must meet all the requirements identified below.
- ☒ Non-sensitive and Non-PII data, and therefore is not subject to Section II, Security of Systems and Data. Section I, Non-Disclosure of Confidential Information and Section IV, Amendment is applicable.

I. Non-Disclosure of Confidential Information

- A. Except, as necessary, to the performance of my duties under this contract, I will not:
 - 1. Reveal, divulge or publicize any matters dealt with under this contract.
 - 2. Disseminate any oral or written information or electronic data obtained as a result of execution of this contract, except those disclosures specifically authorized in writing by the Civil Rights Division Attorney.
 - 3. Remove any document, whether in paper or electronic format, from the place of contract performance, except as approved, in advance by the Civil Rights Division Attorney whose name appears below.
- B. I understand that should I make any unauthorized disclosure(s) of confidential information, the terms of the Default Clause contained in FAR 52.249-8 (48 C.F.R.), incorporated herein by reference, may be invoked and that I will be considered to be in breach of this contract.

II. Security of Systems and Data, Including PII

- A. I understand that the work to be performed under this contract requires the handling of data that originated within the Civil Right Division, data that the contractor manages or acquires for the Division, and/or data that is acquired in order to perform the contract and concerns Division programs or personnel.

For all systems handling such data, other than DOJ provided computers or other electronic devices, I shall comply with all security requirements applicable to Department of Justice systems, including but not limited to all Executive Branch system security requirements (*e.g.*, requirements imposed by Office of Management and Budget [OMB] and National Institute of Standards and Technology [NIST]), DOJ IT Security Standards, and DOJ Order 2640.2F. In addition, upon

The term "personally identifiable information," as defined by OMB, means any information about an individual maintained by an agency, including, but not limited to, education, financial transactions, medical history, and criminal or employment history and information which can be used to distinguish or trace an individual's identity, such as their name, social security number, date and place of birth, mother's maiden name, biometric records, etc., including any other personal information which is linked or linkable to an individual.

request, I shall provide Civil Rights Division access to and information regarding my policies and procedures for deleting all electronic data provided to me by the Civil Rights Division from my computer systems at the end of the contract period.

To the extent that I process or use confidential Division-provided data on a non-government laptop or other media storage device, I hereby certify that I have complied with the following requirements:

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- 4) Log all computer-readable data extracts from databases holding sensitive information and verify to the Department that each extract including sensitive data has been erased within 90 days or its use is still required. All DOJ information is sensitive information unless designated as non-sensitive by the Department;
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- 6) When data is no longer needed, all removable media and laptop hard drives shall be processed (sanitized, degaussed, or destroyed) in accordance with security requirements applicable to DOJ;
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☐ Place a check in the box if you will using DOJ issued equipment to comply with security guidelines.

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IV. Amendment; application of contract provisions

- A. In accordance with contract provision, this Agreement may be formally modified or changed by the Division in those instances in which the courts (e.g. civil investigative demands), or specific circumstances dictate such a modification change.
- B. The above clauses are not meant to apply to materials which are matters of public record or available to interested parties upon request from the Division; but are intended to apply to privileged documents and internal memoranda and other work product of the Division.
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8/10/2011

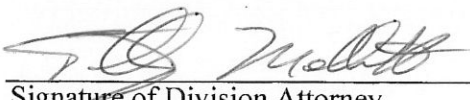
Date



Signature of Contractor

8/11/2011

Date



Signature of Division Attorney

Exhibit 3

Exhibit 3

U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION

CONFIDENTIALITY AGREEMENT AND SECURITY CERTIFICATION
FOR CONSULTANT OR EXPERT WITNESS

I, Lisa R. Handley, solemnly swear (or affirm) that I understand the high standards of trustworthiness and integrity required of me with regard to materials and information which may come to my attention in connection with Department of Justice case/matter Perez v. Perry, 11-CA-360 (W.D. Texas), DJ 166-76-140, while I am employed as a contractor with the Civil Rights Division.

This contract has been designated to include the following information:

- ☐ Sensitive and/or Personally Identifiable Information (PII) and therefore contractor must meet all the requirements identified below.
- ☒ Non-sensitive and Non-PII data, and therefore is not subject to Section II, Security of Systems and Data. Section I, Non-Disclosure of Confidential Information and Section IV, Amendment is applicable.

I. Non-Disclosure of Confidential Information

- A. Except, as necessary, to the performance of my duties under this contract, I will not:
 - 1. Reveal, divulge or publicize any matters dealt with under this contract.
 - 2. Disseminate any oral or written information or electronic data obtained as a result of execution of this contract, except those disclosures specifically authorized in writing by the Civil Rights Division Attorney.
 - 3. Remove any document, whether in paper or electronic format, from the place of contract performance, except as approved, in advance by the Civil Rights Division Attorney whose name appears below.
- B. I understand that should I make any unauthorized disclosure(s) of confidential information, the terms of the Default Clause contained in FAR 52.249-8 (48 C.F.R.), incorporated herein by reference, may be invoked and that I will be considered to be in breach of this contract.

II. Security of Systems and Data, Including PII

- A. I understand that the work to be performed under this contract requires the handling of data that originated within the Civil Right Division, data that the contractor manages or acquires for the Division, and/or data that is acquired in order to perform the contract and concerns Division programs or personnel.

For all systems handling such data, other than DOJ provided computers or other electronic devices, I shall comply with all security requirements applicable to Department of Justice systems, including but not limited to all Executive Branch system security requirements (*e.g.*, requirements imposed by Office of Management and Budget [OMB] and National Institute of Standards and Technology [NIST]), DOJ IT Security Standards, and DOJ Order 2640.2F. In addition, upon

The term "personally identifiable information," as defined by OMB, means any information about an individual maintained by an agency, including, but not limited to, education, financial transactions, medical history, and criminal or employment history and information which can be used to distinguish or trace an individual's identity, such as their name, social security number, date and place of birth, mother's maiden name, biometric records, etc., including any other personal information which is linked or linkable to an individual.

request, I shall provide Civil Rights Division access to and information regarding my policies and procedures for deleting all electronic data provided to me by the Civil Rights Division from my computer systems at the end of the contract period.

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Date

4/23/14

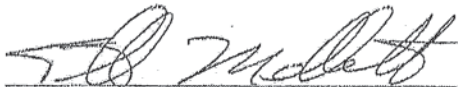
Signature of Contractor



Date

4/23/14

Signature of Division Attorney



**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

STATE OF CALIFORNIA, by and through
Attorney General Xavier Becerra,

Plaintiff,

v.

WILBUR L. ROSS, JR., in his official
capacity as Secretary of the U.S. Department
of Commerce; U.S. DEPARTMENT OF
COMMERCE; RON JARMIN, in his official
capacity as Acting Director of the U.S.
Census Bureau; U.S. Census Bureau; DOES
1-100,

Defendants.

Case No. 3:18-cv-01865

CITY OF SAN JOSE, a municipal corporation;
and BLACK ALLIANCE FOR JUST
IMMIGRATION, a California Non-Profit
Corporation,

Plaintiffs,

vs.

WILBUR L. ROSS, JR., in his official capacity
as Secretary of the U.S. Department of
Commerce; U.S. DEPARTMENT OF
COMMERCE; RON JARMIN, in his official
capacity as Acting Director of the U.S. Census
Bureau; U.S. CENSUS BUREAU,
Defendants.

Case No. 5:18-cv-02279

**RULE 26(A)(2)(B) EXPERT REPORT AND DECLARATION
OF PAMELA S. KARLAN, PhD**

Pursuant to 28 U.S.C. § 1746, I make the following statement.

INTRODUCTION AND BACKGROUND

I am the Kenneth and Harle Montgomery Professor of Public Interest Law at Stanford Law School. My scholarly specialty is constitutional law and litigation, with a special emphasis on legal regulation of the political process. I am the co-author of the leading casebook in the field, *The Law of Democracy: Legal Structure of the Political Process*, now in its fifth edition, as well as dozens of scholarly articles about voting rights. From 1986 to 1988, I served as an assistant counsel at the NAACP Legal Defense and Educational Fund, Inc., where I spent the majority of my time working on cases under section 2 of the Voting Rights Act of 1965 (now codified at 52 U.S.C. § 10301 et seq.). I continued to participate in litigating cases under the Voting Rights Act throughout the decades after I entered teaching. During 2014 and 2015, I served as a Deputy Assistant Attorney General in the Civil Rights Division of the U.S. Department of Justice, where one of my responsibilities was to review the work of the Voting Section and to assist in reviewing the voting rights-related work of the Appellate Section. A full copy of my curriculum vitae is attached to this Report as Appendix A.

On December 12, 2017, Arthur Gary, General Counsel in the Justice Management Division of the U.S. Department of Justice, sent a letter to Ron Jarmin at the Census Bureau of the U.S. Department of Commerce. The full text of that letter (“the Gary letter”), which I obtained from ProPublica’s website, is attached to this Report as Appendix B. In the letter, Gary requests that the Bureau “reinstate” on the 2020 census form sent to each household a question regarding citizenship. The Gary letter asserts that citizenship data “is critical to the [Justice] Department’s enforcement of Section 2 of the Voting Rights Act and its important protections against racial discrimination in voting.” It further asserts that “the decennial census questionnaire is the most appropriate vehicle for collecting that data.”

I have been retained by plaintiffs’ counsel to serve as an expert in the above-captioned cases. Although I am being reimbursed for my costs, I am not receiving compensation for my services. However, my standard hourly rate for expert witness services is \$650 per hour.

Plaintiffs’ counsel asked me to offer my opinion, based on my experience litigating and studying section 2 cases, on whether a citizenship question on the decennial census would assist the Department of Justice’s section 2 enforcement, as outlined in the Gary letter. In my opinion, it would not. The remainder of this report sets out the basis for my opinion, which is provided to a reasonable degree of certainty.

BACKGROUND ASSUMPTIONS

When I refer to case law in this report, I do so for two reasons: (1) to describe the standards that I have assumed apply to cases litigated under section 2 and (2) to provide real-world illustrations of why the Gary letter is wrong to argue that citizenship data provided from decennial census questionnaires are critical to section 2 enforcement.

I have made the following assumptions about the state of the law. Section 2 of the Voting Rights Act provides, in pertinent part, that no State or political subdivision can use a voting practice that gives members of minority groups “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 52 U.S.C. § 10301(b). Election schemes that violate this prohibition are said to “dilute” minority voting strength. The Department of Justice has litigating authority to bring section 2 vote-dilution claims. *See* <https://www.justice.gov/crt/section-2-voting-rights-act>.

The Supreme Court has articulated three “necessary preconditions” for plaintiffs to succeed on a section 2 vote-dilution claim. *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). “First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.” *Id.* “Second, the minority group must be able to show that it is politically cohesive.” *Id.* at 51. “Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, . . . usually to defeat the minority’s preferred candidate.” *Id.* In *Bartlett v. Strickland*, 556 U.S. 1 (2009), the Supreme Court explained that to satisfy the first *Gingles* precondition, plaintiffs must show that it is possible to draw a district with a “numerical majority of minority voters,” *id.* at 14, which the Court equated with the “voting-age population,” *id.* at 20. The Gary letter is correct that numerous lower courts, both before and after *Bartlett*, have required that section 2 plaintiffs satisfy the first *Gingles* precondition by drawing an illustrative district in which the minority group constitutes a majority of the citizens of voting age within the relevant population (“CVAP”). So I assume throughout this report that plaintiffs can prevail in a section 2 lawsuit only if they can provide the court with such a district.

Data regarding total population and voting-age population comes directly from answers to questions on the existing decennial census form. The census is an actual enumeration. Data regarding citizenship currently comes from the American Community Survey (ACS). The ACS provides estimates of citizenship and CVAP. *See* U.S. Census Bureau, Voting Age Population by Citizenship and Race (CVAP), CVAP Documentation (2017), available at <https://tinyurl.com/y9anvyel>.

CONCLUSIONS

The existing data sources, including most recently the ACS-derived citizenship and CVAP estimates, are entirely sufficient to enable plaintiffs, including the Department of Justice, to successfully litigate section 2 cases.

During more than thirty years spent as a staff attorney at the NAACP Legal Defense and Educational Fund, as a pro bono attorney litigating section 2 cases, as a scholar studying voting rights, or as a presidential appointee at the Department of Justice, I have never heard either any counsel representing section 2 plaintiffs or any social scientific expert ever suggest that adding a citizenship question to the decennial census questionnaire would be helpful, let alone necessary, to effective enforcement of section 2.

This is not because discussions about data and data-related issues were rare. To the contrary: I have been present during many meetings, and have read voluminous scholarship, involving discussion of methodological issues that arise in section 2 cases. These have included, for example, discussions regarding how to determine polarized voting or how to determine the race of citizens who lack government-issued identification. And they have involved census-related issues: for example, the implications of the Census Bureau's decision prior to the 2000 census to allow individuals to report themselves as being bi- or multiracial. If the adequacy of existing data sources regarding citizenship had been a concern of the section 2 plaintiffs' bar, the issue certainly would have been discussed.

In particular, during my time at the Department of Justice, I had conversations both with other attorneys in the office of the Assistant Attorney General and with attorneys in the Voting Section on data-related matters. I was also aware of ongoing discussions between career staff and their counterparts at the Census Bureau over preparation for the 2020 enumeration. But there was, to my knowledge, no discussion whatsoever of the need, or desirability, of adding a citizenship question to the decennial census form.

The complete decades-long silence on the need for additional citizenship-related questions is not surprising given the realities of section 2 litigation.

Census data are used in analyzing all three *Gingles* preconditions, but information about citizenship is most important to the first *Gingles* precondition. The other two preconditions, which together indicate the level of racial bloc voting (or racial polarization) within the relevant jurisdiction, can be proven without the need for citizenship data. Leaving aside the very few jurisdictions in which non-

citizens are eligible to vote for specific local offices, everyone who votes in an election must be a citizen.¹

While section 2 protects all citizens against racial vote dilution, virtually all section 2 cases involve claims by voters who are African American, Latino, American Indian, or Alaska Natives. (There are very few vote-dilution claims brought by Asian Americans alone because there are relatively few places with sufficient levels of racially polarized voting where Asian American communities are sufficiently geographically concentrated to create predominantly Asian American districts.)

Citizenship data is almost never important in cases involving African American, American Indian, or Alaska Native plaintiffs. The reason for this is straightforward: citizenship rates among these communities are so high (over 99 percent among American Indians and Alaska Natives of voting age, and over 95 percent among African Americans of voting age) that if one of these groups constitutes a majority of the voting age population, it almost surely constitutes a majority of CVAP as well.²

The situation is, of course, different with respect to section 2 cases involving alleged dilution of Latino voting strength. Nationwide, roughly one-third of Latinos of voting age are non-citizens. So citizenship data can be crucial to determining whether it makes sense to bring a section 2 case. But it is important to understand that the problem from the perspective of vindicating minority voting rights is rarely one of inadequate data (as opposed to insufficient numbers of geographically concentrated minority citizens of voting age within the jurisdiction at issue). This “numbers” problem thus has nothing to do with the accuracy of census or ACS data regarding CVAP. To the contrary, plaintiffs have routinely and successfully used ACS-derived data to satisfy the first *Gingles* precondition and to establish other relevant factors in section 2 vote-dilution cases.³

Neither the Department of Justice nor private counsel litigating section 2 cases has any practical need for the data the Gary letter requests (that is, for data

¹ For a detailed discussion of how census data and citizenship information are used in section 2 cases, see Justin Levitt, *Citizenship and the Census*, 119 Colum. L. Rev. ____ (forthcoming 2019) (manuscript at 24-29), draft available at <https://tinyurl.com/yd5gly2h>.

