

February 12, 2018

The Honorable Wilbur Ross
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, DC 20230

Dear Secretary Ross,

We, the undersigned Attorneys General of New York, Massachusetts, California, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Mississippi, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington, as well as the Governor of Colorado, write to oppose the recent request by the Department of Justice to add a question on citizenship to the questionnaire for the 2020 decennial Census.¹ Adding a citizenship question – especially at such a late date in the 2020 Census planning process – would significantly depress participation, causing a population undercount that would disproportionately harm states and cities with large immigrant communities. This undercount would frustrate the Census Bureau’s obligation under the Constitution to determine “the whole number of persons in each state,”² threaten our states’ fair representation in Congress, dilute our states’ role in the Electoral College, and deprive our states of their fair share of hundreds of billions of dollars in federal funds that are allocated in part on decennial Census data. Indeed, as the Census Bureau has itself previously explained, “any effort to ascertain citizenship” in the decennial Census “will inevitably jeopardize the overall accuracy of the population count.”³

These tremendous harms are not justified by the Justice Department’s purported interest in strengthening enforcement of Section 2 of the Voting Rights Act. To the contrary, requesting citizenship data would undermine the purposes of the Voting Rights Act and weaken voting rights enforcement across the board.

For these reasons, we have serious concerns that adding a citizenship question to the 2020 Census at this late date would violate the Census Bureau’s obligations under the Constitution, the Administrative Procedure Act, and other federal statutes.

¹ See Letter from Arthur E. Gary, General Counsel, Justice Management Division, U.S. Dep’t of Justice, to Ron Jarmin, Performing the Non-Exclusive Functions and Duties of the Director, U.S. Bureau of the Census, U.S. Dep’t of Commerce (Dec. 12, 2017), <https://www.documentcloud.org/documents/4340651-Text-of-Dec-2017-DOJ-letter-to-Census.html> [hereinafter DOJ Letter]. The Justice Department’s request that the Bureau “reinstate” a citizenship question on the Census, *see id.* at 1, is misleading, as no citizenship question has been included on the decennial census since 1950. From 1970 to 2000, a citizenship question was included only on the “long form” questionnaire, which was distributed to a sample of about one in six households in lieu of the decennial census questionnaire. Following the 2000 Census, the Census Bureau discontinued the “long form” questionnaire and replaced it with the American Community Survey, which is now sent to about one in every 38 households each year.

² U.S. Const. amend. XIV, § 2; *see also id.* art. I, § 2, cl. 3.

³ *Fed’n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980).

Furthermore, the underfunding of the Census Bureau raises concerns that technology and implementation strategies will not be adequately developed before the start of the full 2020 Census. The lack of testing in rural areas is particularly disconcerting. We request your assurances that the Bureau will be able to cope with this funding crisis and provide a full and accurate enumeration of the population of each state.

I. Adding a citizenship question at this late date would fatally undermine the accuracy of the 2020 Census, harming the states and our residents. The Justice Department’s request should be rejected because adding a citizenship question to the 2020 Census would reduce participation and response rates, threatening the Census Bureau’s ability to comply with its obligations under the Constitution and harming the states’ interests.

1. Questions about citizenship would deter participation in the 2020 Census, undermining the constitutional mandate to conduct an “actual Enumeration.” The Constitution provides that Representatives “shall be apportioned among the several States . . . according to their respective Numbers,”⁴ which requires “counting the whole number of persons in each State.”⁵ This count is to be determined by an “actual Enumeration” conducted every ten years.⁶ It is well-settled that this “actual Enumeration” includes *all* residents, both citizens and noncitizens.⁷ A citizenship question would hinder the Census Bureau’s ability to complete this “actual Enumeration” by chilling participation in the 2020 Census by noncitizens and naturalized citizens alike.

