AMERICAN CIVIL LIBERTIES UNION FOUNDATION

October 30, 2026

SUBMITTED VIA REGULATIONS.GOV

U.S. Department of Commerce
U.S. Census Bureau
4600 Silver Hill Road
Washington, DC 20233

Re: Comments of the American Civil Liberties Union on "Decennial Census of the Population of Americans; Proposed Residence Criteria and Proposed Regulations for Demographic Questions," 91 Fed. Reg. 57,524 (Sept. 10, 2026) (Docket No. 260903-0005, RIN 0607-AA75)

Dear Census Bureau Officials:

The American Civil Liberties Union (ACLU) submits this comment on the above-docketed proposed rule (Proposed Rule) concerning proposed revisions to Parts 60 and 70 of the Code of Federal Regulations. The Proposed Rule would exclude millions of noncitizens from the population used to apportion Congress, redefine where everyone else "usually resides," and bar the decennial census from asking about race, ethnicity, and sexual orientation.

By excluding millions of people who reside in the United States from the apportionment base, the Proposed Rule would violate the Constitution, the Census Act, and the Administrative Procedure Act. It would also upend two centuries of settled understanding about the census's scope and purpose and abandon longstanding U.S. Census Bureau practice.

The proposed exclusions are unlawful no matter what evidence or explanation the Bureau offers. The Proposed Rule's other provisions are independently flawed, and the Bureau offers almost no evidence for any of them. It identifies no testing or operational analysis behind its most consequential proposals and says little about how it would implement them.

Those gaps matter because the Proposed Rule would change both who is counted for apportionment and what the census tells governments, researchers, and the public. Even if these changes were lawful—and they are not—the Bureau could not finalize them without first addressing the methodological, operational, and data-quality problems they create. The ACLU strongly opposes the Proposed Rule and urges the Bureau to withdraw the Proposed Rule in its entirety.

ACLU
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I. Part 60 Would Unlawfully Change Who Is Included In The Apportionment Population

Since the first Census Act in 1790, the census has counted each "person" where they usually reside. The Proposed Rule would fundamentally alter that framework by excluding millions of "persons" who reside in the United States from the apportionment population.

The Bureau cites two bases for that change. First, it contends that "under the best reading of the Constitutional mandate, illegal aliens (among others) should not be included in the apportionment count," which it describes as "the interpretive argument." *Decennial Census of the Population of Americans; Proposed Residence Criteria and Proposed Regulations for Demographic Questions*, 91 Fed. Reg. 57,524, 57,526 (Sep. 10, 2026). Second, it argues that excluding those individuals is independently a "lawful and appropriate exercise of the Census Bureau's discretion under 13 U.S.C. 141, *Franklin v. Massachusetts*, and all other applicable law." *Id.* Both rationales are wrong and contrary to law.

A. The proposed exclusions are inconsistent with the constitutional text, history, and longstanding practice.

The Bureau's constitutional argument turns on who counts as a "person" for apportionment. According to the Bureau, the term "persons" in Article I was "largely informed by (and synonymous with)" the term "inhabitants," which in turn referred to members of the "body politic." 91 Fed. Reg. at 57,525. The Bureau further reasons that the historical concept of usual residence incorporated "allegiance, durable permission from the sovereign to settle within the United States, and establishment of domicile," and concludes that undocumented immigrants and other noncitizens lacking sufficiently durable immigration status need not be counted. *Id.* at 57,526.

The constitutional text and historical record refute this reading. Having made this ahistorical interpretation a principal justification for changing who is included in the apportionment population, the Bureau must, at a minimum, confront the contrary evidence bearing directly on its construction of the constitutional text and history. As explained below, substantial evidence disproves the Proposed Rule's premises concerning "persons," "inhabitants," allegiance, and sovereign permission.

1. The original Constitution and Founding-era practice tied apportionment to population and residence.

From the outset, the Constitution based representation on population and "[p]ersons," not citizenship or "citizens." Article I provides that representatives be apportioned among the states according to their "respective Numbers," determined by adding the "whole [n]umber of free [p]ersons" and "three fifths of all other [p]ersons"—that is, slaves—while excluding "Indians not taxed." U.S. Const. art. I, § 2, cl. 3. Starting from the universe of "[p]ersons"—i.e., anyone living in the country—the Constitution spelled out exactly who would be excluded or counted unequally. As a federal three-judge court explained, "[b]y making express provision for Indians and slaves, the Framers demonstrated their awareness that" the provision's otherwise "all-inclusive" language encompassed the population generally. *Fed'n for Am. Immigr. Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C. 1980).