² I obtained the relevant percentages from the CSV file for the Nation contained in U.S. Census Bureau, Voting Age Population by Citizenship and Race (CVAP) (2017), available at <https://tinyurl.com/lbldpo7>.

³ For example, in *Fabela v. City of Farmers Branch*, 2012 WL 3135545, at *4-*8 (N.D. Tex. Aug. 2, 2012), the court found that the plaintiff had satisfied the first *Gingles* precondition based on illustrative districts that relied on ACS-derived data.

on citizenship derived directly from the decennial census questionnaires.) The situations where the absence of data might deter plaintiffs from filing are ones that are very close to the line: jurisdictions where it is unclear whether, using existing estimation techniques, it is possible to create a district that will perform for the minority community. Before bringing suit in such a marginal district, a competent attorney will certainly have an expert analyze election data (which by definition involves citizen-voters) to see whether it is possible to craft a performing district.

The object of a section 2 vote-dilution lawsuit is to obtain a districting plan in which the minority community can elect some representatives of its choice. There is no point to bringing suit if it is impossible to create a district that will perform for the minority community. Few organizations that operate voting rights projects have the resources to bring cases where there is only a marginal prospect of creating a performing district. And while the Department of Justice has tremendous financial resources, the Voting Section is sufficiently small and has a sufficiently broad range of responsibilities that it has no incentive to bring marginal cases. In my observation, for reasons unrelated to the availability of census data regarding citizenship, the Voting Section is also quite cautious about the cases it brings. Perhaps that is why the Gary letter does not identify, or even allude to, a single situation in which the Voting Section found itself unable to bring a case its attorneys considered meritorious because of insufficient data.

Section 2 lawsuits have been successful using existing data sources.

The history of section 2 shows that plaintiffs have consistently succeeded using the existing data sources. At all times since the Act's passage in 1965 and its amendment in 1982 (which introduced the "results" test for racial vote dilution claims), plaintiffs have relied on estimated citizenship figures, either from the "long form" or from the ACS, each of which is survey-based.

According to the most comprehensive studies of the Act's consequences, there were 117 "reported Section 2 cases leading to favorable results for minority voters" in the "23-year period following the 1982 reauthorization." National Commission on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005*, at 88 (2006) [*Protecting Minority Voters*].⁴ See also Ellen Katz et. al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982 Final Report of the Voting Rights Initiative*, University of Michigan Law School, 39 U. Mich. J.L. Reform 643, 656-57(2006).

⁴ The report is available online at *Voting Rights Act: Evidence of Continuing Need: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong (2006), <https://tinyurl.com/yd2kbbbh>. The report begins at page 104 of the Committee print. I have used the report's internal pagination.

But that number understates the magnitude of plaintiffs' success. For example, I worked for many years on the "*Dillard* litigation," a lawsuit challenging at-large elections for county commissions, city councils, and school boards in Alabama that produced a series of reported decisions. Ultimately, more than 170 election systems were changed, either through adjudication or remedial settlements.

Once unreported decisions and remedial settlements are factored in, the number of successful section 2 cases skyrockets. The National Commission undertook a comprehensive inquiry into voting rights cases in nine states with a particularly significant history of voting-related discrimination (eight of the states fully covered by the preclearance provisions of section five, plus the partially-covered state of North Carolina). It found "approximately ten times the number of" unreported cases as reported ones. *Protecting Minority Voters* at 88. Looking at the more granular county-by-county level, the Commission found that there were at least 825 counties in those nine states affected by successful section 2 lawsuits. *See id.* tbl. 5.

Thus, section 2 plaintiffs were able to win or successfully settle significant numbers of cases using the existing data sources, which provided citizenship estimates rather than an actual enumeration of citizens.

Unsuccessful section 2 suits are not due to problems with existing data.

If one looks at the section 2 cases plaintiffs have lost for failure to satisfy the first *Gingles* precondition, there is no reason to believe that those defeats were in any way attributable to the lack of a citizenship question on the decennial census questionnaire. I am aware of twenty-four reported cases in which courts have held that plaintiffs' section 2 claims failed to satisfy the first *Gingles* precondition. (I have listed these cases in Appendix C.) In none of these cases was there even a hint that some inadequacy in ACS data prevented plaintiffs from meeting their burden.

It is striking that the Gary letter fails to identify even a single case where inadequate citizenship data caused plaintiffs to lose. And although the Gary letter cites three cases that are in my set of twenty-four cases available on Westlaw—*Negron v. City of Miami Beach*, 113 F.3d 1563 (11th Cir. 1997); *Reyes v. City of Farmers Branch*, 586 F.3d 1019 (5th Cir. 2009); and *Romero v. City of Pomona*, 665 F. Supp. 853 (C.D. Cal. 1987), *aff'd*, 883 F.2d 1418 (9th Cir. 1989)—it never attempts to explain why those cases provide support for the letter's request. In my opinion, they provide no support.

It is important to understand the limited universe of cases in which a lack of citizenship information from the decennial questionnaires even could cause a plaintiff to lose a case that he would otherwise win. The problem the Gary letter purports to identify – that the Department of Justice lacks sufficient data to bring

section 2 cases – would arise only where an actual enumeration would show the possibility of a majority minority CVAP district, but survey-provided estimates cannot show such a possibility. This condition is implausible. Among other things, it presupposes that the actual enumeration, with its well-known undercount, would capture and thereby report a higher number of minority citizens of voting age than the more statistically sophisticated survey techniques estimate there to be. The Gary letter offers no suggestion that estimates of minority CVAP are likely to be lower than numbers produced by an actual enumeration. And it ignores the significance of intra-decade demographic changes that are captured by the ACS but not by the decennial census.

None of the actual cases where section 2 claims failed the first *Gingles* precondition suggest the problem I have just described. In some cases, the plaintiffs lost because:

1. The plaintiffs failed to provide any illustrative district at all.⁵
2. The plaintiffs' illustrative district was not “geographically compact.”⁶
3. The plaintiffs acknowledged that they could not create an illustrative district that satisfied the numerosity requirement—that is, a district in which they constituted a majority of the total population, a majority of the voting-age

⁵ See *Wright v. Sumter County Bd. of Elections & Registration*, 2014 WL 1347427, at *2 (M.D. Ga. Apr. 3, 2014); *In re 2012 Legislative Districting*, 80 A.3d 1073, 1115–16 (Md. 2013); *Fairley v. Hattiesburg*, 584 F.3d 660, 669 (5th Cir. 2009) (the only illustrative district plaintiffs provided simply excluded students living in the city from the plan).

⁶ See *Sensley v. Albritton*, 385 F.3d 591, 596 (5th Cir. 2004); *Gause v. Brunswick County*, 1996 WL 453466, at *2 (4th Cir. 1996); *Al-Hakim v. Florida*, 892 F. Supp. 1464, 1474 (M.D. Fla. 1995) (finding “no evidence . . . that the precincts [where black voters live] are geographically contiguous”), *aff'd*, 99 F.3d 1154 (11th Cir. 1996).

In *Stabler v. Cty. of Thurston*, 129 F.3d 1015, 1024, 1025 (8th Cir. 1997), the court held that the plaintiffs could not prove “that Native Americans are sufficiently large and geographically compact to constitute a majority in a single-member district which is regularly drawn and non-bizarrely shaped”; the Native American majority in the illustrative districts was so “fragile” that “if 4 or 5 Native Americans moved from the proposed majority-minority districts . . . and they were replaced by non-Native Americans, the majority-minority composition would be destroyed.”

population, or a majority of the CVAP.⁷ I recognize that these proportions differ from one another and that it is conceptually possible that a minority community's share of CVAP could be higher than its share of the total population or its share of the voting-age population. But I am unaware of any case in which plaintiffs have

⁷ *Romero v. City of Pomona*, 665 F. Supp. 853 (C.D. Cal. 1987) *aff'd*, 883 F.2d 1418 (9th Cir. 1989), and *Negron v. City of Miami Beach*, 113 F.3d 1563 (11th Cir. 1997), both cited in the Gary letter, fall into this category.

In *Romero*, the plaintiffs' expert "testified that when the eligible voting age population is considered, none of the districts in plaintiffs' proposed district plans have a majority hispanic or black population." 665 F. Supp. 2d at 857 n.2.

In *Negron*, the plaintiffs' expert proffered an illustrative plan that created three districts that were majority Latino with respect to voting-age population. *See* 113 F.3d at 1567. The district court adjusted those figures downward by "synthesizing" them with data regarding the "Hispanic citizenship rate," which produced districts that were between 41 and 48 percent Latino. *Id.* The court of appeals rejected the plaintiffs' various methodological challenges to the district court's reliance on survey data to impose an across-the-board reduction. *See id.* at 1569-70. But the plaintiffs in *Negron* never attempted to proffer illustrative districts that were majority Latino with respect to CVAP; their claim was only that voting-age population was the relevant measure.

The other cases where the plaintiffs' proposed districts concededly did not contain majority minority CVAPs are: *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (seeking a district that was 39.36 black in VAP); *Dillard v. Baldwin County Comm'rs*, 376 F.3d 1260, 1269 (11th Cir. 2004) (black VAP was too small to create a majority-black district); *Hall v. Virginia*, 385 F.3d 421, 430 (4th Cir. 2004) ("The plaintiffs concede that black voters cannot form a majority in the Fourth District, and thereby elect a candidate"); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 944 (7th Cir. 1988) (blacks "would not comprise a majority of the voting age population" in the illustrative districts); *Metts v. Almond*, 217 F. Supp. 2d 252, 261 (D.R.I. 2002) (pointing to "plaintiffs' failure to allege that African-American voters could constitute a majority in a reconfigured [d]istrict"), *rev'd*, 363 F.3d 8 (1st Cir. 2004) (en banc) (holding, prior to the Supreme Court's decision in *Bartlett*, that plaintiffs were entitled to proceed on a crossover district theory); *Rios-Andino v. Orange County*, 51 F. Supp. 3d 1215, 1225 (M.D. Fla. 2014) (at trial, plaintiffs' expert "stated that he was uncertain as to whether Latino citizens of voting age were actually a majority in District 3 of his illustrative Map"); *Skorepa v. City of Chula Vista*, 723 F. Supp. 1384, 1390 (S.D. Cal. 1989) (illustrative district was only 45.9% Latino in total population); *Thompson v. Kemp*, 309 F. Supp. 3d 1360, 1366 (N.D. Ga. 2018) (plaintiffs did not allege that "minority voters could be a majority in either" of their proposed illustrative districts); *Turner v. Arkansas*, 784 F. Supp. 553, 570 (E.D. Ark. 1991) (plaintiffs sought the creation of a 38 percent black district), *summarily aff'd*, 504 U.S. 952 (1992).

made such a claim or of any secondary literature that suggests such a reality in the jurisdictions where vote-dilution claims are likely to be brought. Plaintiffs who concede that they cannot create an illustrative district in which the minority group constitutes a majority of the total population or the voting-age population—both figures entirely derivable from existing census data—thus realistically have conceded *a fortiori* that they cannot satisfy a requirement to show a district that is majority minority with respect to CVAP.⁸

4. The plaintiffs did not make sufficient use of ACS data.⁹

5. Given its proportion of the jurisdiction's population and CVAP, the minority community was already electing sufficient representatives of its choice.¹⁰

In none of these five circumstances did a court conclude that the CVAP available from the ACS was inadequate to enable plaintiffs to provide an illustrative district.

Nor would a citizenship question on the decennial form do anything to help section 2 plaintiffs whose claim rests on assertions of population shifts that occurred during the decade (that is, after statistics from the decennial census were reported). So, for example, the Gary proposal would have done nothing to help the plaintiffs in *Benavidez v. Irving Indep. Sch. Dist.*, 690 F. Supp. 2d 451 (N.D. Tex. 2010), given their expert's concession that "none of the illustrative districts" he had drawn "ha[d] greater than a 50% Hispanic share of CVAP according to 2000 Census data." *Id.* at 457. Moreover, the court's rejection of the plaintiffs' attempt to use ACS data to show that in the interim the share of Latino CVAP had risen to the point where the potential districts "now have [majority] Hispanic CVAP shares," *id.* at 458 (emphasis added), came from the plaintiffs' reliance on a single year's worth of

⁸ And plaintiffs who cannot show the possibility of creating districts that are majority minority with respect to either total population or voting age population would almost certainly gain nothing from the inclusion of a citizenship question on the decennial census form.

⁹ See *Reyes v. City of Farmers Branch*, 586 F.3d 1019 (5th Cir. 2009) (court of appeals left open whether plaintiffs could have succeeded in satisfying the first *Gingles* precondition had their expert properly used his alternative methods, none of which relied on the ACS); *Benavidez v. Irving Indep. Sch. Dist.*, 690 F. Supp. 2d 451 (N.D. Tex. 2010) (plaintiffs relied on a single year's worth of ACS data instead of the more accurate five-year ACS data).

¹⁰ See *Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997) ("Houston's current electoral scheme," which had nine single-member districts and five at-large seats and which had produced four Latino council members, was already "enabl[ing] its Hispanic community to elect city council members in greater than proportional numbers, based on its citizen voting-age population.")

ACS data in the face of the Bureau's explanation that for small jurisdictions the five year data is needed for reliability.¹¹

In short, I have been wholly unable to find a single case where the availability of citizenship data from the decennial census would have changed the outcome.

Other problems with the Gary letter.

There are problems with the Gary letter beyond its claim regarding the need for additional citizenship information. The Gary letter asserts that it is problematic to use different data sets to "determine compliance with the Constitution's one-person, one vote requirement" and to analyze section 2 claims. Not so. Although "one-person, one-vote" is the common way of referring to the requirement that jurisdictions draw equipopulous districts, that requirement does not focus at all on election results, or the ability of groups of citizens to elect representatives of their choice. So there is nothing anomalous about using an actual enumeration to

¹¹ *Perez v. Pasadena Indep. Sch. Dist.*, 958 F. Supp. 1196 (S.D. Tex. 1997), *aff'd*, 165 F.3d 368 (5th Cir. 1999), provides another example of a case where census data would not have changed the outcome. The parties apparently agreed that the exemplary districts were not majority Latino in CVAP as of the 1990 census. *See id.* at 1209. The disagreement centered on whether the plaintiffs' proposed adjustments to take account of population growth and census undercount would make it possible to create such districts, *id.* at 1210.