The Census Bureau has long recognized the difficulty of counting immigrant and noncitizen communities. In preparing for the 2010 Census, the Bureau identified immigrants as one of several hard-to-count populations, and designed a significant public education campaign to increase participation from that group.⁸ Similarly, in the lead up to the current decennial Census, the Bureau organized a working group to recommend strategies to minimize undercounts of undocumented immigrants, as well as immigrant Latinos and Asians.⁹

Notwithstanding these efforts, the difficulty of counting such groups has only increased in the current climate. Recent pretests by the Census Bureau have revealed that immigrant respondents increasingly expressed concerns about confidentiality and data sharing, especially

⁴ *Id.* art. I, § 2, cl. 3.

⁵ *Id.* amend. XIV, § 2.

⁶ *Id.* art. I, § 2, cl. 3; *see also* 13 U.S.C. § 4 (delegating to the Secretary of Commerce authority to conduct the decennial census).

⁷ *Klutznick*, 486 F. Supp. at 575-77.

⁸ U.S. Census Bureau, *2010 Census Integrated Communications Plan*, 21, 75, 191, 223, 278 (Aug. 2008), https://www.census.gov/2010census/partners/pdf/2010_ICC_Plan_Final_Edited.pdf; U.S. Gov’t Accountability Office, GAO-09-525T, *Communications Campaign Has Potential to Boost Participation*, 6 (Mar. 6, 2009), <https://www.gao.gov/assets/130/122012.pdf>.

⁹ U.S. Census Bureau, Nat’l Advisory Comm. on Racial, Ethnic, and Other Populations, *Final Report of the Administrative Records, Internet, and Hard to Count Population Working Group*, 2, 8 (July 2016), https://www2.census.gov/cac/nac/reports/2016-07-admin_internet-wg-report.pdf.

when asked questions about citizenship.¹⁰ Citing fears related to the current discourse on immigration policy, respondents have also refused to respond to questions and have ended interactions with surveyors.¹¹ The Census Bureau has recognized that these anxieties might present a barrier to participation in the 2020 Census, and may diminish overall data quality.¹² Even before the Department of Justice made its request, Census Bureau officials reported that early test surveys showed “an unprecedented groundswell in confidentiality and data-sharing concerns among immigrants or those who live with immigrants” related to the 2020 count.¹³ The Bureau already acknowledges that questions about citizenship in *any* federal statistical survey are sensitive and must be treated with care¹⁴; adding a citizenship inquiry to the mandatory decennial Census would undoubtedly exacerbate these problems, leading to larger undercounts and less reliable data.

Indeed, in a brief filed with the Supreme Court less than three years ago, four former Directors of the Census Bureau – appointed by Presidents of both political parties – explained based on their experience that “a one-by-one citizenship inquiry would invariably lead to a lower response rate to the Census in general,” and would “seriously frustrate the Census Bureau’s ability to conduct the only count the Constitution expressly requires: determining the whole number of persons in each state in order to apportion House seats among the states.”¹⁵ The former Directors explained that “[r]ecent experience demonstrates lowered participation in the Census and increased suspicion of government collection of information in general. Particular anxiety exists among non-citizens. There would be little incentive for non-citizens to offer to the government their actual status; the result [of inquiring about citizenship status] would be a reduced rate of response overall and an increase in inaccurate responses.”¹⁶

¹⁰ Memorandum from the U.S. Census Bureau, Ctr. for Survey Measurement, to Assoc. Directorate for Research and Methodology, 1, 5-7 (Sept. 20, 2017), <https://www2.census.gov/cac/nac/meetings/2017-11/Memo-Regarding-Respondent-Confidentiality-Concerns.pdf>.

¹¹ *Id.* at 2.

¹² U.S. Census Bureau, Nat’l Advisory Comm. on Racial, Ethnic, and Other Populations, *Respondent Confidentiality Concerns and Possible Effects on Response Rates and Data Quality for 2020 Census*, 2, 12-13, 15 (Nov. 2, 2017), <https://www2.census.gov/cac/nac/meetings/2017-11/Meyers-NAC-Confidentiality-Presentation.pdf>.