That structure matters because the Proposed Rule asserts that the Three-Fifths Clause—the Constitution's most notorious concession to slavery—explains why that document used "persons" rather than "citizens." 91 Fed. Reg. at 57,525–26. It then contends that "persons" carried an implicit limitation to "inhabitants" understood as members of the body politic. *Id.* The Proposed Rule cites no contemporaneous evidence for that contention, which ignores that where the Constitution departed from counting persons fully, it did so expressly.[1] Nothing in Article I excludes noncitizens, persons lacking lawful immigration status, or persons lacking permission to remain.

The Framers considered basing representation on wealth and property but chose population instead. James Wilson described the U.S. House of Representatives as "the most exact transcript of the whole Society," while Alexander Hamilton spoke of representation of "every individual of the community at large." 1 *The Records of the Federal Convention of 1787* 132, 473 (Max Farrand ed., 1911), https://perma.cc/8ZTP-ZJ5Y.

The Proposed Rule instead seizes on the Framers' choice of the "number of [a] State's inhabitants" as the measure of representation. *See* 91 Fed. Reg. at 57,525

[1] *See, e.g.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793 n.9 (1995) (applying principle of *expressio unius* to Constitution's Qualifications Clauses, noting "the affirmation of these qualifications would seem to imply a negative of all others"); *cf. also TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("When Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied . . . .").

(quoting *Wesberry v. Sanders*, 376 U.S. 1, 13–14 (1964)). But that gets the Bureau nowhere. In the eighteenth century and now, "inhabitancy" meant the fact of living in a place. In 1789, David Ramsay, who represented South Carolina in the Continental Congress, explained in a treatise on citizenship that "[a]ny person living within a country or state, is an inhabitant of it, or resident in it." David Ramsay, *A Dissertation on the Manners of Acquiring the Character and Privileges of a Citizen of the United States* 3 (1789). Contemporary dictionaries also defined an inhabitant as a "[d]weller; one that lives or resides in a place," Samuel Johnson, 1 *A Dictionary of the English Language* (6th ed. 1785), or "one who dwells or lives in a Place," Nathan Bailey, *An Universal Etymological English Dictionary* (20th ed. 1763). And an early congressional compilation later explained that "[t]he word inhabitant comprehends a single fact, locality of existence," expressly distinguishing the fact of inhabitancy from the legal status of citizenship. M. St. Clair Clarke & D.A. Hall, *Cases of Contested Elections in Congress* 415 (1834).

The First Congress's implementation of the census confirms that Congress understood "[p]ersons," for purposes of Article I, to include anyone "dwelling in a [p]lace," subject to the narrow exceptions Congress enumerated.[2] The Census Act of 1790 directed that "every person" be counted at his or her "usual place of abode." Census Act of 1790, ch. 2, § 5, 1 Stat. 101, 103. A person "without a settled place of residence" was to be reported where he or she was located at the time of enumeration, while "every person occasionally absent at the time of the enumeration" was to be counted at "that place in which he usually resides in the United States." *Id.* The statute thus turned on where people lived and whether their presence was settled or temporary, not on citizenship or legal authorization to remain.

The Proposed Rule overlooks those contemporaneous definitions and instead relies on eighteenth-century Swiss theorist Emmerich de Vattel's description of inhabitants as "strangers, who are permitted to settle and stay in the country" to support its additional requirement of "durable permission from the sovereign." 91 Fed. Reg. at 57,525–26 (citing Vattel, *The Law of Nations* § 213, at 92 (1760)). But the Bureau never explains why a law-of-nations treatise should override domestic sources that defined inhabitancy by residence and distinguished it from citizenship. Nor does it explain why historical requirements of domicile and an intent to remain translate into a modern requirement that a person possess a particular immigration

[2] *See Marsh v. Chambers*, 463 U.S. 783, 790 (1983) ("[A]n Act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument . . . is contemporaneous and weighty evidence of [the Constitution's] true meaning." (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888))).

status. Wherever the line between inhabitants and visitors falls, people who have lived in a state for years or decades are on the inhabitant side.[3]

Early census practice continued to distinguish citizenship from residence. In 1820, Congress expressly directed the census to identify "foreigners not naturalized." *See* Act of Mar. 14, 1820, 3 Stat. 550. Those individuals were nevertheless part of the population being enumerated. Personhood, in other words, never turned on citizenship. That practice cannot be reconciled with the Proposed Rule's account of the historical meaning of usual residence. The Proposed Rule does not acknowledge or address any of this history—a telling omission that proves the entire proposal is unlawful.