The flip side of cases like *Benavidez* and *Perez* is cases where plaintiffs offer illustrative districts that are majority minority with respect to census-derived data but courts nonetheless held that they failed to satisfy the first *Gingles* precondition because the defendant provided evidence of post-census demographic change within the jurisdiction. In *Johnson v. DeSoto County Bd. of Comm'rs*, 204 F.3d 1335 (11th Cir. 2000), the plaintiffs, using 1990 census figures proffered illustrative districts that were 54 to 57 percent black with respect to voting-age population. *Id.* at 1342. (There was no suggestion that the black population contained a disproportionate number of non-citizens). Nonetheless, relatively higher white population growth during the decade led the court to conclude that the plaintiffs' illustrative districts no longer satisfied the first precondition. *Id.* at 1343. Similarly, in *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848 (5th Cir. 1999), the defendant conceded that according to the 1990 census, the plaintiffs' illustrative district was majority Latino with respect to CVAP, but provided evidence that persuaded the court "that demographic changes between the 1990 census and the 1997 trial had eliminated that majority." *Id.* at 850. Even if there were citizenship data derived from decennial census forms, nothing about the existence of that data would preclude defendants from making arguments about intra-decade demographic changes. So nothing about the Gary proposal would help these plaintiffs either.

determine whether jurisdictions have satisfied the equipopulous districting requirement and using sophisticated estimation techniques to determine whether it is possible to create districts where a minority group can be electorally successful. (The other two *Gingles* preconditions by necessity use estimation techniques.) Nor is it problematic that ACS estimates are “rolling” and aggregated while the Census offers a static number. The Gary letter offers no reason why the numbers need to be derived simultaneously. Here, too, in a section 2 lawsuit, to prove racial bloc voting, the plaintiff must offer analysis of election results, often from intra-decade elections. So there will always be some degree of dynamism.

* * * * *

My conclusion from my experience and from rereading the existing cases in light of the Gary letter is that a citizenship question on the decennial census would not assist the Department of Justice (or private parties) in enforcing section 2 of the Voting Rights Act.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 19, 2018.



Pamela S. Karlan

Appendix A CurriculumVita of Pamela S. Karlan

Stanford Law School
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Stanford, CA 94305-8610

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ACADEMIC APPOINTMENTS

Stanford Law School
Kenneth and Harle Montgomery Professor of Public Interest Law (since 1999); Co-Director, Supreme Court Litigation Clinic (since 2004); Associate Dean (1999-2000, 2005-06); Professor of Law (1998-99)

University of Virginia School of Law
Roy L. and Rosamond Woodruff Morgan Research Professor (1994-98); Professor of Law (1993-98); Associate Professor of Law (1988-93)

Visiting Professor, Harvard Law School (1994-95); N.Y.U. School of Law (Spring 1993); Stanford Law School (Fall 1996); Stanford University Breyer Center for Overseas Studies in Florence (Winter 2016, Winter 2019); Tel Aviv University Buchmann Faculty of Law (Spring 2011); University of Virginia School of Law (Fall 2002); Yale Law School (Fall 1992, Fall 2006, Fall 2011)

Recent Law School Courses: Civil Procedure; Conflicts, Ethics, and the Academy; Constitutional Law; Constitutional Litigation; Regulation of the Political Process; Supreme Court Litigation Clinic; Torts

Recent Undergraduate Courses: Constituting a Republic: Machiavelli, Madison, and Modern Issues; Justice and the University

Policy Fellow, Rockefeller Foundation Bellagio Center (2017); Phi Beta Kappa Visiting Scholar (2011-12); Coif Distinguished Visiting Professor (2006); John Bingham Hurlbut Award for Excellence in Teaching, Stanford (2002, 2009); State Council of Higher Education in Virginia Outstanding Faculty Award (1997); University of Virginia All-University Outstanding Teaching Award (1995-96); Elected Graduation Speaker, Yale Law School (2007), University of Virginia School of Law (1991)

OTHER PROFESSIONAL EXPERIENCE

United States Department of Justice
Deputy Assistant Attorney General, Civil Rights Division (2014-15)

Reviewer for the Employment Litigation Section, the Voting Section, and the Office of Special Counsel for Immigration-Related Unfair Employment Practices

Received the Attorney General's John Marshall Award for Providing Legal Advice – the Department's highest award to attorneys for contributions and excellence in specialized areas of legal performance – as part of the team responsible for guiding the department to its new position regarding Title VII and gender identity (2015)

Received the Attorney General's Award for Exceptional Service – the Department's highest award for employee performance – for work on the *Windsor* Implementation Team (2014)

California Fair Political Practices Commission
Commissioner (2003-05)

Appointed by Controller Steve Westley to the state commission responsible for implementing and enforcing California's campaign finance, lobbying, and conflict of interest laws

NAACP Legal Defense and Educational Fund, Inc.
Cooperating Attorney (1988-2013); Assistant Counsel (1986-88)

Focused on trials and appeals of cases involving Title VII of the Civil Rights Act of 1964 and Section 2 of the Voting Rights Act of 1965 (individual cases are listed under Litigation Experience)

Supreme Court of the United States
Law Clerk to Justice Harry A. Blackmun, October Term 1985

United States District Court for the Southern District of New York
Law Clerk to Judge Abraham D. Sofaer (1984-85)

Lecturer, Judicial Education Programs (since 1993), including, among others, the Federal Judicial Center and the ABA Appellate Judges' Conference; the NYU Institute of Judicial Administration New Judges' Seminar and the University of Virginia School of Law Master of Laws in the Judicial Process Program; and state programs in California, Delaware, Pennsylvania, and Washington

Guest Lecturer, Federal Bureau of Investigation National Academy (1990-2001)

Pro bono representation of individuals, groups, and elected officials before courts and in the legislative process (individual cases are listed under Litigation Experience) (since 1988)

Named one of the *Politico 50* – a group of “thinkers, doers, and visionaries transforming American politics” (2016)

Alumni Achievement Award, Yale Law School OutLaws (2014)

National Public Service Award, Stanford Law School (2013)

Named one of the *American Lawyer Public Sector 45* – a group of lawyers “actively using their law degrees to change lives” (1997)

Elected Member: American Law Institute; American Academy of Arts and Sciences;
American Academy of Appellate Lawyers

PUBLICATIONS

Books

Civil Rights Actions: Enforcing the Constitution (2000; 2nd ed. 2007; 3rd ed. 2013; 4th ed. 2018) (with John C. Jeffries, Jr., Peter W. Low and George A. Rutherglen) (with supplements)

A Constitution for all Times (2013)

Constitutional Law (5th ed. 2005; 6th ed. 2009; 7th ed. 2013; 8th ed. 2018) (with Geoffrey R. Stone, Louis Michael Seidman, Cass R. Sunstein, and Mark V. Tushnet) (with supplements)

The First Amendment (2nd ed. 2003; 3rd ed. 2008; 4th ed. 2012) (with Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet) (with supplements)

Keeping Faith with the Constitution (2009; rev. ed. 2010) (with Goodwin Liu and Christopher Schroeder) (honored by the Green Bag as one of its examples of “Exemplary Legal Writing 2011”)

The Law of Democracy: Legal Structure of the Political Process (1998; 2nd ed. 2001; rev. 2nd ed. 2002; 3rd ed. 2007; 4th ed. 2012; 5th ed. 2016) (with Samuel Issacharoff, Nathaniel Persily, and Richard H. Pildes) (with supplements)

Race, Incarceration, and American Values (2008) (with Glenn C. Loury, Tommie Shelton, and Loïc Wacquant) (Tanner Lecture and commentaries)

When Elections Go Bad: The Law of Democracy and the Presidential Election of 2000 (with Samuel Issacharoff and Richard H. Pildes) (2001; rev. ed. 2001)

Articles and Book Chapters

2018

Reapportionment, Nonapportionment, and Recovering Some Lost History of One-Person, One Vote, 59 Wm. & Mary L. Rev. 1921 (2018)

Undue Burdens and Potential Opportunities in Voting Rights and Abortion Law, 93 Ind. L.J. 139 (2018)

2016

Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Cases, 77 Ohio St. L.J. 763 (2016)

2015

The Alabama Foundations of the Law of Democracy, 67 Ala. L. Rev. 415 (2015)

2014

Citizens Deflected: Electoral Integrity and Political Reform *in* Citizens Divided: A Constitutional Theory of Campaign Finance Reform (2014) (Tanner Lectures and commentaries)

Out of Alignment, Boston Rev., Jan./Feb. 2014, at 10

2013

Answering Questions, Questioning Answers, and the Role of Empiricism in the Law of Democracy, 65 Stan. L. Rev. 1269 (2013)

The Constitution Without the Court, Boston Rev., July/Aug. 2013, at 10

Founding Firearms: Originalism and the Second Amendment, Boston Rev., May/June 2013, at 10

Gideon at Fifty, Boston Rev., Mar./Apr. 2013, at 8

A Moveable Court, Boston Rev., Sept./Oct. 2013, at 10

The Supreme Court's Docket Addresses the Washington Gridlock, Boston Rev., Nov./Dec. 2013, at 10

Votes Behind Bars, Boston Rev., Jan./Feb. 2013, at 14

2012

The "Ambiguous Giving Out": The Complicated Roles of Disclosure and Anonymity in Political Activity, 27 Va. J.L. & Pol. 655 (2012)

Big Brother Buys a GPS, Boston Rev., Jan./Feb. 2012, at 10

Contempt of Court, Boston Rev., Nov./Dec. 2012, at 10

Empty Benches, Boston Rev., Sept./Oct. 2012, at 12

Forty Years After Watergate, Boston Rev., July/Aug. 2012, at 10

The Supreme Court, 2011 Term, Foreword: Democracy and Disdain, 126 Harv. L. Rev. 1 (2012)

The Transformation of Judicial Self-Restraint, 100 Cal. L. Rev. 607 (2012) (Jorde Symposium)

What's a Right Without a Remedy?, Boston Rev., Mar./Apr. 2012, at 10

When the Umpire Throws the Pitches, Boston Rev., May/June 2012, at 10

2011

The Cost of Death, Boston Rev., Nov./Dec. 2011, at 10

The Gay and the Angry: The Supreme Court and the Battles Surrounding Same-Sex Marriage, 2011 Sup. Ct. Rev. 159

The Health Care Challenge Threatens All Regulation, Boston Rev., Mar./Apr. 2011, at 10

In Memoriam: William J. Stuntz, 124 Harv. L. Rev. 1841 (2011)

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Me, Inc., Boston Rev., July/Aug. 2011, at 10

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The Reconstruction of Voting Rights *in* Race, Reform, and the Regulation of the Political Process: Recurring Puzzles in American Democracy (Heather Gerken, Guy-Uriel Charles and Michael Kang ed. 2011)

Sometimes an Amendment Is Just an Amendment, Boston Rev., Sept./Oct. 2011, at 12

Ten Years After Bush v. Gore, Boston Rev., Jan./Feb. 2011, at 10

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Acting Out, Boston Rev., Nov./Dec. 2010, at 10

In the Beginning, Boston Rev., Sept./Oct. 2010, at 7

Let's Call the Whole Thing Off, 98 Cal. L. Rev. 697 (2010) (Jorde Symposium)

Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century, 78 U.M.K.C. L. Rev. 875 (2010) (Edward A. Smith/Bryan Cave Lecture)

2009

Ballots, Bullets, and Battles on the Roberts Court, 35 Ohio N.U.L. Rev. 435 (2009) (Kormendy Lecture)

Constitutional Law as Trademark, 43 U.C. Davis L. Rev. 385 (2009) (Barrett Lecture)

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Lessons Learned: Voting Rights and the Bush Administration, 4 Duke J. Con. Law & Pub. Pol'y 17 (2009)

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2007

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It's Not Black and White Any More: Contemporary Controversies in Voting Rights, 43 *N.Y.L. School L. Rev.* 137 (1999)

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Two Concepts of Judicial Independence, 72 *So. Cal. L. Rev.* 535 (1999)

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The Fire Next Time: Reapportionment after the 2000 Census, 50 *Stan. L. Rev.* 731 (1998)

The Geography of Race in Elections: Color Blindness and Redistricting, 14 *J.L. & Pol.* 109 (1998) (American Bar Association Presidential Showcase Program roundtable discussion)

The Impact of the Voting Rights Act on African Americans: Second and Third Generation Issues in Voting Rights and Redistricting in the United States (Mark Rush ed. 1998)

The Path of the Law Firm: A Comment on Ribstein's "Ethical Rules, Agency Costs and Law Firm Structure," 84 *Va. L. Rev.* 1761 (1998)

Race, Rights, and Remedies in Criminal Adjudication, 96 *Mich. L. Rev.* 2001 (1998)

Some Thoughts on Autonomy and Equality in Relation to Justice Blackmun, 26 *Hastings Const. L.Q.* 59 (1998)

Standing and Misunderstanding in Voting Rights Law, 111 *Harv. L. Rev.* 2276 (1998) (with Samuel Issacharoff)

Two Section Twos and Two Section Fives: Voting Rights and Remedies after *Boerne*, 39 *Wm. & Mary L. Rev.* 725 (1998)

1997

Just Politics?: Five Not So Easy Pieces of the 1995 Term, 34 *Houston L. Rev.* 289 (1997) (Frankel Lecture)

Loss and Redemption: Voting Rights at the Turn of a Century, 50 *Vand. L. Rev.* 291 (1997)

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†Mount Lemmon Fire District v. Guido, ___ S. Ct. ___ (counsel for respondent)

†Nieves v. Bartlett, ___ S. Ct. ___ (counsel for respondent)

†United States v. Sims, ___ S. Ct. ___ (counsel for respondent)

†Weyerhaeuser Company v. U.S. Fish and Wildlife Service, ___ S. Ct. ___ (counsel for respondent-intervenors)

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†Abbott v. Perez, 138 S. Ct. 2305 (2018) (counsel for appellee Mexican American Legislative Caucus)

†Currier v. Virginia, 138 S. Ct. 2144 (2018) (counsel for petitioner)

†Lozner v. City of Riviera Beach, 138 S. Ct. 1945 (2018) (counsel for petitioner) (arguing counsel)

†Gill v. Whitford, 138 S. Ct. 1916 (2018) (counsel for amici curiae law professors Samuel R. Bagenstos, Richard Briffault, Erwin Chemerinsky, Henry L. Chambers, Jr., Joshua A. Douglas, Joseph Fishkin, Rebecca Green, Michael Halberstam, Michael S. Kang, Pamela S. Karlan, and Franita Tolson in support of appellees)

†Koons v. United States, 138 S. Ct. 1783 (2018) (counsel for petitioners)

†Jesner v. Arab Bank, 138 S. Ct. 1386 (2018) (counsel for petitioners)

†Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (counsel for petitioner)

†Esquivel-Quintana v. Lynch, 137 S. Ct. 1562 (2017) (counsel for petitioner)

†Endrew F. v. Douglas County School District RE-1, 137 S.Ct. 988 (2017) (counsel for petitioner)

†Manuel v. City of Joliet, 137 S.Ct. 911 (2017) (counsel for petitioner)

†Peña Rodriguez v. Colorado, 137 S.Ct. 855 (2017) (counsel for petitioner)

†Ivy v. Morath, 137 S. Ct. 414 (2016) (counsel for petitioners)

†Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016) (counsel for amicus curiae Association of American Law Schools in support of respondents)

*Evenwel v. Abbott, 136 S. Ct. 1120 (2016) (counsel for amicus curiae United States supporting respondent)

†Friedrichs v. California Teachers Association, 136 S. Ct. 1083 (2016) (per curiam) (counsel for amici curiae Peace Officers Research Association of California, Peace Officers Research Association of California Legal Defense Fund, National Association of Police Organizations, CAL FIRE Local 288, New York State Association Of Police Benevolent Associations, Detectives' Endowment Association Of The New York City Police Department, California Statewide Law Enforcement Association, Davis Professional Firefighters Association Local 3494, Fresno Deputy Sheriff's Association, San Francisco Police Officers Association, Deputy Sheriffs' Association Of Santa Clara County, And Engineers & Architects Association in support of respondents)