¹³ Mica Rosenberg, *U.S. Officials Worry Immigrant Fears Could Make Census Inaccurate*, Reuters (Nov. 30, 2017, 3:10 PM), <https://www.reuters.com/article/us-usa-immigration-census/u-s-officials-worry-immigrant-fears-could-make-census-inaccurate-idUSKBN1DU2U7>. These concerns from some federal officials are shared by state-level experts with experience coordinating the administration of the decennial Census in their states. Massachusetts Secretary of the Commonwealth, William Galvin, for example, recently testified before a state legislative committee that a citizenship inquiry would be a clear deterrent to participating in the 2020 Census. See Christina Prignano, *Mass. secretary of state warns Trump could “sabotage” 2020 Census*, Boston Globe (Feb. 6, 2018), <https://www.bostonglobe.com/metro/2018/02/06/mass-secretary-state-warns-trump-could-sabotage-census/HH2b73v0o2dkddzrjYDyUK/story.html>.

¹⁴ U.S. Census Bureau, Data Stewardship Exec. Policy Comm., *DS-16: Policy on Respondent Identification and Sensitive Topics in Dependent Interviewing*, 1-2 (Dec. 9, 2014), https://www2.census.gov/foia/ds_policies/ds016.pdf.

¹⁵ Brief of Former Directors of the U.S. Census Bureau as Amici Curiae Supporting Appellees at 25, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940).

¹⁶ *Id.* at 5.

The Census Bureau in fact declined to add a citizenship question to the 2010 Census questionnaire,¹⁷ and has repeatedly warned against adding such a question to the decennial Census because of the risk of lower response rates and reduced accuracy.¹⁸ As the Census Bureau has explained, questions about “citizenship are particularly sensitive” for individuals who “perceive[] any possibility of the information being used against them,” and thus “any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count” required by the Constitution.¹⁹

2. *This threat to the accuracy of the 2020 Census is magnified by the extreme lateness of the Justice Department’s proposal.* Even assuming it were possible to devise a citizenship inquiry that would not risk an unconstitutional undercount, it is far too late in the planning process for the Census Bureau to test and validate any such approach. The Bureau must meet a statutory deadline of March 31, 2018 – less than two months away – to submit its final questionnaire for the 2020 Census to Congress.²⁰ Two months is insufficient time to design and test a question as sensitive as this one consistent with the guidelines that apply to federal statistical agencies.

By statute, the Office of Management and Budget (OMB) has responsibility for coordinating the federal statistical system, including to ensure “the integrity, objectivity, impartiality, utility, and confidentiality of information collected for statistical purposes.”²¹ OMB is also required to establish government-wide guidelines and policies regarding statistical collection methods.²² Consistent with these statutory obligations, OMB has published a number of Statistical Policy Directives that govern the data collection efforts of federal statistical agencies, including the Census Bureau.²³ These guidelines require, among other obligations, that agencies “ensure that all components of a survey function as intended . . . by conducting a pretest

¹⁷ See U.S. Census Bureau, *2010 Census Memorandum Planning Series No. 239, 2010 Census Content and Forms Design Program Assessment Report*, 14 (Sept. 25, 2012).

¹⁸ See *Census Equity Act: Hearings Before the Subcomm. on Census & Population of the Comm. on Post Off. & Civ. Serv.* 43-45 (1989) (statement of C. Louis Kincannon, Deputy Director, U.S. Bureau of the Census); *Exclude Undocumented Residents from Census Counts Used for Apportionment: Hearing Before the Subcomm. on Post Office & Civil Serv.*, 100th Cong. 50-51 (1988) (testimony of John Keane, Director, U.S. Bureau of the Census) [hereinafter *Census Counts*].

¹⁹ *Klutznick*, 486 F. Supp. at 568.

²⁰ 13 U.S.C. § 141(f)(2) (providing, with respect to each decennial census, “the Secretary [of Commerce] shall submit to the committees of Congress having legislative jurisdiction over the census . . . not later than 2 years before the appropriate census date, a report containing the Secretary’s determination of the questions proposed to be included in such a census”); 13 U.S.C. § 141(a) (establishing April 1, 2020 as the decennial census date).