2. The Fourteenth Amendment adopted the "Whole Number of Persons" after Congress considered citizenship-based alternatives.

The Fourteenth Amendment made the Constitution's population-based rule still more explicit. Section 2 eliminated the Three-Fifths Clause and provided that Representatives would be apportioned among the states according to their respective numbers, "counting the whole number of persons in each State," subject to the then-remaining exception for "Indians not taxed."[4] U.S. Const. amend. XIV, § 2. Section 2 thus expressly requires counting the "whole number of persons," without qualification based on citizenship, immigration status, lawful presence, or allegiance.

That choice of language is especially significant because § 2 itself distinguishes between "persons" and "citizens." While its apportionment requirement refers to the "whole number of persons," its separate provision reducing a state's basis of representation for certain denials or abridgments of voting rights expressly refers to

[3] The Bureau's flawed historical reading ignores other relevant aspects of early American history. "At the end of the eighteenth century, the line separating citizens from aliens was not clearly or consistently drawn, either in law or in practice," and for a time most states did not distinguish between citizens and aliens when extending the right to vote. Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 32 (2000). Against that backdrop, the Bureau's suggestion that those same Americans nonetheless distinguished between citizens and noncitizens for purposes of the census makes little sense.

[4] This exception ceased to exclude anyone from the apportionment population following statutory changes to the legal status and taxation of Native Americans. *See* Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253.

"citizens of the United States." U.S. Const. amend. XIV, § 2. That contrast within a single section confirms that citizenship is not a condition of inclusion.[5]

The Bureau nonetheless argues that § 2 silently carried forward its reading of "persons" as being members of the "body politic." 91 Fed. Reg. at 57,526. The Amendment's drafting history refutes that argument. The Thirty-Ninth Congress considered whether representation should instead turn on citizenship or voting eligibility and rejected those alternatives in favor of population. Senator George W. Edmunds of Vermont (R-VT) explained that representation was to be based on population "independent of the franchise, independent of citizenship." Cong. Globe, 39th Cong., 1st Sess. 2944 (1866). Representative James Blaine of Maine (R-ME) similarly observed that "women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot." *Id.* at 141. Senator Jacob Howard (R-MI) put it most simply: "numbers, not voters; numbers, not property." *Evenwel v. Abbott*, 578 U.S. 54, 67 (2016) (quoting Cong. Globe, 39th Cong., 1st Sess. 2767 (1866)).

Most directly, Representative John Bingham of Ohio (R-OH) explained that "the *entire immigrant population of this country* is included in the basis of representation," and that the "*whole immigrant population* should be numbered with the people and counted as part of them." Cong. Globe, 39th Cong., 1st Sess. 432 (1866) (emphasis added). Other proponents agreed. *See id.* at 2944 ("Representation is now based upon population," including "foreigners not naturalized." (Sen. Williams (R-OR)); *id.* at 1256 (refusing to "throw[] out of the basis at least two and a half millions of unnaturalized foreign-born men and women" (Sen. Wilson (R-MA))); *see also, e.g.*, *id.* at 2987 (proposal to apportion based on voting population was a "blow which strikes the two million one hundred thousand unnaturalized foreigners who are now counted in the basis of representation from that basis" (Sen. Wilson (R-MA))); *id.* at 411 (representation based on voters improperly "takes from the basis of representation all unnaturalized foreigners" (Rep. Cook (R-IL))).

The Proposed Rule's account of the Fourteenth Amendment ignores all this. Congress considered citizenship-based alternatives, rejected them, and adopted language that its members understood to include the immigrant population in the basis of representation. A final rule retaining the Bureau's interpretation would be wrong on the history, the evidence, and the law.

[5] *See Wright v. United States*, 302 U.S. 583, 588 (1938) ("'In expounding the Constitution' . . . 'every word must have its due force, and appropriate meaning.'" (quoting *Holmes v. Jennison*, 39 U.S. 540, 570 (1840))).

3. Longstanding congressional and administrative practice undermines the Proposed Rule's historical account.

Congress and the Executive Branch alike understood the census to cover all persons, not just citizens and permanent residents. Two distinct aspects of that history stand out: Congress repeatedly declined to exclude noncitizens from apportionment, and the Census Bureau consistently administered the census based on residence, not immigration status.