*Arizona State Legislature v. Arizona Independent Redistricting Commission, 135 S. Ct. 2652 (2015) (counsel for amicus curiae United States supporting appellees)

*Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (counsel for amicus curiae United States supporting petitioners)

†Harris v. Quinn, 134 S. Ct. 2618 (2014) (counsel for amicus curiae Paraprofessional Health Institute in support of respondents)

†Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623 (2014) (counsel for amici curiae constitutional and local government law scholars Michelle Wilde Anderson, Richard Briffault, Richard Thompson Ford, Sheila Foster, Gerald E. Frug, Daniel B. Rodriguez, Richard C. Schragger, and Rick Su in support of the Cantrell Respondents)

†Fernandez v. California, 134 S. Ct. 1126 (2014) (counsel for petitioner)

†Air Wisconsin Airlines Corp. v. Hoeper, 134 S. Ct. 852 (2014) (counsel for respondent)

†Daimler-Chrysler AG v. Bauman, 134 S. Ct. 746 (2014) (counsel for respondent)

†United States v. Windsor, 570 U.S. 744 (2013) (counsel for respondent)

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†Fisher v. University of Texas, 570 U.S. 297 (2013) (counsel for amicus curiae American Association of Law Schools in support of respondents)

†Descamps v. United States, 570 U.S. 254 (2013) (counsel for amici curiae National Association of Criminal Defense Lawyers and National Association of Federal Defenders in support of petitioner)

†Salinas v. Texas, 570 U.S. 178 (2013) (counsel for petitioner)

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†Moncrieffe v. Holder, 569 U.S. 184 (2013) (counsel for petitioner)

†Kiobel v. Royal Dutch Shell Co., 569 U.S. 108 (2013) (counsel for amici curiae Abukar Hassan Ahmed, Daniel Alvarado, Dr. Juan Romagoza Arce, Aldo Cabello, Zita Cabello, Aziz Mohamed Deria, Dolly Filartiga, Neris Gonzales, Gloria Reyes, Oscar Reyes, Cecilia Santos Moran, Zenaida Velasquez, Bashe Abdi Yousuf, and the Center for Justice and Accountability in support of petitioners)

†Decker v. Northwest Environmental Defense Center, 568 U.S. 597 (2013) (counsel for respondent)

†Chaidez v. United States, 568 U.S. 342 (2013) (counsel for petitioner)

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†Golan v. Holder, 565 U.S. 302 (2012) (counsel for petitioners)

†Greene v. Fisher, 565 U.S. 34 (2011) (counsel for petitioner)

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Board of Trustees of Leland Stanford Junior University v. Roche Molecular Systems, Inc., 563 U.S. 776 (2011) (counsel for petitioner)

†United States v. Tinklenberg, 563 U.S. 647 (2011) (counsel for respondent)

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†Brown v. Plata, 563 U.S. 493 (2011) (counsel for appellee California Correctional and Peace Officers Association)

†Sossamon v. Texas, 563 U.S. 277 (2011) (counsel for petitioner)

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†Magwood v. Patterson, 561 U.S. 320 (2010) (counsel for petitioner)

†Dolan v. United States, 560 U.S. 605 (2010) (counsel for petitioner) (arguing counsel)

†Abbott v. Abbott, 130 S. Ct. 1983 (2010) (counsel for petitioner)

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curiae Central New York Citizens in Action, Inc., Empire Justice Center, Lawyers' Committee for Civil Rights Under Law, Long Island Housing Services, Inc., National Community Reinvestment Coalition, National Fair Housing Alliance, Neighborhood Economic Development Advocacy Project, Progressive Research & Action Center, Inc., Public Citizen, Inc., South Brooklyn Legal Services, U.S. PIRGs: Federation of State PIRGs, and Washington Lawyers' Committee for Civil Rights and Urban Affairs at the certiorari stage and amici curiae NAACP Legal Defense and Educational Fund, Inc., and Lawyers' Committee for Civil Rights Under Law at the merits stage)

†Melendez-Diaz v. Massachusetts 557 U.S. 305 (2009) (counsel for petitioner)

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†AT&T v. Hulteen, 556 U.S. 701 (2009) (counsel for respondents)

†Flores-Figueroa v. United States, 556 U.S. 646 (2009) (counsel for petitioner)

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†Cone v. Bell, 556 U.S. 149 (2009) (counsel for petitioner)

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†Herring v. United States, 555 U.S. 135 (2009) (counsel for petitioner) (arguing counsel)

†Jimenez v. Quarterman, 555 U.S. 113 (2009) (counsel for petitioner)

†Kennedy v. Louisiana, 554 U.S. 407 and 554 U.S. 945 (2008) (counsel for petitioner)

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†Meacham v. Knolls Atomic Power Laboratory, 554 U.S. 84 (2008) (counsel for petitioners)

†Richlin Security Services Corp. v. Chertoff, 553 U.S. 571(2008) (counsel for amici curiae National Association of Legal Assistants and Paralyzed Veterans of America)

- †Riley v. Kennedy, 553 U.S. 406 (2008) (counsel for appellees) (arguing counsel)
- †Crawford v. Marion County Election Board, 553 U.S. 181 (2008) (counsel for petitioners)
- †Virginia v. Moore, 553 U.S. 164 (2008) (counsel for respondent)
- †Burgess v. United States, 553 U.S. 124 (2008) (counsel for petitioner)
- †Tennessee Secondary School Athletics Association v. Brentwood Academy, 551 U.S. 291 (2007) (counsel for amicus curiae National School Boards Association)
- †Wilkie v. Robbins, 551 U.S. 537 (2007) (counsel for respondent)
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- †Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006) (counsel for amici curiae National Women's Law Center et al.)
- †Hill v. McDonough, 547 U.S. 573 (2006) (counsel for amici Bradley A. MacLean and William P. Redick)
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- †Spector v. Norwegian Cruise Line Limited, 545 U.S. 119 (2005) (counsel for petitioners)

†Rousey v. Jacoway, 544 U.S. 320 (2005) (counsel for petitioners) (arguing counsel)

†Smith v. City of Jackson, 544 U.S.228 (2005) (counsel for petitioners)

†Whitfield v. United States, 543 U.S. 209 (2005) (counsel for petitioners)

†U.S. Dept. of Transportation v. Public Citizen 541 U.S. 752 (2004) (counsel for amici curiae Defenders of Wildlife, Environmental Defense, and Sierra Club)

Vieth v. Jubelirer, 541 U.S. 267 (2004) (counsel for amici curiae Texas House Democratic Caucus and Representatives Chris Bell, Martin Frost, Sheila Jackson Lee, and John Lewis)

Lawrence v. Texas, 539 U.S. 558 (2003) (counsel for amici curiae constitutional law professors)

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Branch v. Smith, 538 U.S. 254 (2003) (counsel for appellants)

Sinkfield v. Kelley, 531 U.S. 28 (2000) (counsel for the Sinkfield appellants)

State of Texas v. United States, 523 U.S. 296 (1998) (counsel for amici curiae American Civil Liberties Union and NAACP Legal Defense and Educational Fund)

Clinton v. Jones, 520 U.S. 681 (1997) (counsel for amici curiae group of law professors)

Shaw v. Hunt, 517 U.S. 899 (1996) (counsel for amici curiae North Carolina Legislative Black Caucus and North Carolina Association of Black Lawyers)

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Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (1990) (counsel for petitioners)

U.S. Supreme Court Certiorari, Jurisdictional Statement, and Stay Stage Cases

(Note: Cases in which I participated in which the Supreme Court granted plenary review or issued a written opinion are listed above if I participated at the merits stage; cases in which I participated in the courts of appeals where review was sought but denied are listed in the section concerning litigation in those courts.)

†Campos v. United States, ___ S.Ct. ___ (counsel for petitioner)

†J.B.R. v. United States, ___ S. Ct. ___ (counsel for petitioner)

†Turner v. United States, ___ S. Ct. ___ (counsel for *amici curiae* former judges and prosecutors U.W. Clemon, W.J. Michael Cody, Nancy Gertner, John Gleeson, Alex Little, Wendy J. Olson, Kevin Sharp, Joyce Vance, and Edward M. Yarbrough in support of petitioner)

†Licci v. Lebanese Canadian Bank, ___ S. Ct. ___ (counsel for petitioners)

†Planned Parenthood v. Jegley, 138 S. Ct. 2473 (2018) (counsel for petitioner)

†D.T. v. W.G., 138 S. Ct. 1441 (2018) (counsel for petitioner)

†Davenport v. City of Sandy Springs, 138 S. Ct. 1326 (2018) (counsel for petitioners)

†Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah), 138 S. Ct. 639 (2018)

(counsel for respondents)

†Evans v. Georgia Regional Hospital, 138 S. Ct. 557 (2017) (counsel for petitioner)

†Robinson v. United States, 138 S. Ct. 379 (2017) (counsel for petitioner)

†Glisson v. D.O., 138 S. Ct. 316 (2017) (counsel for respondents)

†Blackorby v. BNSF Railway Co., 138 S. Ct. 264 (2017) (counsel for petitioner)

†Loomis v. Wisconsin, 137 S. Ct. 2290 (2017) (counsel for petitioner)

†Northeast Ohio Coalition for the Homeless v. Husted, 137 S. Ct. 2265 (2017) (counsel for petitioners Northeast Ohio Coalition for the Homeless and Columbus Coalition for the Homeless)

†Connecticut v. Dickson, 137 S. Ct. 2263 (2017) (counsel for respondent)

United States ex rel. Advocates for Basic Legal Equality, Inc. v. U.S. Bank, N.A., 137 S. Ct. 2180 (2017) (counsel for petitioner)

†Garner v. Colorado, 137 S. Ct. 1813 (2017) (counsel for petitioners)

†Walker v. Texas, 137 S. Ct. 1813 (2017) (counsel for petitioner)

†FTS USA, LLC v. Monroe 137 S. Ct. 590 (2016) (counsel for petitioners)

†West Virginia Department of Health and Human Resources v. E.H., 137 S. Ct. 328 (2016) (counsel for respondents)

†Hyland v. Xerox Corp., 137 S. Ct. 84 (2016) (counsel for petitioner)

†GEICO General Insurance Co. v. Calderon, 137 S. Ct. 53 (2016) (counsel for respondents)

†Territory of Guam v. Paeste, 136 S. Ct. 2508 (2016) (counsel for respondents)

†Haberstroh v. Nevada, 136 S. Ct. 1660 (2016) (counsel for petitioner)

†Schumacher Homes of Circleville v. Spencer, 136 S. Ct. 1157 (2016) (counsel for respondents)

†Town of Mocksville v. Hunter, 136 S. Ct. 897 (2016) (counsel for respondents)

*Kobach v. United States Electoral Assistance Commission, 135 S. Ct. 2891 (2015) (counsel for respondents)

*Veasey v. Perry, 135 S. Ct. 9 (2014) (counsel for applicant United States)

†Brewington v. North Carolina, 134 S. Ct. 2660 (2014) (counsel for petitioner)

†Heien v. North Carolina, 134 S. Ct. 1872 (2014) (counsel for petitioner at the certiorari stage only)

†Hoagland v. Ada County, 134 S. Ct. 1024 (2014) (counsel for petitioner)

†Riley v. California, 134 S. Ct. 999 (2014) (counsel for petitioner at the certiorari stage only)

†Loughrin v. United States, 134 S. Ct. 822 (2013) (counsel for petitioner at the certiorari stage only)

†Alabama Black Legislative Caucus v. State of Alabama, 134 S. Ct. 694 (2013) (counsel for appellants)

†New Mexico v. Navarette, 134 S. Ct. 64 (2013) (counsel for respondent)

†Windsor v. United States, 133 S. Ct. 2884 (2013) (counsel for petitioner)

†Bipartisan Legislative Advisory Group of the United States House of Representatives v. Windsor, 133 S. Ct. 2885 (2013) (counsel for respondent)

†Donaldson v. Dep't of Homeland Security, 133 S. Ct. 2854 (2013) (counsel for petitioner)

†Allshouse v. Pennsylvania, 569 U.S. 972 (2013) (counsel for petitioner)

†Miller v. Louisiana, 568 U.S. 1157 (2013) (counsel for petitioner)

†City of New York v. Southerland, 568 U.S. 1150 (2013) (counsel for respondents)

†Pleau v. United States, 568 U.S. 1122 (2013) (counsel for petitioner)

†Delling v. Idaho, 568 U.S. 1038 (2012) (counsel for petitioner)

†Rivas-Lopez v. United States, 568 U.S. 817 (2012) (counsel for petitioner)

†Pickering v. Colorado, 566 U.S. 1009 (2012) (counsel for petitioner)

†Heydt-Benjamin v. Heydt-Benjamin, 564 U.S. 1047 (2011) (counsel for petitioner)

†Zuress v. Donley, 564 U.S. 1037 (2011) (counsel for petitioner)

†Cardinal v. Metrish, 563 U.S. 969 (2011) (counsel for petitioner)

- †South Carolina, 563 U.S. 963 (2011) (counsel for petitioner)
- †Edwards v. A.H. Cornell and Son, Inc., 562 U.S. 1280 (2011) (counsel for the petitioner)
- †Allshouse v. Pennsylvania, 562 U.S. 1267 (2011) (counsel for petitioner)
- †Barbour v. Louisiana, 562 U.S. 1217 (2011) (counsel for petitioner)
- †Castro v. United States, 562 U.S. 1168 (2011) (counsel for petitioner)
- †Experian Information Solutions v. Pintos, 562 U.S. 1134 (2011) (counsel for respondent)
- †Gao v. Holder, 562 U.S. 1134 (2011) (counsel for petitioner)
- †Lafler v. Cooper, 562 U.S. 1127 (2011) (counsel for respondent at the certiorari stage only)
- †Bannister v. Illinois, 562 U.S. 1061 (2010) (counsel for petitioner)
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- †Pendergrass v. Indiana, 560 U.S. 965 (2010) (counsel for petitioner)
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- †United States v. Bowden, 558 U.S. 1091 (2009) (counsel for respondent)
- †Virginia v. Rudolph, 558 U.S. 1048 (2009) (counsel for respondent)
- †Burkey v. Marberry, 558 U.S. 969 (2009) (counsel for petitioner)
- †Daniels v. Washington, 558 U.S. 819 (2009) (counsel for petitioner)
- †Bowen v. Oregon, 558 U.S. 815 (2009) (counsel for petitioner)
- †Durall v. Quinn, 557 U.S. 904 (2009) (counsel for petitioner)
- †Navajo Nation v. United States Forest Service, 556 U.S. 1281 (2009) (counsel for petitioners)
- †Dunphy v. United States, 556 U.S. 1257 (2009) (counsel for petitioner)
- †Mitchell v. Rees, 555 U.S. 1212 (2009) (counsel for petitioner)
- †Polar Tankers, Inc. v. City of Valdez, 555 U.S. 1083 (2008) (counsel for respondent at the certiorari stage only)

†Smith v. United States, 555 U.S. 993 (2008) (counsel for petitioner)

†Lee v. Louisiana, 555 U.S. 823 (2008) (counsel for petitioner)