²¹ 44 U.S.C. § 3504(e)(1); see also 44 U.S.C. § 3501(9); 44 U.S.C. §§ 3504(a)(1)(B)(iii), (e); Office of Mgmt. & Budget, *Statistical Programs of the United States Government, Fiscal Year 2017*, 3-4, 11 (2017).

²² 44 U.S.C. § 3504(e)(3).

²³ Office of Mgmt. & Budget, *Statistical Policy Directive No. 1: Fundamental Responsibilities of Federal Statistical Agencies and Recognized Statistical Units*, 79 Fed. Reg. 71,610 (Dec. 2, 2014); Office of Mgmt. & Budget, *Statistical Policy Directive No. 2: Standards & Guidelines for Statistical Surveys* (Sept. 2006); Office of Mgmt. & Budget, *Statistical Policy Directive No. 4: Release and Dissemination of Statistical Products Produced by Federal Statistical Agencies*, 73 Fed. Reg. 12,621 (Mar. 7, 2008).

of the survey components or by having successfully fielded the survey components on a previous occasion.”²⁴ OMB specifically recommends pretesting new components of a survey prior to a field test, and incorporating results into the final design.

In addition, the Census Bureau has further clarified the statistical standards it must utilize to address the agency’s unique methodological and operational challenges.²⁵ These standards require that all data collection instruments be tested “in a manner that balances data quality and respondent burden,” and specifically require pretesting to ensure questions are not “unduly sensitive” and “do not cause undue burden.”²⁶

These requirements cannot reliably be met in the limited time available before the Census Bureau’s March 31 deadline. The Census Bureau already developed and approved its National Content Test in 2015, which it characterized as its “primary mid-decade opportunity to compare different versions of questions prior to making final decisions for the 2020 Census.”²⁷ And the 2018 End-to-End Census Test – which the Census Bureau describes as the “culmination” of its years-long process of testing and validating all aspects of the decennial Census design – is already underway, having begun in August 2017.²⁸ In short, there is insufficient time for the Census Bureau to conduct the extensive development and testing that would be required to comply with OMB guidelines for adding new questions to the 2020 Census while assuring its validity and accuracy. And as the Census Bureau has explained, conducting the Census with “untested and unproven procedures” would further undermine the Bureau’s ability to conduct “a timely, accurate” enumeration.²⁹

These concerns are heightened even further by the Census Bureau’s already-precarious fiscal position as it prepares for the 2020 Census. The Bureau is dramatically underfunded, and the addition of a citizenship question would add significantly to the overall price of completing the Census. The Bureau’s appropriated budget for Fiscal Year 2017 was roughly ten percent below its request, and was finalized seven months late.³⁰ And the administration’s initial budget request for Fiscal Year 2018 proposed only a two percent increase for the Census Bureau over the previous year – well short of the resources needed for the Bureau to prepare adequately for

²⁴ Office of Mgmt. & Budget, *Statistical Policy Directive No. 2*, § 1.4 at 9 (2006).

²⁵ See U.S. Census Bureau, *Statistical Quality Standards*, ii (Jul. 2013), https://www.census.gov/content/dam/Census/about/about-the-bureau/policies_and_notices/quality/statistical-quality-standards/Quality_Standards.pdf.

²⁶ *Id.* at 7-8 reqs. A2-3 & A2-3.3.

²⁷ U.S. Census Bureau, *Information Collection Request: 2015 National Content Test*, 80 Fed. Reg. 29,609, 29,610 (May 22, 2015).

²⁸ U.S. Census Bureau, *Frequently Asked Questions for the 2018 End-to-End Census Test* (Dec. 20, 2017), <https://www.census.gov/programs-surveys/decennial-census/2018-census-test/faqs.html>.

²⁹ *Census Counts*, at 49-50.