Start with Congress, which repeatedly legislated against the background understanding that noncitizens residing in the United States were included in the apportionment population. When the issue of enumerating noncitizens came up in 1929, members expressly noted that persons who were "not here properly" would nonetheless be counted for representation. 71 Cong. Rec. 2078–83 (1929) (Sen. Heflin (D-AL)); *see also* 71 Cong. Rec. 2054 ("They are not citizens of the United States. They violated our laws to get here. They have no right to be here, but . . . you permit them to count their numbers and obtain Members of Congress upon alien population" (Sen. Heflin (D-AL))). Proposals were made to distinguish noncitizens lawfully and unlawfully present. But Congress enacted the reapportionment scheme without adopting those exclusions after members declared that "the plain mandate of the Constitution" requires counting all persons, including noncitizens. *See* 71 Cong. Rec. 1910 (1929) (Sen. Bratton (D-NM)).

Congress confronted the issue in 1940 and again declined to exclude noncitizens from apportionment. *See* H.R. Rep. No. 1787, at 1 (1940). Representative Celler (D-NY) stated that "the fathers agreed some 150 years ago" that "[w]hen we use the word 'persons' we include all peoples." 86 Cong. Rec. 4372 (1940); *see also id.* at 4386 (voting 209-23 to reject exclusion).

Similar proposals failed in 1980 and 1989. In 1980, a bill to exclude undocumented immigrants from the apportionment base failed after Senator Javits (R-NY) explained that the Constitution's words cannot be construed to mean "anything other than as described in the Federalist papers, the aggregate number of inhabitants, which includes aliens, legal and illegal." *1980 Census: Counting Illegal Aliens, Hearing Before the S. Subcomm. on Energy, Nuclear Proliferation & Fed. Servs. of the Comm. on Governmental Affs.*, 96th Cong. 10, 2d Sess. (Mar. 26, 1980). And in 1989, Congress rejected a proposal providing that "aliens in the United States in violation of the immigration laws shall not be counted in tabulating population." 135 Cong. Rec. 14539–40 (July 13, 1989). Senator Bumpers (D-AR) said: "I wish the

Founding Fathers had said you will only enumerate 'citizens,' but they did not. They said 'persons.'" *Id*. at 14551.

The Bureau's administrative practice drew the same line. The Bureau itself has described "usual residence" as a principle established by the Census Act of 1790 that "has been followed in all subsequent censuses," and historically defined it as "the place where a person lives and sleeps most of the time." *2020 Decennial Census Residence Rule and Residence Situations*, 80 Fed. Reg. 28,950, 28,950 (May 20, 2015); *see also Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5,525, 5,526 (Feb. 8, 2018) (explaining concept of usual residence is "grounded in the law providing for the first census" and means "the place where a person lives and sleeps most of the time").

And when the Bureau reviewed its residence criteria for the 2020 Census, it emphasized continuity with previous practice: most of the proposed criteria would "remain unchanged" from the 2010 Census. *Proposed 2020 Census Residence Criteria and Residence Situations*, 81 Fed. Reg. 42,577, 42,581 (June 30, 2016). The resulting criteria continued to count "[*c*]*itizens of foreign countries living in the United States*" where they lived and slept most of the time, while excluding noncitizens merely visiting. 83 Fed. Reg. at 5,533. The Bureau expressly retained that guidance after receiving comments objecting to the inclusion of undocumented persons in population counts used for redistricting. *Id.* at 5,530. And the Proposed Rule itself acknowledges that the 2020 criteria did not distinguish between foreign citizens present lawfully and unlawfully. 91 Fed. Reg. at 57,525.

That practice carries constitutional weight. "[L]ong and consistent historical practice" matters in constitutional interpretation of the Enumeration Clause, which can be "guided by a Government practice that 'has been open, widespread, and unchallenged since the early days of the Republic.'" *Dep't of Com. v. New York*, 588 U.S. 752, 770 (2019) (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in the judgment)); *see also Wisconsin v. City of New York*, 517 U.S. 1, 21 (1996) (noting "importance of historical practice" in census context).

Together, these two strands of historical practice confirm the Proposed Rule is wrong on the history and interpretation of the constitutional text. Congress maintained an enumeration and apportionment system that included noncitizen residents, while the Bureau administered the census for generations using residence, not immigration status, as the relevant distinction. If the Bureau believes that Congress and the Executive Branch were mistaken for the past two centuries, it must explain why.