†Kay v. United States, 555 U.S. 813 (2008) (counsel for petitioners)

†Lewis v. United States, 555 U.S. 813 (2008) (counsel for petitioners)

†Riley v. Plump, 555 U.S. 801 (2008) (counsel for appellee)

†Green v. Chilton County Commission, 554 U.S. 918 (2008) (counsel for Dillard respondents)

†Baker v. Chisom, 554 U.S. 902 (2008) (counsel for petitioner)

†Anderson v. Cagle's, Inc., 553 U.S. 1093 (2008) (counsel for petitioners)

†Lawler v. Nara, 552 U.S. 1309 (2008) (counsel for respondent)

†Beasley v. United States, 552 U.S. 1242 (2008) (counsel for petitioner)

†Dickinson v. Collier, 552 U.S. 1096 (2008) (counsel for respondents)

†NCAA v. Cohane, 552 U.S. 1022 (2007) (counsel for respondent)

†Sasouvong v. Washington, 552 U.S. 816 (2007) (counsel for petitioner)

†McKenzie v. Carolina Care Plan, Inc., 551 U.S. 1176 (2007) (counsel for petitioner)

†Carolina Care Plan, Inc. v. McKenzie, 551 U.S. 1176 (2007) (counsel for respondent)

†Hrasky v. United States, 550 U.S. 903 (2007) (counsel for petitioner)

†Lively v. Wild Oats Market, 549 U.S. 1207 (2007) (counsel for petitioner)

†Goodin v. U.S. Postal Service, 549 U.S. 1111 (2006) (counsel for petitioner)

†Davis v. United States, 549 U.S. 1030 (2006) (counsel for petitioner)

†Medeiros v. Sullivan, 548 U.S. 904 (2006) (counsel for petitioner)

†Mouelle v. Gonzalez, 548 U.S. 901 (2006) (counsel for petitioners)

†Pierce v. Jeter, 547 U.S. 1127(2006) (counsel for petitioner)

†Cox v. United States, 547 U.S. 1127 (2006) (counsel for petitioner)

†City of Columbus v. Golden, 546 U.S. 1032 (2005) (counsel for petitioner)

†Johnson v. Bush, 546 U.S. 1015 (2005) (counsel for amicus curiae League of Women Voters of Florida)

†Hadfield v. McDonough, 546 U.S. 961 (2005) (counsel for petitioner)

†Illinois v. Bartels, 546 U.S. 801 (2005) (counsel for respondent)

†Bell v. Abdur’Rahman, 545 U.S. 1151 (2005) (counsel for respondent)

†Stavropolous v. Firestone, 544 U.S. 976 (2005) (counsel for petitioner)

†City of Evanston v. Franklin, 544 U.S. 956 (2005) (counsel for respondent)

†Arkansas v. Jolly, 544 U.S. 948 (2005) (counsel for respondent)

†Donaldson v. Lott, 543 U.S. 1050 (2005) (counsel for petitioners)

Meadows v. Moon, 521 U.S. 1113 (1997) (counsel for private appellants)

Harris v. City of Birmingham, 505 U.S. 1201 (1992) (counsel for appellant)

United States Courts of Appeals

Lewis v. Alabama, 896 F.3d 1282 (11th Cir. 2018) (counsel for amici curiae historians Susan Ashmore, Wayne Flynt, Hasan Jeffries, J. Morgan Kousser, Peyton McCrary, and Patricia Sullivan in support of appellants seeking reversal)

*North Carolina Conf. of the State NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016) (counsel for appellant United States)

*Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (en banc) (counsel for appellee United States)

*Lopez v. City of Lawrence, 823 F.3d 102 (1st Cir. 2016) (counsel for amicus curiae United States)

*United States v. State of Georgia, 778 F.3d 1202 (11th Cir. 2015) (counsel for appellee United States)

*United States v. State of Alabama, 778 F.3d 926 (11th Cir. 2015) (counsel for appellee United States)

*Kobach v. United States Electoral Assistance Commission, 772 F.3d 1183 (10th Cir. 2014)

(counsel for appellants Electoral Assistance Commission and Alice Miller)

*Veasey v. Perry, 769 F.3d 890 (5th Cir. 2014) (counsel for appellee United States)

*Frank v. Walker, 769 F.3d 494 (7th Cir. 2014) (counsel for amicus curiae United States)

*League of Women Voters v. North Carolina, 769 F.3d 224 (4th Cir. 2014) (counsel for amicus curiae United States)

†Farrakhan v. Gregoire, 623 F.3d 990 (9th Cir. 2010) (en banc) (counsel for amici curiae law professors)

Simpson v. Colorado University, 500 F.3d 1170 (10th Cir. 2007) (counsel for appellant)

Dillard v. Baldwin County Commission, 376 F.3d 1260 (11th Cir. 2004) (counsel for appellants)

United States v. Smith and Tyree, 231 F.3d 800 (11th Cir. 2000), *cert. denied*, 532 U.S. 1019 (2001) (counsel for appellants) (arguing counsel)

Hoffman v. Hunt, 126 F.3d 525 (4th Cir. 1997), *cert. denied*, 526 U.S. 1135 (1998) (counsel for amicus curiae Planned Parenthood Federation of America)

Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir.), *cert. denied*, 522 U.S. 963 (1997) (counsel for *amici curiae* law professors)

Cane v. Worcester County, 35 F.3d 921 (4th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995), and 59 F.3d 165 (4th Cir. 1995) (counsel for amicus curiae Center for Voting and Democracy)

Boureslan v. Arabian American Oil Co., 892 F.2d 1291 (5th Cir. 1990), *aff'd*, 499 U.S. 244 (1991) (counsel for amicus curiae NAACP Legal Defense and Educational Fund)

City of Scottsboro v. Battle, No. 88-7674 (11th Cir. 1989) (counsel for interlocutory appellants) (arguing counsel)

Westwego Citizens for Better Government v. City of Westwego, 872 F.2d 1201 (5th Cir. 1989) (counsel for amicus curiae NAACP Legal Defense and Educational Fund)

Montero v. Meyer, 861 F.2d 603 (10th Cir. 1988) (counsel for amici curiae NAACP Legal Defense and Educational Fund and American Civil Liberties Foundation of Colorado)

Larkin v. Pullman-Standard, 854 F.2d 1549 (11th Cir. 1988), *vacated and remanded*, 493 U.S. 929 (1989) (counsel for appellants)

Chisom v. Edwards, 853 F.2d 1156 (5th Cir. 1988) (counsel for appellees) (arguing counsel)

Gomez v. City of Watsonville, 852 F.2d 1186 (9th Cir. 1988) (counsel for amicus curiae NAACP Legal Defense and Educational Fund)

Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988) (counsel for appellants) (arguing counsel)

Mallory v. Eyrich, 839 F.2d 275 (6th Cir. 1988) (counsel for amici curiae NAACP Legal Defense and Educational Fund and Lawyers' Committee for Civil Rights under Law)

United States v. Gordon, 836 F.2d 1312 (11th Cir. 1988) (per curiam) (counsel on petition for rehearing for defendant)

United States District Courts

*United States v. Alabama, (M.D. Ala) (counsel for plaintiff)

*Brown v. Con-Way Freight, 2016 WL 861210 (N.D. Ill. 2016) (counsel for plaintiff)

*Jamal v. Saks & Co., Civ. Act. No. 14-2782 (S.D. Tex.) (settled 2015) (counsel for United States (statement of interest))

*Poor Bear v. County of Jackson, 2015 WL 1969760 (D.S.D. 2015) (counsel for United States (statement of interest))

*Toyukak v. Treadwell, Case No. 3:13-cv-137-SLG (D. Alaska 2014) (counsel for United States (statement of interest))

*Wandering Medicine v. McCulloch, Case No. 1:12-CV-135-DWM (D. Mont.) (counsel for United States (statement of interest))

*United States v. City of Austin, Civ. Act. No. 1:14cv533-L (W.D. Tex.) (counsel for plaintiff)

*United States v. Chicago Board of Education, Case No. 14-CIV-10285 (N.D. Ill.) (counsel for plaintiff)

*United States v. State of Louisiana, Civ. Act. No. 3:11-CV-470-JWD-RLB (M.D. La.) (counsel for plaintiff)

*United States v. School District of Philadelphia, Civ. Act. No. 2:14-cv-01334 (E.D. Pa.) (settled 2014) (counsel for plaintiff)

*United States v. West Virginia, 2014 WL 7338867 (S.D.W. Va. 2014) (counsel for plaintiff)

*United States v. Southeastern Oklahoma State University, Case No. CIV-15-324-C (W.D. Okla.) (counsel for plaintiff)

*Veasey v. Perry, 29 F. Supp. 3d 386 (S.D. Tex. 2014) (counsel for plaintiff United States)

*Ohio State Conference, NAACP v. Husted, 2014 WL 4377869 (S.D. Ohio 2014) (counsel for United States (statement of interest))

*Kobach v. United States Electoral Assistance Commission, 6 F. Supp. 3d 1252 (D. Kans.), *rev'd*, 772 F.3d 1183 (10th Cir. 2014) (counsel for defendants Electoral Assistance Commission and Alice Miller)

*North Carolina State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322 (M.D.N.C. 2014) *aff'd in part, rev'd in part and remanded sub nom.* League of Women Voters v. North Carolina, 769 F.3d 224 (4th Cir. 2014) (counsel for plaintiff United States)

*Burnett v. City of Philadelphia-Free Library, Civ. Act. No. 09-4348 (E.D. Pa.) (settled 2014) (counsel for United States (statement of interest))

Voting Integrity Project v. Fleischer, Case No. Civ. 00 0109 PHX (PGR) (D. Ariz. Feb. 29, 2000) (counsel for amici curiae Center for Governmental Studies, Benjamin E. Mays National Educational Resource Center and Professor Charles E. Nesson)

Dillard v. Baldwin County Commission, 53 F. Supp.2d 1256 (M.D. Ala. 1999), *rev'd*, 275 F.3d 1271 (11th Cir. 2000) (counsel for plaintiffs)

Dillard v. City of Greensboro, 956 F. Supp. 1576 (M.D. Ala. 1997) (counsel for plaintiffs)

Moon v. Meadows, 952 F. Supp. 1141 (E.D. Va.) (three-judge court), *aff'd*, 521 U.S. 1113 (1997) (counsel for defendant-intervenors)

Mack v. Russell County Commission, 869 F. Supp. 1555 (M.D. Ala. 1994) (counsel for plaintiffs)

Morse v. Oliver North for U.S. Senate Committee, 853 F. Supp. 212 (W.D. Va. 1994) (three-judge court), *rev'd sub nom.* Morse v. Republican Party of Virginia, 517 U.S. 186 (1996) (counsel for plaintiffs) (arguing counsel)

Guy v. Hickel, No. A92-494 CIV (JWS) (D. Alaska 1994) (counsel for plaintiffs)

Texas Rural Legal Assistance v. Legal Services Corporation, 740 F. Supp. 880 (D.D.C. 1990), *rev'd and remanded*, 940 F.2d 685 (D.C. Cir. 1991) (counsel for amicus curiae National Legal Aid and Defender Association)

Jeffers v. Clinton, 730 F. Supp. 196 (E.D. Ark. 1989) (three-judge court), and 740 F. Supp. 585 (E.D. Ark. 1990) (three-judge court), *aff'd*, 498 U.S. 1019 (1991) (counsel for plaintiffs)

McDaniels v. Mehfood, 708 F. Supp. 754 (E.D. Va. 1989), *appeal dismissed*, 1991 U.S. App. LEXIS 2896 (4th Cir. 1989) (counsel to the Special Master)

Chisom v. Edwards, 690 F. Supp. 1524 (E.D. La. 1988), *vacated*, 853 F.2d 1186 (5th Cir.

1988) (counsel for plaintiffs)

Dillard v. Crenshaw County, 679 F. Supp. 1546 (M.D. Ala. 1988) (*on remand from* 831 F.2d 246 (11th Cir. 1987)); Dillard v. Chilton County Board of Education and Chilton County Commission, 699 F. Supp. 870 (M.D. Ala. 1988) and 1988 U.S. Dist. LEXIS 18248 (M.D. Ala. 1988); Dillard v. Baldwin County Commission, 694 F. Supp. 836 (M.D. Ala. 1988), and 701 F. Supp. 808 (M.D. Ala. 1988); Dillard v. Baldwin County Board of Education, 686 F. Supp. 1459 (M.D. Ala. 1988) (counsel for plaintiffs)

Whitfield v. Democratic Party of Arkansas, 686 F. Supp. 1365 (E.D. Ark. 1988), *aff'd by an equally divided court*, 902 F.2d 15 (8th Cir. 1990) (*per curiam*), *cert. denied*, 498 U.S. 1126 (1991) (counsel for plaintiffs)

Jones v. Edwards, 674 F. Supp. 1225 (E.D. La. 1987) (three-judge court) (counsel for plaintiffs)

Chisom v. Edwards, 659 F. Supp. 183 (E.D. La. 1987), *rev'd*, 839 F.2d 1056 (5th Cir.), *cert. denied*, 488 U.S. 955 (1988) (counsel for plaintiffs)

Martin v. Allain, 658 F. Supp. 1183 (S.D. Miss. 1987), and Martin v. Mabus, 700 F. Supp. 327 (S.D. Miss. 1988) (counsel for plaintiffs)

Patterson v. NMDU, No. 73 Civ. 3058 (WCC) (S.D.N.Y.) (counsel for plaintiffs)

State Courts

*Joseph v. Legislature of the Virgin Islands, Civil No. ST-11-CV-419 (V.I. Superior Ct.) (counsel for United States (statement of interest))

Wilkins v. West, 571 S.E.2d 100 (Va. 2002) (counsel to Governor Mark Warner) (arguing counsel)

Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068 (Cal. Sup. Ct. 2000) (of counsel to *amicus curiae* NAACP Legal Defense and Educational Fund, Inc.)