³⁰ Robert Shapiro, *The 2020 Census May Be Wildly Inaccurate – And It Matters More Than You Think*, BROOKINGS (Aug. 31, 2017), <https://www.brookings.edu/blog/fixgov/2017/08/31/the-2020-census-may-be-wildly-inaccurate-and-it-matters-more-than-you-think/>.

the decennial Census.³¹ Further exacerbating these budget constraints, the reduced response rates that a citizenship question would cause will result in vastly increased costs overall. Reduced response rates trigger an expensive in-person follow-up process, which could result in an estimated increase of hundreds of millions of dollars to the price tag for the 2020 Census.

Because of inadequate financial resources, unreliable cost estimates, information technology challenges, and other concerns, GAO has already placed the 2020 Census on its “High Risk List” of government programs at greatest risk of fraud, waste, abuse, and mismanagement.³² Adding the challenge of testing and validating a question on citizenship to the tremendous operational and planning challenges that the Census Bureau already faces would increase the risk of error and heighten the chance of an undercount in our states.

3. *The states would be irreparably harmed by an inaccurate 2020 Census.* By deterring participation in the Census, the proposed citizenship question would harm everyone, citizens and non-citizens alike.

First, an inaccurate 2020 Census could result in widespread malapportionment of the states’ representation in Congress. As noted, the Constitution requires that Representatives “shall be apportioned among the several States . . . according to their respective Numbers.”³³ As provided by the Census Act, the Secretary of Commerce is required to use the decennial Census results to tabulate the total population by state and report those results to the President,³⁴ who must then “transmit to the Congress a statement showing the whole number of persons in each State . . . and the number of Representatives to which each State would be entitled.”³⁵ An undercount that fails accurately to report the “whole number of persons” in each state would result in an incorrect calculation of the number of Representatives to which each state is entitled, in violation of the Census Clause of the Constitution.³⁶ Inaccurate data would also jeopardize the ability of the states – and all of our local jurisdictions – to comply with the Fourteenth Amendment’s one-person one-vote requirement when drawing district lines for everything from the state legislature to local city councils.³⁷ Moreover, there would be no possibility of correcting this harm for at least a decade, when the next decennial Census takes place – and no

³¹ See *id.* (noting that the Census Bureau’s funding increased 60 percent between 2007 and 2008 in advance of the 2010 Census).

³² U.S. Gov’t Accountability Office, GAO-17-317, *High-Risk Series: Progress on Many High-Risk Areas, While Substantial Efforts Needed on Others*, 220-31 (Feb. 2017), <https://www.gao.gov/assets/690/682765.pdf>.

³³ U.S. Const. art. I, § 2, cl. 3.

³⁴ 13 U.S.C. § 141(a).

³⁵ 2 U.S.C. § 2a(a).

³⁶ See, e.g., *Utah v. Evans*, 536 U.S. 452, 459 (2002) (challenge by the State of Utah and its Congressional delegation to a Census Bureau methodology that resulted in Utah receiving one less Representative in Congress); *Franklin v. Massachusetts*, 505 U.S. 788, 790-91 (1992) (challenge by the Commonwealth of Massachusetts to the Census Bureau’s change in the method of counting overseas federal employees, which caused Massachusetts to receive one less seat in the House of Representatives).

³⁷ See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); *Baker v. Carr*, 369 U.S. 186, 208-09, 237 (1962).

way to undo the harm the states would suffer from a ten-year deprivation of their constitutional allotment of Representatives.

In addition, a Census undercount could affect state representation in the Electoral College. The Constitution assigns each state a number of electors equal to “the whole number of Senators and Representatives to which the State may be entitled in the Congress.”³⁸ An undercount that affected the apportionment of Representatives would also misrepresent the number of electors each state should receive, thereby miscalculating each state’s proper role in selecting the President and Vice President.