4. Judicial precedent does not support the Proposed Rule's new limitation.

The Supreme Court's decisions likewise do not support treating immigration status or sovereign permission as an antecedent condition for inclusion in the apportionment population. The Proposed Rule largely ignores this case law, too.

In *Plyler v. Doe*, the Court explained that "whatever [their] status under the immigration laws, an alien is surely a 'person' in any ordinary sense of the term." 457 U.S. 202, 210 (1982). *Plyler* arose under the Equal Protection Clause, but it construed the same word in the same Amendment, and its reading cuts against the Proposed Rule's premise that immigration status determines whether a resident falls within the constitutional category of "persons."

Franklin v. Massachusetts likewise does not support the immigration-status limitation the Proposed Rule draws from it. *Franklin* explained that "usual residence" can encompass "some element of allegiance or enduring tie to a place." 505 U.S. 788, 804 (1992). But *Franklin* addressed federal employees physically located overseas whose continuing ties to particular states justified counting them in those states. *Franklin* thus held that residence can mean more than physical presence, not that it requires citizenship, lawful status, or the Government's permission to remain.

The Proposed Rule then stretches *Franklin*'s reference to "some element of allegiance or enduring tie" into a requirement of "allegiance, durable permission from the sovereign to settle within the United States, and establishment of domicile." 91 Fed. Reg. at 57,526. Nothing in *Franklin* supports that leap.

Evenwel v. Abbott then reinforced that Section 2 rests on total population. *Evenwel* located the Fourteenth Amendment's population-based rule in a constitutional tradition extending back to the Founding and explained that Section 2 "retained total population as the congressional apportionment base." 578 U.S. at 67. As the Court explained, the Framers of the Fourteenth Amendment understood that representatives serve persons who cannot vote as well as those who can, and deliberately rejected proposals that would have shifted representation away from population. *See id.* at 66–70.

Finally, the Proposed Rule's reliance on allegiance and domicile is especially unpersuasive following the Supreme Court's recent treatment of those historical concepts in *Trump v. Barbara*. 146 S. Ct. 2438 (2026). Although *Barbara* concerned the Citizenship Clause, its analysis bears directly on the Proposed Rule's reliance on historical concepts of allegiance and domicile.

There, the Court rejected the Government's argument that domicile supplied the relevant historical conception of allegiance, finding "scant evidence for this dramatically revisionist view" and observing that the Government had identified "no source that defined allegiance at birth as being based on domicile in the period from 1776 to 1868." *Id.* at 2453. The Court's analysis drew in part on *United States v. Wong Kim Ark*, which examined the common-law understanding of allegiance and the status of persons residing within the sovereign's territory. *See* 169 U.S. 649, 655–66 (1898).

The Proposed Rule does not so much as mention *Barbara*. Having made allegiance and domicile central to its interpretation, the Bureau must reconcile its proposed "durable permission" requirement with that decision. 91 Fed. Reg. at 57,526.

B. The proposed exclusions exceed the Secretary's discretion under 13 U.S.C. § 141.

The Proposed Rule offers the Secretary's discretion as an alternative basis for the proposed exclusions. *See* 91 Fed. Reg. at 57,526. But neither 13 U.S.C. § 141 nor the cases the Bureau cites confer that discretion.

Section 141 directs the Secretary to conduct a "decennial census of population" and to report the "tabulation of total population by States." 13 U.S.C. § 141(a), (b). To be sure, § 141(a) gives the Secretary substantial discretion concerning the census's "form and content." *Id.* But the Supreme Court has emphasized that the Census Act "does not leave his discretion unbounded." *Dep't of Com.*, 588 U.S. at 771–72. Discretion over the census's form and content does not confer authority to redefine "total population" to exclude persons residing in a state. Nor could Congress confer discretion to exclude persons whom the Constitution requires to be counted.

The broader statutory scheme confirms that limitation. Section 141(b)'s reporting requirement operates alongside 2 U.S.C. § 2a(a), which requires apportionment based on the "whole number of persons in each State" as ascertained by the decennial census. Read together, these provisions give the Secretary authority over *how* to count, not *whom* to count. Indeed, Congress understood these provisions to serve a single constitutional function. In explaining the legislation that established the modern reapportionment framework, the Senate Report stated that "the functions served by them interlock," because "there is but one basic constitutional function served by the census. It is to provide an enumeration of the people for redistributing congressional representatives proportioned thereto." S. Rep. No. 71-2, at 2 (1929).