Gamboa v. Chandler, Civil No. 92-1846 (Hawaii Circuit Ct.) (of counsel to attorneys for plaintiffs)

Hicks v. Kemp, No. 87-V-1122 (Butts County Superior Ct., Dec. 30, 1988), *certificate of probable cause denied*, No. 4180 (Ga. Sup. Ct. Oct. 5, 1990), *cert. denied*, 494 U.S. 1074 (1991); *later proceeding*, No. 91-V-3647 (Butts County Superior Ct. 1994), *certificate of probable cause denied*, No. S94H1032 (Ga. Sup. Ct. Sept. 30, 1994), *cert. denied sub nom.* Hicks v. Thomas, 514 U.S. 1020 (1995) (counsel for petitioner)

† Cases litigated as co-director of the Stanford Supreme Court Litigation Clinic

* Cases in which I had significant involvement while serving as Deputy Assistant Attorney General in the Civil Rights Division of the United States Department of Justice (Note: It is a convention of the Appellate, Employment Litigation, and Voting Sections of the Civil Rights Division generally not to include the names of Deputy Assistant Attorneys General on court filings)

INVITED LECTURES, WORKSHOPS, PAPERS, AND SYMPOSIUM PRESENTATIONS

AFL-CIO Lawyers Conference; University of Alabama Law School; American Association of Law Schools Annual Meeting; American Bar Association Annual Meeting Presidential Showcases; American Bar Association Annual Meeting; American Civil Liberties Union Biennial Plenary Session; American Constitution Society Annual Convention; American Political Science Association Annual Meeting; American Sociological Association Annual Meeting; American University, Washington College of Law; Appellate Judges Educational Institute Annual Meeting; Association of Business Trial Lawyers San Francisco Chapter Annual Meeting; Aspen Institute Justice & Society Program; Augustana College; Boston University Law School; Brown University; California Judicial Council; University of California at Berkeley Institute of Governmental Studies; University of California at Berkeley, Boalt Hall; University of California at Davis School of Law; University of California, Hastings College of the Law; University of California at Los Angeles School of Law; University of California at Santa Cruz; Benjamin N. Cardozo School of Law; Case Western Reserve University School of Law; Chautauqua Institution; Chicago Humanities Festival; University of Chicago Law School; University of Cincinnati College of Law; University of Colorado Law School; Cornell Law School; Cumberland Law School; Defense Research Institute Appellate Lawyers Conference; Delaware Courts Annual Meeting; University of Denver, Sturm College of Law; DePaul University College of Law; Dickinson Law School; Drake Law School; Duke Law School; Eighth Circuit Judicial Conference; Emory Law School; Federal Judicial Center; Federalist Society National Student Convention; Fifth Circuit Judicial Conference; Florida State University School of Law; University of Florida College of Law; Fordham University School of Law; Fourth Circuit Judicial Conference; George Washington University Law School; Georgetown University Law Center; Georgia State University College of Law; University of Georgia Law School; Harvard University Civil Rights Project; Harvard Law School; University of Houston Law Center; Human Rights Campaign Right to THRIVE Conference; University of Illinois College of Law; Iowa Federal Bar Association Annual Meeting; Indiana University Law School; Johns Hopkins University; Kansas Bar Association Annual Meeting; University of Kansas Law School; Lavender Law; Law and Society Association Annual Meeting; Law School Admissions Council; Lewis and Clark Law School; Linfield College; Institute of Advanced Legal Studies, University of London; Louisiana State Bar Association/Louisiana Judicial College Annual Meeting; Loyola University Law School; Luther College; McGeorge School of Law; University of Miami Law School; University of Michigan Law School; Minnesota Judicial Branch Annual Conference of Judges; University of Minnesota Law School; University of Montana; NAACP Legal Defense and Educational Fund, Inc., Annual Civil Rights Training Institute; National Association of Attorneys General; National Association of College and University Attorneys; National Association of Criminal Defense

Lawyers West Coast White Collar Conference; National Civil Rights Museum; National Legal Aid and Defender Association Annual Litigation Directors' Conference; National Association of Women Judges; University of Nebraska; Nebraska Supreme Court and Court of Appeals Annual Meeting; University of New Mexico School of Law; N.Y.U. School of Law; Ninth Circuit Judicial Conference; University of North Carolina School of Law; Northern District of California Historical Society; Northern District of California Judicial Conference; Nova Southeastern University; Oberlin College; Ohio Northern University Pettit College of Law; Ohio State University College of Law; Oklahoma City University Law School; Oregon Bar Association; Oregon Women Lawyers Society; Pacific Northwest Judicial Conference; Pennsylvania State Appellate Courts Annual Conference; University of Pennsylvania School of Law; Princeton University; Seventh Circuit Judicial Conference; Sixth Circuit Judicial Conference; University of Southern California Law School; Southern Oregon Federal Bar Association; Southwestern Law School; Stanford Law School; Tel Aviv University Buchmann Faculty of Law; Tenth Circuit Judicial Conference; Texas A & M University; University of Texas Law School; Tribunal Electoral del Poder Judicial de la Federación (Mexico); Tulane Law School; United Nations Development Program International Congress on Elections; Vanderbilt Law School; University of Virginia School of Law; Washington State Courts Appellate Conference; Washington and Lee School of Law; Western New England College School of Law; Washington University School of Law; William & Mary College of Law; William & Mary Bill of Rights Institute; University of Wisconsin Law School; Yale Law School

EDUCATION

Yale Law School, J.D./M.A. (History), 1984

Article & Book Review Editor, Yale Law Journal
Director, Yale Moot Court of Appeals
Supervising Student, Jerome N. Frank Legal Services Organization
Head Coach, Yale Debate Association
Research Assistant, Professor Paul Gewirtz
Freshman Counselor, Jonathan Edwards College

Yale College, B.A. *magna cum laude* with distinction in history, 1980

Robert D. French Scholar (intellectual leadership; ranking prize of Jonathan Edwards College)
Ellsworth Prize (senior essay)
DeForest, Thacher, TenEyck, and Buck-Jackson Prizes (debate and public speaking)

BAR ADMISSIONS

Supreme Court of the United States
United States Courts of Appeals for the Fourth, Eighth, Ninth, and Eleventh Circuits
United States District Court for the Southern District of New York
Supreme Court, Appellate Division, First Department of the State of New York

Dec. 12 2017

Dr. Ron Jarmin
Performing the Non-Exclusive Functions and Duties of the Director
U.S. Census Bureau
United States Department of Commerce
Washington, D.C. 20233-0001

Re: Request To Reinstate Citizenship Question On 2020 Census Questionnaire

Dear Dr. Jarmin:

The Department of Justice is committed to robust and evenhanded enforcement of the Nation's civil rights laws and to free and fair elections for all Americans. In furtherance of that commitment, I write on behalf of the Department to formally request that the Census Bureau reinstate on the 2020 Census questionnaire a question regarding citizenship, formerly included in the so-called "long form" census. This data is critical to the Department's enforcement of Section 2 of the Voting Rights Act and its important protections against racial discrimination in voting. To fully enforce those requirements, the Department needs a reliable calculation of the citizen voting-age population in localities where voting rights violations are alleged or suspected. As demonstrated below, the decennial census questionnaire is the most appropriate vehicle for collecting that data, and reinstating a question on citizenship will best enable the Department to protect all American citizens' voting rights under Section 2.

The Supreme Court has held that Section 2 of the Voting Rights Act prohibits "vote dilution" by state and local jurisdictions engaged in redistricting, which can occur when a racial group is improperly deprived of a single-member district in which it could form a majority. See *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). Multiple federal courts of appeals have held that, where citizenship rates are at issue in a vote-dilution case, citizen voting-age population is the proper metric for determining whether a racial group could constitute a majority in a single-member district. See, e.g., *Reyes v. City of Farmers Branch*, 586 F.3d 1019, 1023-24 (5th Cir. 2009); *Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998); *Negrn v. City of Miami Beach*, 113 F.3d 1563, 1567-69 (11th Cir. 1997); *Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989), overruled in part on other grounds by *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1141 (9th Cir. 1990); see also *LULAC v. Perry*, 548 U.S. 399, 423-442 (2006) (analyzing vote-dilution claim by reference to citizen voting-age population).

The purpose of Section 2's vote-dilution prohibition "is to facilitate participation ... in our political process" by preventing unlawful dilution of the vote on the basis of race. *Campos v. City of Houston*, 113 F.3d 544, 548 (5th

Cir. 1997). Importantly, “[t]he plain language of section 2 of the Voting Rights Act makes clear that its protections apply to United States citizens.” *Id.* Indeed, courts have reasoned that “[t]he right to vote is one of the badges of citizenship” and that “[t]he dignity and very concept of citizenship are diluted if noncitizens are allowed to vote.” *Barnett*, 141 F.3d at 704. Thus, it would be the wrong result for a legislature or a court to draw a single-member district in which a numerical racial minority group in a jurisdiction was a majority of the total voting-age population in that district but “continued to be defeated at the polls” because it was not a majority of the citizen voting-age population. *Campos*, 113 F.3d at 548.

These cases make clear that, in order to assess and enforce compliance with Section 2’s protection against discrimination in voting, the Department needs to be able to obtain citizen voting-age population data for census blocks, block groups, counties, towns, and other locations where potential Section 2 violations are alleged or suspected. From 1970 to 2000, the Census Bureau included a citizenship question on the so-called “long form” questionnaire that it sent to approximately one in every six households during each decennial census. See, e.g., U.S. Census Bureau, *Summary File 3: 2000 Census of Population & Housing*—Appendix B at B-7 (July 2007), available at <https://www.census.gov/prod/cen2000/doc/sf3.pdf> (last visited Nov. 22, 2017); U.S. Census Bureau, Index of Questions, available at https://www.census.gov/history/www/through_the_decades/index_of_questions/ (last visited Nov. 22, 2017). For years, the Department used the data collected in response to that question in assessing compliance with Section 2 and in litigation to enforce Section 2’s protections against racial discrimination in voting.

In the 2010 Census, however, no census questionnaire included a question regarding citizenship. Rather, following the 2000 Census, the Census Bureau discontinued the “long form” questionnaire and replaced it with the American Community Survey (ACS). The ACS is a sampling survey that is sent to only around one in every thirty-eight households each year and asks a variety of questions regarding demographic information, including citizenship. See U.S. Census Bureau, *American Community Survey Information Guide* at 6, available at [https://www.census.gov/content/dam/Census/programs-surveys/acs/about/ACS](https://www.census.gov/content/dam/Census/programs-surveys/acs/about/ACS%20Information%20Guide.pdf) Information Guide.pdf (last visited Nov. 22, 2017). The ACS is currently the Census Bureau’s only survey that collects information regarding citizenship and estimates citizen voting-age population.

The 2010 redistricting cycle was the first cycle in which the ACS estimates provided the Census Bureau’s only citizen voting-age population data. The Department and state and local jurisdictions therefore have used those ACS estimates for this redistricting cycle. The ACS, however, does not yield the ideal data for such purposes for several reasons:

- Jurisdictions conducting redistricting, and the Department in enforcing Section 2, already use the total population data from the census to determine compliance with the Constitution's one-person, one-vote requirement, see *Evenwel v. Abbott*, 136 S. Ct. 1120 (Apr. 4, 2016). As a result, using the ACS citizenship estimates means relying on two different data sets, the scope and level of detail of which vary quite significantly.
- Because the ACS estimates are rolling and aggregated into one-year, three-year, and five- year estimates, they do not align in time with the decennial census data. Citizenship data from the decennial census, by contrast, would align in time with the total and voting-age population data from the census that jurisdictions already use in redistricting.
- The ACS estimates are reported at a ninety percent confidence level, and the margin of error increases as the sample size—and, thus, the geographic area—decreases. See U.S. Census Bureau, *Glossary: Confidence interval (American Community Survey)*, available at https://www.census.gov/glossary/#term_ConfidenceintervalAmericanCommunitySurvey (last visited November 22, 2017). By contrast, decennial census data is a full count of the population.
- Census data is reported to the census block level, while the smallest unit reported in the ACS estimates is the census block group. See *American Community Survey Data* 3, 5, 10. Accordingly, redistricting jurisdictions and the Department are required to perform further estimates and to interject further uncertainty in order to approximate citizen voting-age population at the level of a census block, which is the fundamental building block of a redistricting plan. Having all of the relevant population and citizenship data available in one data set at the census block level would greatly assist the redistricting process.

For all of these reasons, the Department believes that decennial census questionnaire data regarding citizenship, if available, would be more appropriate for use in redistricting and in Section 2 litigation than the ACS citizenship estimates.

Accordingly, the Department formally requests that the Census Bureau reinstate into the 2020 Census a question regarding citizenship. We also request that the Census Bureau release this new data regarding citizenship at the same time as it releases the other redistricting data, by April 1 following the 2020 Census. At the same time, the Department requests that the Bureau also maintain the citizenship question on the ACS, since such question is necessary, *inter alia*, to yield information for the periodic

determinations made by the Bureau under Section 203 of the Voting Rights Act, 52 U.S.C. § 10503.

Please let me know if you have any questions about this letter or wish to discuss this request I can be reached at (202) 514-3452, or at Arthur.Gary@usdoj.gov.

Sincerely yours,

Arthur E. Gary
General Counsel
Justice Management Division

Appendix C-1

APPENDIX C

Cases where section 2 plaintiffs lost because of a failure to satisfy
the first *Gingles* precondition

1. In re 2012 Legislative Districting, 80 A.3d 1073 (Md. 2013)
2. Al-Hakim v. Florida, 892 F. Supp. 1464 (M.D. Fla. 1995), aff'd, 99 F.3d 1154 (11th Cir. 1996)
3. Bartlett v. Strickland, 556 U.S. 1 (2009)
4. Benavidez v. Irving Indep. Sch. Dist., 690 F. Supp. 2d 451 (N.D. Tex. 2010)
5. Campos v. City of Houston, 113 F.3d 544 (5th Cir. 1997)
6. Dillard v. Baldwin County Comm'rs, 376 F.3d 1260 (11th Cir. 2004)
7. Fairley v. Hattiesburg, 584 F.3d 660 (5th Cir. 2009)
8. Gause v. Brunswick Cty., N.C., 1996 WL 453466 (4th Cir. 1996)
9. Hall v. Virginia, 385 F.3d 421(4th Cir. 2004)
10. Johnson v. DeSoto County Bd. of Comm'rs, 204 F.3d 1335 (11th Cir. 2000)
11. McNeil v. Springfield Park Dist., 851 F.2d 937 (7th Cir. 1988)
12. Metts v. Almond, 217 F. Supp. 2d 252 (D.R.I. 2002), rev'd, 363 F.3d 8 (1st Cir. 2004) (en banc)
13. Negron v. City of Miami Beach, 113 F.3d 1563 (11th Cir. 1997)
14. Perez v. Pasadena Indep. Sch. Dist., 165 F.3d 368 (5th Cir. 1999)
15. Reyes v. City of Farmers Branch, 586 F.3d 1019 (5th Cir. 2009)
16. Rios-Andino v. Orange County, 51 F. Supp. 3d 1215 (M.D. Fla. 2014)
17. Romero v. City of Pomona, 665 F. Supp. 853 (C.D. Cal. 1987), aff'd, 883 F.2d 1418 (9th Cir. 1989)
18. Sensley v. Albritton, 385 F.3d 591 (5th Cir. 2004)

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19. Skorepa v. City of Chula Vista, 723 F. Supp. 1384 (S.D. Cal. 1989)
20. Stabler v. Thurston County, 129 F.3d 1015 (8th Cir. 1997), cert. denied, 523 U.S. 1118 (1998)
21. Thompson v. Kemp, 309 F. Supp. 3d 1360 (N.D. Ga. 2018)
22. Turner v. Arkansas, 784 F. Supp. 553 (E.D. Ark. 1991) (three-judge court), aff'd, 504 U.S. 952 (1992)
23. Valdespino v. Alamo Heights Indep. Sch. Dist., 168 F.3d 848 (5th Cir. 1999)
24. Wright v. Sumter County Bd. of Elections & Registration, 2014 WL 1347427 (M.D. Ga. Apr. 3, 2014)

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

ROBYN KRAVITZ, *et al.*

Plaintiffs,

v.

U.S. DEPARTMENT OF COMMERCE, *et al.*

Defendants.

Civil Action No. 8:18-cv-01041-GJH

Hon. George J. Hazel

LA UNIÓN DEL PUEBLO ENTERO; *et al.*

Plaintiffs,

v.

WILBUR L. ROSS, sued in his official
capacity as U.S. Secretary of Commerce; *et al.*

Defendants.

