



**Testimony of the Lawyers' Committee for Civil Rights Under Law  
Submitted by Kristen Clarke, President and Executive Director**

**to the U.S. House of Representatives Judiciary Committee  
Subcommittee on the Constitution and Civil Justice  
Hearing on "Questions Regarding the U.S. Census"**

**June 8, 2018**

The national Lawyers' Committee for Civil Rights Under Law is a nonpartisan, nonprofit organization established in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice for all, particularly in the areas of voting rights, economic justice, education, criminal justice, employment, and fair housing across our nation. The respect for the rule of law, the enforcement of our nation's civil rights laws, and the proper functioning of our democracy are of paramount importance to the Lawyers' Committee and the broader civil rights community. In fulfillment of this mission, the Census touches all of what we do. The apportionment of congressional, state, and local representatives and fair allocation of federal funding are central to our work and to the communities we serve. Working to address the undercount of African Americans, Latinos and other minority communities is an issue that we have contended with in recent census cycles. To that end, we filed federal litigation on April 17, 2018 to challenge this administration's unconstitutional and unlawful 11<sup>th</sup> hour decision to incorporate an untested and unnecessary citizenship question that will fully obstruct efforts to secure a fair and accurate census count in 2020.<sup>1</sup>

As the Subcommittee on the Constitution and Civil Justice of the Judiciary Committee of the House of Representatives considers "Questions Regarding the U.S. Census," two centuries of consistent interpretation already provide the clear answer to the foundational question of who should be counted in the Census: everyone counts. Since 1790, every census has counted all people in the United States, regardless of their immigration status. The constitutional mandate to count "the whole number of persons in each state," has a long and settled tradition of including all persons, regardless of their citizenship or immigration status. (The only exceptions are foreign tourists and diplomatic personnel living on embassy grounds.) This has been the practice since the very first census and any current disruptive efforts will ignore the Constitution's plain language and clear intent, disrupt the integrity of the Census, and undermine participation in the Census. As history, practice, and precedent demonstrate, the duty of the Census is to be inclusive and accurate. As it was in past Census counts, it is the responsibility today of the U.S. Census Bureau, the Secretary of Commerce, and Congress to maintain and ensure the legitimacy, accuracy, and integrity of the 2020 Census.

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<sup>1</sup> Complaint, *City of San Jose v. Ross*, No. 5:18-cv-2279 (N.D. Cal. April 17, 2018)

The United States Constitution, Article I, section 2, clause 3 provides legal authority for the Census or “Enumeration.” Consonant with both the text and history of the Constitution, there is no basis to exclude persons from the Census based on immigration status. The Fourteenth Amendment makes clear that the enumeration must include “the whole number of persons in each state.” There is no distinction made in the Constitution between citizens and non-citizens, or documented and undocumented immigrants. All are persons.

Further, the U.S. Supreme Court has never restricted the inclusivity of the Census. Indeed, it has only expanded it. In 1992, for instance, despite legal challenge seeking to exclude overseas federal employees for not being present “in” the states, the Court reaffirmed their inclusion in the census count and apportionment process. *Franklin v. Massachusetts*, 505 U.S. 788 (2012). In 2016, in a Texas state apportionment case, the Court also unanimously affirmed the role of including non-voters and total population in the state apportionment process. “Nonvoters have an important stake in many policy debates—children, their parents, even their grandparents, for example, have a stake in a strong public-education system—and in receiving constituent services,” Justice Ginsburg wrote. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016). “Total-population apportionment promotes equitable and effective representation.” *Id.* Any effort to include in the Census count anything other than a count of “all persons” would thus conflict with the bedrock principles upon which the Census has long rested.

The Supreme Court has described the census as the “linchpin of the federal statistical system...collecting data on the characteristics of individuals, households, and housing units throughout the country.” *Dept. of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 341 (1999). Congress, states, and municipalities all rely on the Census enumeration for many purposes, including the allocation of state and local legislative districting and federal funding programs. This includes some of the largest federal assistance programs, with allocations totaling more than \$675 billion,<sup>2</sup> for public health, education, and transportation. Census-based data and funding are crucial for services like police, fire, and emergency medical treatment to all persons, citizens and non-citizens alike and to all immigrants, regardless of their status. Census numbers also are vital to states and localities for other planning decisions, such as disaster and emergency preparedness. Disasters do not discriminate between citizens and non-citizens or between immigrants depending on their status. Anything but a full and accurate Census enumeration has potentially dangerous and life-threatening implications.