History further undermines the Bureau's reading. Until Congress made the Census Office, the Bureau's predecessor, a permanent federal agency in 1902, *see* Act of Mar. 6, 1902 (to provide for a permanent Census Office), the census was primarily a congressional affair. And before 1929, Congress would enact census statutes once a decade to define the scope and form of the census. *See* Margo Anderson, *The Missing History of the Disclosure of Individual Responses in the American Census: What Happened and Why it Matters Now*, 6 Geo. L. Tech. Rev. 408, 414 (2022). Not once did Congress depart from its settled interpretation that the constitutional purpose of the census was to enumerate the total population, without regard to immigration or citizenship status. The Proposed Rule does not account for this history.

The Proposed Rule instead relies on *Wisconsin v. City of New York*, 517 U.S. 1 (1996), to support its claim that the Bureau has broad discretion to develop and modify the criteria used to determine usual residence, emphasizing that those criteria have changed over time in response to changing circumstances and operational judgments. 91 Fed. Reg. at 57,525. That case concerned how the census would be conducted—specifically, whether the Secretary should statistically adjust the enumeration to address an undercount. 517 U.S. at 19–24. And while the Court recognized broad discretion over the census's conduct, it expressly noted that the Secretary had to "conduct the census . . . consistent with the constitutional language" and declined to decide the "precise bounds" of the authority delegated to the Secretary under the Census Act. *Id.* at 19 n.11. Nothing in *Wisconsin* suggests that the Secretary's discretion extends to excluding otherwise resident persons from the "total population" Congress directed the Bureau to tabulate.

Nor does the Proposed Rule's reliance on "allegiance," "durable permission," or *Franklin*'s reference to "enduring tie[s]" supply a statutory basis. 91 Fed. Reg. at 57,526. As explained above, *Franklin*, 505 U.S. at 804, held only that federal personnel stationed overseas could keep a usual residence in their home states. It says nothing about excluding people who actually live here.

Further, even on the Bureau's own terms, immigration status is a poor proxy for "enduring tie[s]." 91 Fed. Reg. at 57,525. The Proposed Rule reasons that lawful permanent residents have the requisite "allegiance [and] durable permission" to be included in the apportionment population, while persons with less durable immigration statuses do not. *Id.* at 57,526. But it does not address substantial evidence that many persons the Proposed Rule would categorically exclude have deep, lasting connections to the states where they live.

Consider housing and marriage—two obvious indicators of "enduring tie[s]." The Proposed Rule would exclude undocumented immigrants who own homes. Studies estimate that around 4.3 million undocumented immigrants own homes in the United States.[6] Those ties are, by any reasonable definition, enduring. Federal courts deciding where a person is domiciled, for example—the very concept the Bureau invokes—ask where a person "owns real and personal property" and "maintains a home for [their] family," among others. *Coury v. Prot*, 85 F.3d 244, 251 (5th Cir. 1996); *see also Lew v. Moss*, 797 F.2d 747, 750 (9th Cir. 1986).

Similarly, studies have estimated that nearly 4.2 million undocumented immigrants are married to U.S. citizens or lawful permanent residents.[7] Supreme Court case law has long recognized the significance of marriage and family relationships to a person's enduring connection to a state. *See Williams v. North Carolina*, 325 U.S. 226, 229–30 (1945) (explaining domicile reflects a "nexus between person and place of such permanence" that it governs legal relationships of the "utmost significance," including marriage); *Williams v. North Carolina*, 317 U.S. 287, 298 (1942) (recognizing a state's "rightful and legitimate concern in the marital status of persons domiciled within its borders"). If the Bureau believes immigration status outweighs homeownership and marriage, it must explain why.

Tax payments similarly undermine the Bureau's conclusion that undocumented immigrants lack enduring ties to the United States or to the states and cities in which they live. Taxes illustrate enduring ties because they are often based on "domicile" and reflect the social contract that inheres in "the privileges of residence within [a] state," which is "inseparable from the responsibility for sharing the costs of government." *Lawrence v. State Tax Comm'n of Miss.*, 286 U.S. 276, 279 (1932). Undocumented immigrants, like other members of their communities, pay their fair share. In 2022, undocumented immigrants paid nearly $100 billion in taxes, including $59.4 billion to the federal government and $37.3 billion to states and localities.[8] In 40 states, undocumented immigrants paid "higher state and local tax rates than the top 1 percent of households living within their borders."[9] Again, the

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[6] Julia Gelatt, et al., *Changing Origins, Rising Numbers: Unauthorized Immigrants in the United States*, Migration Pol'y Inst., Oct. 2025, https://perma.cc/9LNB-A9U9.