Civil Action No. 8:18-cv-01570-GJH

Hon. George J. Hazel

RULE 26(A)(2)(B) EXPERT REPORT AND DECLARATION OF DAVID ELY

EXPERT WITNESS REPORT AND DECLARATION OF DAVID ELY

I. Professional Background

1. I am the founder of Compass Demographics, a consulting and database management firm specializing in projects involving Census and Elections Data. I have extensive expertise and experience in the management of redistricting projects, the analysis of voting behavior, and demographic analysis.
2. Prior to founding Compass Demographics, from 1986 to 2007, I was the Director of Research for the Redistricting and Reapportionment practice of Pactech Data and Research, where in addition to litigation expert and consulting work, I provided database construction and redistricting consultation to numerous jurisdictions.
3. Since 1986, I have served as an expert witness in over 30 federal and state voting rights cases in 12 states. I have been retained as an expert by the Department of Justice and have testified on behalf of the United States in numerous cases involving enforcement of the federal Voting Rights Act, in which I performed analysis similar to the types of analysis discussed in this report.
4. I have also served as a consultant and expert on behalf of private plaintiffs in state and federal voting rights litigation challenging electoral systems in multiple jurisdictions.
5. I have also served as a consultant and expert on behalf of defendant jurisdictions, in voting rights litigation challenging election systems or districts.
6. I have served as an expert witness in numerous cases brought under Section 2 of the federal Voting Rights Act, including with respect to plaintiffs' satisfaction of the first threshold condition under the test of *Thornburg v. Gingles*, 478 U.S. 50 (1986)—namely, whether a minority group is sufficiently large and compact to constitute a majority of the voting age citizen population in a single-member district. Among the cases in which I have provided expert testimony concerning prong one of the *Gingles* test are *Luna v. Kern County Board of Supervisors*, 291 F. Supp.3d 1088 (E.D. Ca. 2018) (Plaintiffs prevailed, my prong one evidence adopted with approval by the court); *Patino v. City of Pasadena*, 230 F.Supp.3d 667, 674 (S.D.Tex. 2017) (same), *Fabela v. City of Farmers Branch, Tex.*, 2012 WL 3135545, (N.D.Tex, 2012) (same); *Benavidez v. City of Irving, Tex.*, 638 F.Supp.2d 709, 720 (N.D.Tex. 2009) (same).
7. In addition to my expert witness work in cases under the federal Voting Rights Act, I have also testified as an expert in cases under the California Voting Rights Act, including *Pico Neighborhood Association v. City of Santa Monica*, Los Angeles Superior Court Case No. BC616804 (judgement pending); *Jauregui v. City of Palmdale*, Los Angeles Superior Court Case, No. BC 482039 (court relied on my testimony to find racially polarized voting and to enter a remedial plan); *Garrett v. City of Highland*, San Bernardino Superior Court, Case No. CIV-DS-1410696 (court approved my remedial plan); *Yumore Kaku v. City of Santa Clara*, Santa Clara Superior Court Case No. 17CV31982 (remedial plan pending).

8. Following the 1990, 2000, and 2010 Censuses, I have also served as a consultant to construct databases, draw district lines, or prepare presentation maps and reports for redistricting authorities in many jurisdictions in conducting their normal decennial redistricting. These jurisdictions include statewide congressional and legislative redistricting authorities, as well as a variety of County Boards, City Councils, School Boards, Water Districts, Regional Transit Boards and others.
9. I participated in the construction of the California Statewide Redistricting Database for the California State Legislature for the last three redistricting cycles. That publicly available database includes voting, registration, and geographic data sets for the State of California for statewide elections beginning in 1992.
10. A copy of my CV is attached as Appendix A. It contains a listing of selected cases in which I testified as an expert witness and a list of selected jurisdictions in which I performed database construction, demographic and voter analysis, and technical assistance; developed districting plans; participated in public hearings and presentation of plans; and analyzed alternative redistricting plans.
11. I am being compensated at a rate of \$250 per hour for my work in this case.

II. Summary of Opinions

12. I have been retained by the Plaintiffs in *Kravitz v. U.S. Department of Commerce* and in *La Unión del Pubelo Entero v. Ross* to provide my expert opinion concerning the use of data that are currently available from the U.S. Census Bureau in developing the statistical evidentiary proof necessary to establish a claim under Section 2 of the Voting Rights Act (“VRA”), particularly in cases where evidence of the citizen voting age population (“CVAP”) of a minority group is needed to prevail on a Section 2 claim.
13. I have reviewed the letter (the “DOJ Letter”) dated December 12, 2017, from Arthur Gary, General Counsel for the Justice Management Division of the U.S. Department of Justice, to Dr. Ron Jarmin, acting Director of the U.S. Census Bureau, requesting that the Census Bureau “reinstate” a question regarding citizenship on the 2020 Census. The letter asserts that, to “fully enforce” the requirements of Section 2 of the Voting Rights Act, the Department of Justice (“DOJ”) needs “a reliable calculation of the citizen voting-age population in localities where voting rights violations are alleged or suspected,” and that the decennial census questionnaire is “the most appropriate vehicle for collecting that data.”
14. The DOJ Letter notes that, prior to the 2010 Census, a question regarding citizenship was included on the “long form” questionnaire sent to a fraction of U.S. households as part of the decennial census. Following the 2000 Census, the Census Bureau discontinued the “long form” questionnaire and replaced it with the American Community Survey (“ACS”). The 2010 redistricting cycle was the first such cycle in which the ACS provided the only CVAP data available from the Census Bureau.

15. The DOJ Letter makes the following four assertions concerning alleged features of the ACS data that are not “ideal” for purposes of enforcing Section 2 of the Voting Rights Act:

- “Jurisdictions conducting redistricting, and the Department in enforcing Section 2, already use the total population data from the census to determine compliance with the Constitution’s one-person, one-vote requirement, see *Evenwel v. Abbott*, 136 S. Ct. 1120 (Apr. 4, 2016). As a result, using the ACS citizenship estimates means relying on two different data sets, the scope and level of detail of which vary quite significantly.”
- ACS data do not “align in time” with decennial census data used in redistricting, because ACS data “are rolling and aggregated into one-year, three-year, and five year estimates.”
- ACS data “are reported at a ninety percent confidence level, and the margin of error increases as the sample size—and thus, the geographic area—decreases,” whereas decennial census data represent “a full count of the population.”
- Decennial census data are reported down to the census block level, but ACS citizenship estimates are reported only to the census block group. Redistricting requires “further estimates and . . . interject[s] further uncertainty in order to approximate citizen voting-age population at the level of a census block.”

16. Based upon my decades of experience as an expert in Section 2 cases and the redistricting process generally, it is my opinion that there is no valid basis for the above assertions as set forth in the DOJ Letter. In particular:

- Reliance upon two or more different data sets is a routine statistical practice in Section 2 work and does not impede development of the proof required for the redistricting process or Section 2 enforcement. Moreover, the availability of decennial census citizenship data would not avoid the need to rely upon more than one data set in that context.
- For purposes of redistricting and Section 2 enforcement, citizenship population data do not need to align exactly in time with decennial census data on the total and voting-age population. Further, for Section 2 cases brought mid-to-late decade, ACS citizenship data would provide an advantage over decennial census data, because aggregated five-year ACS citizenship data would be more current.
- The confidence level and margin of error associated with ACS estimates do not present an obstacle to demonstrating that the minority group at issue constitutes a majority of CVAP in a proposed district. Moreover, census data reported at the block level must be edited for confidentiality purposes and therefore involve error and uncertainty that would not be avoided by adding a citizenship question to the decennial census questionnaire.

- Block-level citizenship data from the Census Bureau have never been available in the past, and their absence has not hindered my work drawing reliable district maps that are in compliance with Section 2, nor prevented courts from finding that the requirements of Section 2 have been met. ACS citizenship data reported at the block group level are sufficient for these purposes.

III. The Use of Citizenship Data in Redistricting and Section 2 Enforcement

17. Redistricting is the process of drawing congressional, state legislative, and local electoral district boundaries. Regular redistricting occurs once a decade. Districts must be drawn with equal populations “as nearly as is practicable” to comply with the U.S. Constitution’s requirement that districts be drawn to comprise substantially equal populations.¹ (The equal population requirement is sometimes referred to as the “one-person, one-vote” requirement.) Total population data from the decennial census are used to draw districts with equal population. Even when remedial districts are drawn mid-decade, these are the only data needed for the purpose of drawing districts that have equal population.
18. Section 2 of the VRA prohibits the adoption of electoral districts that dilute the voting power of a politically cohesive minority population.² In *Gingles*, the U.S. Supreme Court held that, to sustain a “vote dilution” claim under Section 2, plaintiffs must establish three “threshold preconditions.”³ *First*, a “minority group” must be “sufficiently large and geographically compact to constitute a majority in a single-member district.” *Second*, the minority group must be “politically cohesive.” *Third*, “the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority’s preferred candidate.”
19. The first *Gingles* precondition is satisfied by presenting the court with an illustrative districting plan that includes at least one majority-minority district based on CVAP data. Thus, Section 2 of the VRA often requires demographers such as myself to conduct analyses to determine whether a minority group can constitute a majority (i.e., more than 50 percent) of the citizen voting age population in a single-member district.
20. To determine whether a minority population is sufficiently compact to constitute a majority of the citizen voting age population in a district, however, it is not necessary to determine the exact number of citizens in each census block. There is also no requirement regarding the precise geographic distribution of voting-age citizens within a proposed district. The relevant question is whether it is “more likely than not” that the minority group comprises more than 50 percent of the voting-age citizens overall within a properly

¹ *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964); *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

² 52 U.S.C. § 10301(a); *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993).

³ *Thornburg v. Gingles*, 478 U.S. 50-51 (1986).

configured district.⁴ As discussed in detail below, Section 2 plaintiffs use sample survey data collected and reported by the Census Bureau to make this determination.

21. The second and third *Gingles* preconditions require experts to analyze voting patterns by race and ethnicity to show that the minority group is politically cohesive (the second *Gingles* precondition) and that the white majority consistently votes against minority-preferred candidates and usually defeats these candidates (the third *Gingles* precondition). In addition, because the ballot is secret, a voter's race and ethnicity are not available from voting records or election results. Therefore, polarization experts must conduct a statistical analysis comparing data on election results for each candidate by precinct with data on the racial/ethnic composition of the voters in each precinct. The statistical analysis determines the extent to which the number of votes cast for a particular candidate is correlated with the race of the voters supporting that candidate.
22. As a demographer, I have frequently been called upon to conduct the analyses required to demonstrate that a particular minority group within a given jurisdiction (state, county, etc.) meets the first *Gingles* precondition. I also construct databases that include voting, registration, and geographic data, which other experts use to conduct the analyses required to determine if a minority group meets the second and third *Gingles* preconditions.
23. The DOJ Letter asked the Census Bureau to "reinstate into the 2020 Census a question regarding citizenship" to help enforce Section 2 of the VRA. In fact, the decennial census short-form questionnaire has not included a citizenship question since before the VRA was enacted in 1965. Section 2 enforcement has always used citizenship data from sample surveys. From 1970 to 2000, the Census Bureau collected citizenship data from a sample of households through the long-form questionnaire it sent to approximately one in every six households during each decennial census. The citizenship data collected through the long-form questionnaire was reported only down to the census block-group level.
24. In 2005, the Census Bureau began using the ACS to gather population information, including citizenship data, previously collected through the long-form questionnaire. The ACS is administered on an ongoing monthly basis to approximately 3.5 million households nationwide each year. The Census Bureau aggregates ACS data into 1-year and 5-year estimates.⁵ Cumulating ACS data to 5-year estimates yields a sample of

⁴ *Reyes v. City of Farmers Branch, Texas*, No. 3:07-CV-900-O, 2008 WL 4791498, at *7 (N.D. Tex. Nov. 4, 2008), *aff'd sub nom. Reyes v. City of Farmers Branch, Tex.*, 586 F.3d 1019 (5th Cir. 2009).

⁵ The DOJ Letter fails to note that the Census Bureau stopped producing ACS 3-year estimates in 2014. Census Bureau, American Community Survey: When to Use 1-Year, 3-Year, or 5-Year Estimates, <https://www.census.gov/programs-surveys/acs/guidance/estimates.html>; Census Bureau, Understanding and Using ACS Single-Year and Multiyear Estimates, https://www.census.gov/content/dam/Census/library/publications/2018/acs/acs_general_handbook_2018_ch03.pdf.

approximately one in every eight households. While ACS 1-year estimates are only available for geographic areas with a population of 65,000 or greater, ACS 5-year estimates are available for all geographic areas. Like the census long-form questionnaire, the ACS 5-year estimates report citizenship data for all geographic areas down to the census block-group level.

25. In my experience, the process of constructing district-level CVAP estimates, and the reliability of such estimates, are effectively the same regardless of whether the source of the citizenship data is the ACS 5-year estimates or the census long-form questionnaire. Further, the ACS provides important advantages over the census long-form questionnaire, because the ACS collects citizenship and other data throughout the decade, while the census long-form questionnaire provided static data of the population at the beginning of the decade. The ACS thus provides more reliable estimates of the composition of the current population later in the decade.

IV. Reliance on Two Data Sets Is Commonplace and Does Not Impede Redistricting Analysis.

26. The DOJ Letter alleged: “Jurisdictions conducting redistricting, and the Department in enforcing Section 2, already use the total population data from the census” to determine compliance with the Constitution’s equal population requirement, and thus “using the ACS citizenship estimates means relying on two different data sets, the scope and level of detail of which vary quite significantly.”
27. I built redistricting datasets and assisted in the redistricting process for a number of jurisdictions following the decennial census in 1990, 2000, and 2010. Most of these jurisdictions needed to assess compliance with Section 2 of the VRA, and some were required to have plans precleared by the DOJ under Section 5 of the VRA. In my experience, relying on two different data sets does not impede the redistricting process or Section 2 enforcement.
28. Total population data from the decennial census and citizenship data from the ACS serve distinct purposes in redistricting and Section 2 cases. Total population data from the decennial census are used to determine the size of the district, in order to draw districts with equal populations “as nearly as is practicable,” as required by the Constitution’s equal population requirement. These are the only data needed to determine compliance with that requirement.
29. Once the size of the district has been determined, Section 2 experts use data from the ACS and other data sets to determine the demographic composition of a proposed district, including the percentage of the citizen voting age population of the district who are, for example, Hispanic. Currently available survey data are well-suited to this purpose. In practice, it does not matter that their “scope and level of detail . . . vary quite significantly” from a person-by-person enumeration, which is not needed to reliably determine the demographic composition of a district.