To ensure the requisite maximum accuracy in its enumeration, the Census Bureau has a longstanding and well-established planning, testing, and revising process. The Census Bureau’s scientific method is so meticulous, it began the 2020 Census process over a decade ago. Indeed, the Bureau describes its operational design as one comprising “a set of decisions informed through research, testing, and analysis.”<sup>3</sup> Eleventh-hour attempts to change the Census questionnaire are both unwise and unprecedented. For example, the Bureau has spent almost ten years developing and testing the content, specific language, and layout of just one proposed change to the question

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<sup>2</sup> U.S. Census Bureau, 2020 Census Program Memo (2017), [https://www2.census.gov/programs-surveys/decennial/2020/program-management/memo-series/2020-memo-2017\\_19.pdf](https://www2.census.gov/programs-surveys/decennial/2020/program-management/memo-series/2020-memo-2017_19.pdf)

<sup>3</sup> U.S. Census Bureau, 2020 Census Operational Plan (2018), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan-exec-sum-2.pdf>

regarding race and ethnicity on the 2020 questionnaire.<sup>4</sup> Efforts to modify the Census enumeration or survey process at this late date, without appropriate research and testing, will jeopardize the accuracy and integrity of the Census.

The data collected by the Census are used in every facet of our nation's political, social, and economic decision making. As such, it is essential that all participate fully in the Census in order that decisions made in all aspects of private and public decision making are based on fully informed data. The U.S. Census Bureau for years has confronted the problem that African Americans, Latinos and other minority communities have historically been undercounted during each decennial census. Adding untested and unneeded questions will exacerbate this long-standing problem. In discussing the addition of a citizenship status question to the Census, a bipartisan coalition of at least four former Bureau directors shared the view that inquiring about citizenship status on the Census questionnaire "would likely exacerbate privacy concerns and lead to inaccurate responses from non-citizens worried about a government record of their immigration status." Brief of Former Directors of the U.S. Census Bureau as Amici Curiae in Support of Appellees at 23, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940), 2015 WL 5675832, at \*23. The changes to the Census being discussed during this hearing are likely to undermine robust participation and dismantle substantial efforts made to increase participation. "The sum effect would be bad Census data." *Id.* at \*25. Inaccurate and incomplete data directly interferes with the Bureau's fulfillment of its constitutional responsibility.

Furthermore, the ostensible reason for adding a citizenship question is baseless. The decision to do so, results from a letter sent by the General Counsel of the Justice and Management Division of the Department of Justice on December 12, 2017, at the tail end of census testing and preparation. The DOJ stated that it needed data as to the number of citizens of voting age population (CVAP) at the census block level in order to effectively enforce Section 2 of the Voting Rights Act in vote dilution suits — suits brought to ensure that election districts are drawn in a way that gives minority voters an equal opportunity to elect candidates of their choice.

The justification provided by DOJ simply does not withstand scrutiny and is clear pretext for a decision that will undoubtedly jeopardize efforts to secure a full and accurate count. The facts are that:

- This Administration's Department of Justice has demonstrated hostility to enforcement of the Voting Rights Act and has shown no commitment to safeguarding the rights of minority voters;
- Past administrations have had no trouble filing suits to enforce Section 2 without needing data on citizenship from the Census short-form questionnaire; and
- Since 2005, the American Community Survey, administered by the Census Bureau, but not as part of the Census itself, has provided sufficient data as to CVAP to allow both private plaintiffs like the Lawyers' Committee for Civil Rights Under Law and our sister organizations and DOJ to prosecute Section 2 claims successfully.

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<sup>4</sup> U.S. Census Bureau, Research to Improve Data on Race and Ethnicity (2016), <https://www.census.gov/about/our-research/race-ethnicity.html>.

Further, in the past two years, the Lawyers' Committee alone has filed 5 vote dilution cases under Section 2, with two of them settling so as to create new majority-minority districts (Jones County, NC, and Emmanuel Co., GA), without the need of CVAP data other than that provided by the American Community Survey. In none of these cases was there ever a question raised as to the need for more accurate CVAP data than that provided by the American Community Survey.

John Gore, the Deputy Assistant Attorney General of the Civil Rights Division of DOJ, and the true author of DOJ's letter to the Census Bureau, could scarcely make out a case for inclusion of the question in his recent testimony before the House Government Oversight Committee. He admitted that DOJ had "made do" with the ACS data, that responses as to citizenship on the short-form questionnaire would simply make it "easier" for DOJ, and could not point to a single Section 2 case brought by DOJ that failed because the CVAP data was not accurate or reliable.

J. Christian Adams' testimony proves the point that the citizenship question is not essential to enforce the Voting Rights Act. Each case he describes in his testimony is a case that was able to be brought and successfully prosecuted without the need to threaten the integrity of the Census with an unnecessary question concerning citizenship. For example, the *Lake Park* case which he highlights as one of the small jurisdiction cases which are in particular need of citizenship data resulted in a consent decree, changing an at-large election district to single-member districts so that minority voters would have the equal opportunity to elect candidates of their preference. That case was brought and concluded without the need of a citizenship question added to the Census.<sup>5</sup>

For centuries, consistent with its constitutional mandate, the Census has adhered to the same basic enumeration—count all persons—standard. The current efforts to introduce untested and unprecedented changes in the Census questionnaire will result in an inaccurate Census, and, in particular, a Census that further undercounts people of color in this Nation. Thank you.

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<sup>5</sup> <https://www.justice.gov/crt/cases-raising-claims-under-section-2-voting-rights-act-0#lakepark>