[7] *Id.*

[8] Carl Davis, et al., *Tax Payments by Undocumented Immigrants*, Inst. on Tax'n and Econ. Pol'y, (July 30, 2026), https://perma.cc/C7Y4-F88F.

[9] Carl Davis, et al., *Tax Payments by Undocumented Immigrants*, Inst. on Tax'n and Econ. Pol'y, (July 30, 2024), https://perma.cc/F8MV-EZKA.

Bureau must reconcile its position that these immigrants lack enduring ties with the data reflecting these enduring contributions to their state and local governments.

The same is true of undocumented children who live and attend school in the United States. More than forty years ago, the Supreme Court held that a state could not deny undocumented school-age children "the free public education that it provides to children who are citizens of the United States or legally admitted aliens." *Plyler v. Doe*, 457 U.S. 202, 205 (1982). In doing so, the Court recognized the importance of enabling those children "to live within the structure of our civic institutions." *Id.* at 223. The Bureau should therefore explain how excluding these children, many of whom have lived here since infancy, squares with *Franklin*'s enduring-tie reasoning.

These examples are illustrative, not exhaustive. They show how far the Proposed Rule departs from the Bureau's prior approach. The 2020 residence criteria distinguished between foreign citizens "living in" the United States from those merely "visiting," "such as on a vacation or business trip." 83 Fed. Reg. at 5,533. That distinction turned on the character of a person's actual residence. The Proposed Rule instead makes immigration status dispositive for broad categories of foreign citizens, regardless of how long they have lived in a state or the nature of their connections to it. If the Bureau now thinks immigration status measures an "enduring tie" better than where and how a person actually lives, it must explain why.

C. The proposed exclusions raise grave equal protection concerns under the Fifth Amendment.

The proposed exclusions also raise serious concerns under the equal protection guarantee of the Fifth Amendment. That guarantee protects noncitizens, including those without lawful immigration status, from unlawful discrimination from the federal government. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). The federal government's latitude to draw certain distinctions involving noncitizens in the immigration context does not give the Bureau a free hand to discriminate in carrying out the census. Here, the concern is discrimination based on race and national origin in the exercise of the Bureau's enumeration and apportionment responsibilities.[10] Discriminatory purpose may be established

[10] The Supreme Court has afforded substantial deference to certain federal classifications involving noncitizens, reflecting the political branches' authority over immigration and naturalization. *See Mathews*, 426 U.S. at 78–85. That authority does not exempt federal agencies from constitutional constraints. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 100–03, 116–17 (1976) (invalidating a federal agency's citizenship restriction on civil-service employment). Here, the Bureau is determining which residents count toward congressional

through both direct and circumstantial evidence. Relevant considerations include the historical background of a decision, the sequence of events leading to it, departures from established practices, its disparate effects, and statements by decisionmakers. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–68 (1977).

The evidence strongly suggests that the proposed exclusions are motivated, at least in part, by a discriminatory purpose. In July 2020, President Trump directed the exclusion of undocumented immigrants from the apportionment base, explaining that states should not receive additional congressional representation based on their undocumented populations. *See Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020). More recently, on August 7, 2025, President Trump announced that he had instructed the Department of Commerce to develop a new census and declared that "People who are in our Country illegally WILL NOT BE COUNTED IN THE CENSUS."[11] The Proposed Rule follows that directive and adopts exclusions that extend beyond undocumented immigrants to other noncitizens who lawfully reside in the United States.

These actions also occur against a backdrop of statements by the President targeting immigrant communities on the basis of national origin. During a December 2025 cabinet meeting, for example, the President declared that he did not want Somali immigrants in the United States, stating that "their country stinks" and warning against "taking in garbage into our country."[12] At a rally later that month, President Trump described Afghanistan, Haiti, and Somalia as "hellholes" and questioned why the United States accepted immigrants from such countries, rather than Norway or Sweden.[13]

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representation, not whether those residents may enter or remain in the United States. The Bureau should explain why the deference afforded federal immigration decisions would extend to the exclusions proposed here and how those exclusions comport with the Fifth Amendment.