This extraordinary harm to the fabric of our federal system would come with equally significant financial harm. Data derived from the decennial Census guide the geographic distribution of hundreds of billions of dollars in federal grant funds to states and local areas. According to one estimate, there are about 300 Census-guided federal grant programs, with total appropriations in Fiscal Year 2015 of approximately \$700 billion.³⁹ These programs include Medicaid, the Supplemental Nutritional Assistance Program (SNAP), Title I grants to local educational agencies under the Elementary and Secondary Education Act, formula grants for highway planning and construction, Section 8 housing choice vouchers, the Low-Income Home Energy Assistance Program, and more.⁴⁰ In other words, a Census undercount would jeopardize critical federal funding the states need to provide health insurance, public education funding, food assistance, housing opportunities, energy assistance, and other services and support for millions of residents, regardless of citizenship status. Such widespread underfunding harms everyone, starting with the most vulnerable, including low-income communities and children.

The Census Bureau has both constitutional and statutory obligations to conduct an “actual enumeration.” Including a question on the 2020 Census that would manipulate the count by scaring people away from being counted – causing grave harm to the states and our residents – is inconsistent with those obligations.⁴¹

II. Adding a citizenship question to the 2020 Census would hamper the goals of the Voting Rights Act. The Justice Department’s request for citizenship data asserts that this information is necessary to ensure compliance with Section 2 of the Voting Rights Act. In fact, voting rights compliance will be undermined – not enhanced – by the addition of a citizenship question to the 2020 Census. Because the Justice Department’s request is unsupported by its

³⁸ U.S. Const. art. II, § 2, cl. 2; *see also id.* amend. XII, amend. XXIII (allocating electors to the District of Columbia).

³⁹ *See* Andrew Reamer, *Counting for Dollars 2020: The Role of the Decennial Census in the Geographic Distribution of Federal Funds*, G.W. Inst. Pub. Pol’y (Aug. 22, 2017), <https://gwipp.gwu.edu/counting-dollars-role-decennial-census-geographic-distribution-federal-funds>.

⁴⁰ *See id.*

⁴¹ *Cf. Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 348 (1999) (Scalia, J., concurring) (noting that the purpose of a “genuine enumeration” is to accomplish “the most accurate way of determining population with minimal possibility of partisan manipulation”).

stated reason, adding a citizenship question would be arbitrary and capricious under the Administrative Procedure Act.⁴²

1. *Collecting citizenship data would undermine the goal of fair and effective representation for all communities, which the Voting Rights Act was enacted to protect.* The purpose of the Voting Rights Act is to accomplish “nondiscriminatory treatment by government – both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement.”⁴³ Any method of enumeration that predictably undercounts some communities – as the Justice Department’s proposal would do – will mean that those communities are not fairly represented when legislative seats are apportioned and district lines are drawn.

The Supreme Court has long made clear that legislators represent all constituents in the districts they serve, regardless of whether any particular individual is a citizen: “[T]he fundamental principle of representative government in this country” is “one of equal representation for equal numbers of people.”⁴⁴ The Justice Department’s request should be rejected because it would undermine this fundamental principle.

2. *Citizenship data from the decennial Census is unnecessary to enforce the vote-dilution prohibition in Section 2 of the Voting Rights Act.* The Justice Department’s request should also be rejected because it is unsupported. The Justice Department contends that it needs a “reliable calculation of citizen voting-age population” (or “CVAP”) in order to enforce the vote-dilution prohibition of Section 2.⁴⁵ But the Supreme Court has never held that *citizen* voting-age population is the proper measure for examining whether a minority group can constitute a majority in a single-member district (the first element of proving a vote-dilution claim).⁴⁶ The Justice Department notes that in *LULAC v. Perry*, the Supreme Court “analyz[ed] a vote-dilution claim by reference to citizen voting-age population,”⁴⁷ but fails to note that in a subsequent Section 2 case – *Bartlett v. Strickland* – the Court assessed the vote-dilution inquiry in terms of

⁴² See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (noting that an agency acts arbitrarily and capriciously when it “entirely fail[s] to consider an important aspect of the problem” or “offer[s] an explanation for its decision that runs counter to the evidence before the agency”).