30. In serving as an expert demographer in Section 2 cases, sometimes I also use survey data to provide socioeconomic characteristics of the communities captured by the districts I have drawn, to aid the court and the parties in determining whether the minority population comprises a “community of interest” in the Section 2 district.⁶ Such data may include characteristics such as income, education, and language spoken at home, all of which are derived from 5-year ACS data, and none of which are available from the decennial census. For instance, in *Luna v. County of Kern*, a Section 2 case challenging a supervisorial plan in Kern County, California, I used ACS data to demonstrate that plaintiffs’ illustrative maps were more effective than Kern County’s adopted map in “grouping into districts populations with similar socioeconomic characteristics, including educational attainment, income, homeownership, immigration status, and Spanish language ability.”⁷ The maps with these analyses are attached as Attachment 1.
31. In *Kern*, I also used ACS data to draw two illustrative maps demonstrating that Hispanics could constitute a majority of the citizen voting age population in two of the map’s five districts. To draw the maps, I used data from the 2010 decennial census for total population and voting age population by race and ethnicity, and data from the 2005-2009 ACS for citizen voting age population. Using these data, I drew one illustrative map demonstrating that Hispanics could constitute 53.2% of the CVAP in one district and 54.5% of the CVAP in a second district. I drew a second illustrative map demonstrating that Hispanics could constitute 51.6% of the CVAP in one district and 52.0% of the CVAP in a second district. The court found that both illustrative maps established that Hispanics could constitute the majority of the CVAP in a properly configured district.⁸ These illustrative maps are attached as Attachment 2.
32. In addition, experts use other databases that include voting, registration, and geographic data to assess whether (1) the minority group is politically cohesive and (2) the white majority consistently votes against minority-preferred candidates and usually defeats these candidates. These data come from multiple sources, including state, county, and local election authorities. Even if a citizenship question were added to the 2020 Census, experts would still have to work with multiple data sets to perform the analysis necessary to satisfy the *Gingles* preconditions.
33. In sum, experts often use multiple data sets to conduct their analyses. This is not unusual or difficult, nor does it present an obstacle to producing reliable estimates of the composition of a district’s population to meet VRA standards.

⁶ *LULAC v. Perry*, 548 U.S. 399, 433 (2006).

⁷ *Luna v. County of Kern*, 291 F.Supp.3d 1108-09, 1111, 1115-16 (E.D. Cal. 2018).

⁸ *Id.* at 1107-08, 1114-15.

V. The Temporal “Alignment” of ACS Citizenship and Decennial Census Data Does Not Raise an Obstacle to Proof of Section 2 Claims, and Rolling Data Provide Important Advantages.

34. For purposes of redistricting and proving Section 2 claims, citizenship data do not need to align exactly in time with decennial census data on the total and voting-age population. As stated above, VRA experts use ACS citizenship data to determine the demographic composition of a district, not to count the number of eligible voters in a district as of a particular date. ACS data provide ample basis for reliable estimates of the demographic composition of a district even though the data are not all collected at the same time as the decennial census.
35. The ACS is not the only data source used in Section 2 enforcement that does not align perfectly in time with the decennial census count of the total population. Indeed, the election data that are needed to assess whether the minority group satisfies the second and third *Gingles* preconditions reflect past election results, and the racial composition of voters in past elections, therefore, cannot align in time with the once-a-decade total population count obtained through the census.
36. Further, although regular redistricting is done at the beginning of each decade, districts can be challenged in Section 2 litigation throughout the decade, and district boundaries may be redrawn to comply with Section 2. During the course of a decade, changing demographic conditions can result in changes to the vote-diluting effects of district boundaries and, thus, to changes in potential Section 2 liability.
37. For example, if at the time redistricting occurs, the minority group is not sufficiently large to constitute the majority of a properly configured district, Section 2 would not require the redistricting plan to include a majority-minority district. But if the minority population grows and, later in the decade, Section 2 plaintiffs are able to show that the minority group constitutes more than 50 percent of the CVAP of a properly configured district (and the plaintiffs satisfy the other *Gingles* conditions), a court may order a remedial district to be drawn mid-decade. Thus, it is important to have citizenship data that are updated throughout the decade.
38. For Section 2 cases brought mid-to-late decade, using demographic data from the ACS provides a better estimation of the demographic composition of the district than static decennial census data, particularly if the minority population in a particular geographic area is rapidly increasing. The decennial census reports population data only as of the census date. If the decennial census collected citizenship information, it would only provide information on the citizenship status of the population at a single point in time. Because the decennial census provides static data, federal courts have noted that “Census data are less probative the further away from the Census cycle one gets.”⁹ The ACS, by

⁹ *Reyes*, 2008 WL 4791498, at *9; *see also Perez v. Pasadena Indep. Sch. Dist.*, 958 F. Supp. 1196, 1212 (S.D. Tex. 1997), *aff’d*, 165 F.3d 368 (5th Cir. 1999).

contrast, collects citizenship and other data throughout the decade, and thus provides more reliable estimates of the composition of the current population later in the decade.

39. Before ACS 5-year citizenship estimates became available, the lack of current citizenship data created an obstacle to Section 2 enforcement. I have served as an expert witness in cases where Section 2 plaintiffs were able to satisfy the first *Gingles* precondition only after ACS 5-year citizenship estimates became available. For example, in *Reyes v. City of Farmers Branch, Texas* (“*Farmers Branch I*”),¹⁰ Hispanic residents of Farmers Branch, a city in Texas, filed a Section 2 claim challenging the at-large election of council members for the city of Farmers Branch. I did not serve as the expert in the initial case, which was unsuccessful, but served as the Section 2 expert in *Fabela v. City of Farmers Branch, Texas* (“*Farmers Branch II*”),¹¹ the subsequent suit in which the plaintiffs prevailed in their Section 2 challenge to the at-large system of electing council members for the city of Farmers Branch.
40. As the court’s 2008 decision notes, *Farmers Branch I* “was filed in 2007, many years after the 2000 Census data were collected.”¹² The lack of current estimates of the citizenship population (such as ACS 5-year estimates) created an obstacle to plaintiffs satisfying the first *Gingles* precondition in that case. Specifically, the citizenship data collected through the 2000 Census long-form questionnaire indicated that Hispanics constituted less than 50 percent of the CVAP in the proposed district.¹³ Five-year ACS citizenship estimates were not available for the City of Farmers Branch at the time the plaintiffs’ earlier Section 2 expert conducted his analysis. The court found that plaintiffs’ expert failed to demonstrate that it was more likely than not that the Hispanic population constituted more than 50 percent of the CVAP within a proposed district.¹⁴ Plaintiffs’ Section 2 claim therefore failed.
41. In 2010, the Census Bureau began publishing ACS 5-year estimates for all geographic areas down to the block group level.¹⁵ In *Farmers Branch II*, I used citizenship data from the ACS 5-year estimates (2005-2009), in combination with population data from the 2010 Census, to draw four illustrative minority-majority districts.¹⁶ The court accepted these illustrative districts as evidence that plaintiffs met the first prong of *Gingles*, finding

¹⁰ No. 3:07-CV-900-O, 2008 WL 4791498 (N.D. Tex. Nov. 4, 2008), *aff’d sub nom. Reyes v. City of Farmers Branch, Tex.*, 586 F.3d 1019 (5th Cir. 2009).

¹¹ No. 3:10-CV-1425-D, 2012 WL 3135545 (N.D. Tex. Aug. 2, 2012).

¹² *Reyes*, 2008 WL 4791498, at *9.

¹³ *Id.* at *8.

¹⁴ *Id.* at *8-19.

¹⁵ Census Bureau, Understanding and Using ACS Single-Year and Multiyear Estimates, https://www.census.gov/content/dam/Census/library/publications/2018/acs/acs_general_handbook_2018_ch03.pdf.

¹⁶ *Fabela*, 2012 WL 3135545, at *4.

that plaintiffs “have proved that, using the most accurate, readily-available data, a geographically compact demonstration district can be drawn in Farmers Branch in which Hispanics constitute more than 50% of the CVAP.”¹⁷ In addition, the court explained that it was reaching a different outcome than *Farmers Branch I* in large part because the “differences in the proof that the plaintiffs offered in the two trials.”¹⁸

VI. The Confidence Level and Margin of Error Associated With ACS Estimates Do Not Present an Obstacle in Section 2 Cases.

42. The DOJ Letter asserts that “ACS estimates are reported at a ninety percent confidence level, and the margin of error increases as the sample size—and thus, the geographic area—decreases,” whereas “decennial census data is a full count of the population.”
43. The statement that margin of error increases as the geographic area under review gets smaller is irrelevant in this context. The relevant inquiry in Section 2 cases is whether it is more likely than not that the minority group comprises a majority of CVAP at a district level.¹⁹ As the court noted in *Farmers Branch II*, the “pertinent margin of error” is “the margin of error for the Hispanic CVAP,” for example, “for a given illustrative district.”²⁰ Districts typically comprise multiple census block groups—which the ACS data reports—and the statistical margin of error *decreases* as block groups are aggregated into an illustrative district.²¹ The relevant margin of error—*i.e.* margin of error at the district level—is generally small enough that I can estimate the Hispanic CVAP and the CVAP figures needed for Section 2 purposes with a high degree of statistical certainty.
44. Courts have recognized that the relevant margin of error of ACS data for Section 2 purposes is the margin of error at the district level, and have found CVAP calculations based on ACS data to be reliable.²² Courts do not require any level of certainty about the estimate in each and every small block of the district. What is material to a court’s determination of prong one is how certain I can be that the minority population is sufficiently compact to constitute a majority in a district—how certain can I be about the CVAP estimate in the entire district. Even taking into consideration the margin of error of ACS estimates, a point estimate of above 50 percent CVAP still establishes that the Hispanic CVAP is above the 50 percent threshold required to satisfy the first *Gingles* precondition. Point estimates (such as for the Hispanic CVAP) established to a 90 percent confidence level likewise are broadly recognized as sufficient to meet this standard.

¹⁷ *Id.* at *8.

¹⁸ *Id.* at *8 n.21.

¹⁹ *Reyes*, 2008 WL 4791498, at *7.

²⁰ *Fabela*, 2012 WL 3135545, at *7 n.15.

²¹ *Id.*

²² *Id.* at *6-7, n.15.

45. Moreover, the DOJ Letter's suggestion that citizenship data generated by the 2020 Census would not be subject to error or uncertainty is simply incorrect. In fact, as Dr. John Abowd, Chief Scientist at the Census Bureau, acknowledged in his deposition testimony, the decennial census data used for redistricting (P.L. 94-171 data) are affected by error or uncertainty "because of the statistical methods that intervene in converting the responses to tabular data, including [the] disclosure avoidance" protocols the Census Bureau implements to comply with federal law.²³ The impact of these protocols would increase as the geographic areas under scrutiny get smaller.
46. Further, Dr. Abowd testified that the Census Bureau has not yet determined whether the error and uncertainty associated with block-level CVAP data based on the 2020 Census (if the citizenship question is allowed) would be any less significant than the error and uncertainty associated with the ACS citizenship data currently used for Section 2 enforcement purposes.²⁴ Dr. Abowd also indicated that the Census Bureau does not yet know if the error and uncertainty associated with block-level CVAP data based on the 2020 Census will "still allow redistricting offices and the Department of Justice to use the data effectively."²⁵
47. Based on my experience, and especially in light of the above testimony of Dr. Abowd, it is my opinion that this purported reason for the DOJ's request to include a citizenship question on the 2020 Census questionnaire has no foundation.

VII. Block-Level Citizenship Data from the Decennial Census Are Not Needed for Section 2 Enforcement.

48. The DOJ Letter's final stated reason for requesting the addition of a citizenship question is also illusory. Block-level citizenship data are not directly relevant to Section 2 enforcement or redistricting. When courts, jurisdictions, or demographers examine a district intended to be a majority-minority district, it is not necessary to determine the exact number of citizens in the district. There is also no requirement regarding the precise geographic distribution of voting-age citizens within a district. What matters is the minority share of CVAP of the entire district, not the CVAP of any particular block within that district.
49. Block-level citizenship data are needed only when an illustrative district cannot be constructed by aggregating census block groups. When that happens, I use a process that I developed decades ago when citizenship data were obtained from the decennial census long-form questionnaire, which also provided block-group level CVAP estimates. The same process can be applied using the block-group level CVAP estimates provided by the ACS. I have been able to apply a basic methodological system that has been perfectly reliable for those purposes.

²³ Deposition of Dr. John Abowd, Chief Scientist, U.S. Census Bureau, August 29, 2018, at 49.

²⁴ *Id.* at 100-101.

²⁵ *Id.* at 101.

50. Specifically, in those instances in which one or more block-level estimates are necessary to construct an illustrative district meeting the first *Gingles* condition, this can be done through a standard method of disaggregating data, using what is known as a raking factor. This method is more complicated to describe than it is to perform—accurately and reliably.
51. A raking factor is a related data element that is available at both the level of geography at which the aggregate data are available (*e.g.*, the block-group level), and at the level of geography at which disaggregated data are desired (*e.g.*, the block level). The relationship between the aggregate data and the raking data is treated as being the same for both levels of geography. Voting Age Population from P.L. 94-171 data files provide an almost ideal raking factor for Citizen Voting Age Population from the ACS tabulation.
52. In order to compute a block-level estimate of an ethnic group's CVAP, all I have to do is (1) divide the block group CVAP estimate by the block group VAP for the same ethnic group, and then (2) multiply the census block VAP by the result for each block in a block group. This duplicates at the census block level the relationship that exists between CVAP and VAP at the block group level.
53. Once the raking files are created for a state, it is a simple matter to create census block-level estimates from each new CVAP tabulation. These procedures have been set up and used in some form since the 2003 release of CVAP data from the 2000 Census long-form questionnaire. The margins of error associated with these results are well-controlled and have been recognized by courts as reliable in the Section 2 context.
54. Finally, while decennial census data are reported to the census block level, adding a citizenship question to the decennial census will not actually provide the DOJ with citizenship information about the individuals who reside within a particular census block. Dr. Abowd testified that, because of federal confidentiality requirements, the Census Bureau implements disclosure avoidance protocols to hide the actual characteristics associated with the individuals who reside on a particular census block, through disclosure avoidance systems such as data swapping and synthetic data noise infusion.²⁶ Thus, according to Dr. Abowd's testimony, even if the 2020 Census asks about citizenship, "[t]here won't be a single block in which the citizenship variables or the race and ethnicity variables are the values reported by the people who live there."²⁷

²⁶ *Id.* at 50-53, 67-68. I understand from Dr. Abowd's testimony that the Census Bureau does data swapping by selecting a sample of households, matching those households on a set of key variables with households in neighboring geographic areas that have similar characteristics, and swapping the information for each household according to an undisclosed algorithm. *Id.* at 51-53. Synthetic data noise infusion uses statistical modeling to generate contrived household characteristics for purposes of avoiding the disclosure of confidential information.

²⁷ *Id.* at 68.

VIII. Conclusion

In my decades of experience as a voting rights expert, the lack of citizenship data from the decennial census has not hindered my work, including my work for DOJ in Section 2 cases. Based on my experience serving as a Section 2 expert, including for the DOJ, it is my opinion that, for purposes of demonstrating that the minority group citizen population is sufficiently large and compact to constitute a majority of the CVAP in an illustrative single-member district, (1) block-level citizenship data from the decennial census are not needed; and (2) the citizenship estimates currently available from the ACS are sufficient. Finally, the Census Bureau has said that adding a citizenship question to the decennial census will not result in the availability of citizenship information about the individuals who actually reside within a particular census block, and that it is unclear whether the error and uncertainty associated with citizenship data from the decennial census will allow redistricting offices and the DOJ to use the available data effectively. In short, all of the reasons suggested in the DOJ Letter for requesting the addition of a citizenship question to the 2020 Census questionnaire evaporate upon close examination.

* * *

I reserve the right to supplement this declaration if I become aware of additional information or documentation that would require further analysis and any modification or addition to my opinions as stated herein.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 5, 2018.



David Ely