⁴³ *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966).

⁴⁴ *Reynolds*, 377 U.S. at 560-61; see also *Evenwel v. Abbott*, 136 S. Ct. 1120, 1131-32 (2016); *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality opinion); *Daly v. Hunt*, 93 F.3d 1212, 1226 (4th Cir. 1996) (explaining that “people can affect what their representatives do in another way” besides voting: “through their right to petition their representatives to voice their concerns and interests on particular issues. This right is available to everyone, even those who are ineligible to vote.”).

⁴⁵ DOJ Letter at 1.

⁴⁶ *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986)

⁴⁷ DOJ Letter at 1 (citing *LULAC v. Perry*, 548 U.S. 399, 423-442 (2006)).

“voting-age population.”⁴⁸ The question of the appropriate population measure in Section 2 vote-dilution cases is, at best, unsettled.⁴⁹

In addition, even if citizen voting-age population were required in all cases, adding a citizenship question to the Census would not give the Justice Department the “reliable calculation” of citizenship information it claims to need. The Census is of course only administered every ten years,⁵⁰ so any CVAP figures from the decennial Census would quickly become outdated and less reliable over the course of the subsequent decade as a result of population shifts. And a citizenship question would not provide information sufficient to ascertain the precise number of eligible voters in a district because district residents might be ineligible to vote for other reasons, such as prior felony convictions.

In any event, the Census Bureau’s American Community Survey already collects citizenship data, and these estimates are available for the federal government to use as needed.

Indeed, Congress could not possibly have intended for effective Section 2 enforcement to depend on the availability of person-by-person citizenship data, because such data has never been available at any point since Section 2 has existed: not in 1965 when the Voting Rights Act was first enacted; not in 1982 when the Act was amended to clarify the vote-dilution standard; not in 1986 when the Supreme Court articulated the vote-dilution test in *Thornburg v. Gingles*. Because the Justice Department’s request seeks data that has never before been required in Section 2 litigation – and that cannot reliably be collected in any event – it cannot credibly serve as the basis for major changes to the 2020 Census design that will undercut the accuracy of the constitutionally mandated enumeration.

III. The addition of a question regarding citizenship to the 2020 Census is inconsistent with the Census Bureau’s Information Quality Guidelines. The Information Quality Act (“IQA”) requires agencies to ensure that the information they disseminate to the public is accurate, reliable, and objective.⁵¹ Consistent with this directive, the IQA requires OMB and other federal agencies to issue guidelines “ensuring and maximizing the quality, objectivity, utility, and integrity of information, including statistical information, disseminated by the agency.”⁵² Recognizing the critical importance of the information it disseminates, the

⁴⁸ *Bartlett v. Strickland*, 556 U.S. 1, 12 (2009) (“This case turns on whether the first *Gingles* requirement can be satisfied when the minority group makes up less than 50 percent of the voting-age population in the potential election district.”); *see also id.* at 18 (“Unlike any of the standards proposed to allow crossover-district claims, the majority-minority rule relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area? That rule provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2.”).

⁴⁹ *See, e.g., Sanchez v. State of Colo.*, 97 F.3d 1303, 1311 (10th Cir. 1996) (“Because *Gingles* advances a functional evaluation of whether the minority population is large enough to form a district in the first instance, the Circuits have been flexible in assessing the showing made for this precondition.”).

⁵⁰ U.S. Const. art. I, § 2, cl. 3; 13 U.S.C. § 141(a).

⁵¹ Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763 (Dec. 21, 2000).

⁵² *Id.*; *see also* Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8457 (Feb. 22, 2002).

Census Bureau has adopted particularly stringent agency-specific IQA guidelines. These guidelines provide detailed requirements that the Census Bureau must meet to ensure the “utility,” “objectivity,” “integrity,” and “transparency” of information from the decennial Census.⁵³

The Census Bureau’s IQA guidelines disfavor questions that diminish response rates. The Bureau’s guideline for ensuring “objectivity,” requires collection and dissemination of information that is “accurate, reliable and unbiased.”⁵⁴ To achieve this end, the guideline requires the Census Bureau to utilize collection methods that “minimiz[e] respondent burden.”⁵⁵ This concern recognizes that respondents may choose not to respond when confronted by a question that is unduly sensitive or burdensome.⁵⁶ Burdensome questions may diminish the accuracy and reliability of data collected in surveys by driving down response rates. Indeed, the Census Bureau has acknowledged this very concern by adopting statistical standards that test for and revise these types of questions.⁵⁷

The addition of a question regarding citizenship will diminish overall response rates. As noted above, many immigrant and citizen groups are likely to be highly sensitive to the citizenship inquiry. Adding this question to the 2020 Census questionnaire would impose a high burden on these groups, dissuade many from responding, and impair the survey’s ultimate accuracy and reliability. As a result, by adding a citizenship inquiry to the questionnaire, the Census Bureau would hinder compliance with its own objectivity standard.

Moreover, the Census Bureau has not taken any steps to test the citizenship inquiry and its impact on potential respondents. The objectivity standard applies not only to the utilization of a particular data collection method, but also to the development of that method.⁵⁸ As noted above, both OMB and the Census Bureau have adopted statistical standards that require pre-testing in the development of data collection methods and survey questions.⁵⁹ To date, the Census Bureau has not engaged in any pretesting of the citizenship question. As a result, adoption of the citizenship question would conflict with the agency’s IQA guidelines, and the Census Bureau should reject requests to include that question on the 2020 Census questionnaire.

⁵³ *Information Quality Guidelines*, U.S. Census Bureau (May 12, 2015), <https://www.census.gov/about/policies/quality/guidelines.html>.

⁵⁴ *Information Quality: Objectivity*, U.S. Census Bureau (Apr. 17, 2015), <https://www.census.gov/about/policies/quality/guidelines/objectivity.html>.

⁵⁵ *Id.*; Similarly, OMB’s statistical standards require the Census Bureau to design its data collection instruments and methods “in a manner that achieves the best balance between maximizing data quality . . . while minimizing respondent burden and cost.” Office of Mgmt. & Budget, *Statistical Policy Directive No. 2*, § 2.3 at 11.

⁵⁶ U.S. Census Bureau, *Statistical Quality Standards*, at A2-3.3.

⁵⁷ *Id.*

⁵⁸ U.S. Census Bureau, *Information Quality: Objectivity*.

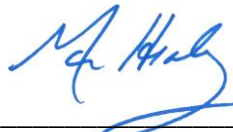
⁵⁹ Office of Mgmt. & Budget, *Statistical Policy Directive No. 2*, § 1.4 at 9; U.S. Census Bureau, *Statistical Quality Standards*, ii.

IV. Conclusion. Fair, proportionate electoral representation in our democracy depends on valid Census data. The proposal to add a citizenship question to the 2020 Census questionnaire would defeat that goal, violate the Constitution, and undermine the purposes of the Voting Rights Act that the Justice Department claims it wants to protect. Because inclusion of a citizenship question would threaten the Census Bureau’s ability to conduct its constitutionally-mandated role, and would be arbitrary and capricious under the Administrative Procedure Act – causing significant, direct harm to our states and residents – we urge you to reject the Justice Department’s request.

Sincerely,



ERIC T. SCHNEIDERMAN
Attorney General of the State of New York



MAURA HEALEY
Attorney General for the Commonwealth of Massachusetts



XAVIER BECERRA
Attorney General of the State of California



JOHN W. HICKENLOOPER
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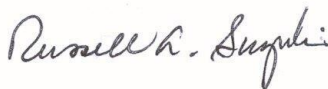
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cc: The Honorable Mick Mulvaney
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Dr. Ron Jarmin
Performing the Non-Exclusive Functions and Duties of the Director
U.S. Bureau of the Census