[11] Donald J. Trump (@realDonaldTrump), Truth Social (Aug. 7, 2025), https://truthsocial.com/@realDonaldTrump/posts/114987220997209419.

[12] Donald J. Trump, *Remarks Prior to a Cabinet Meeting and an Exchange with Reporters* (Dec. 2, 2025), Daily Comp. Pres. Docs., DCPD. No. DCPD202501155, https://perma.cc/N3W8-9QUB.

[13] Amy B. Wang, *Trump finally confirms using vulgar slur about several countries in 2018*, Wash. Post (Dec. 10, 2025), https://www.washingtonpost.com/politics/2025/12/10/trump-shithole-countries-comment-admission/.

More recently, during an October 2026 rally in Ohio, the President again targeted Haitian immigrants and celebrated their departure from Ohio communities, stating that existing residents were "getting their town back."[14] President Trump has also amplified racist rhetoric that questions immigrants' loyalty (the very premise the Proposed Rule seems to adopt). On April 22, 2026, for example, President Trump posted the full transcript of a podcast that said, among other things, there is "almost no loyalty to this country amongst the immigrant class coming in today" and lamented "they're not like the European Americans of today and their ancestors. . . . We've gone from the melting pot to the chamber pot."[15]

These statements, together with the Administration's express efforts to exclude immigrants from congressional representation, are not subtle: they indicate that race at least in part drives the effort to exclude millions of immigrants from the apportionment count. The Bureau must confront this evidence of racial discrimination and explain how its proposed exclusions comply with the Fifth Amendment, including why distinctions based on national origin would be permissible in determining which residents count toward congressional representation.

D. The proposed residence criteria are arbitrary and cannot be lawfully implemented.

Beyond excluding residents from apportionment, the Proposed Rule would change where the remaining population is counted. For the 2020 Census, "usual residence" was "the place where a person lives and sleeps most of the time." 83 Fed. Reg. at 5,525. The Bureau has used that definition in every census since at least 1950.[16] It was consistent with *Franklin*'s recognition that "usual residence" means

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[14] Julie Carr Smyth and Nicholas Riccardi, *WATCH: Trump attacks Somali and Haitian immigrants while rallying for Ohio Republican candidates*, PBS News (Oct. 13, 2026), https://perma.cc/B6RG-YL7E.

[15] Donald J. Trump (@realDonaldTrump), Truth Social (April 22, 2026), https://truthsocial.com/@realDonaldTrump/posts/116450605050795046.

[16] U.S. Census Bureau, *2010 Census Residence Rule and Residence Situations*, https://perma.cc/3UPL-FANU (2010); *Plans and Rules for Taking the Census, Residence Rules* at 1, https://perma.cc/GL9L-YSWG (2000); Elizabeth M. Sweet, *Roster Research Results from the Living Situation Survey*, U.S. Census Bureau, Survey Methodology #1994-10 at 2, (May 2, 1994), https://perma.cc/8UBQ-PUQX (1990); U.S. Dep't of Comm. & Bureau of the Census, *1980 Census of Population and Housing* at 1–6 (Sept. 1986), https://perma.cc/WGN7-TPWX (1980); U.S. Census Bureau, *Appendix A.—Area Classifications* at App.-1, https://perma.cc/CLZ8-FJR7 (1970); U.S. Dep't of Comm. & Bureau of the Census, *Census of*

"more than mere physical presence" and encompasses individuals who have "some element of allegiance or enduring tie to a place." *Franklin*, 505 U.S. at 804. And it tracks the Census Act of 1790, which, as noted *supra*, construed "usual residence" as a person's "usual place of abode." The Bureau jettisons that consistent practice and proposes instead an untested, unworkable definition.

Specifically, the Proposed Rule defines a person's "usual residence" as the residence where the person "lawfully spent the greatest number of days" during a newly defined "enumeration period" running from January 3 through April 1, 2030. 91 Fed. Reg. at 57,529. It also provides that a "person's 'usual residence' should be consistent with, and evidenced by, their tax records." *Id.* The Bureau says that January 3 marks the midpoint of a congressional term during a decennial year, while April 1 is Census Day, and states that it has "preliminarily determined" that considering information from this period is "sufficient and appropriate" for making a holistic determination of usual residence as of April 1. *Id.* at 57,526. It further reasons that defining a specific period is preferable to leaving the relevant period "open-ended and uncertain." *Id.*

All of that is arbitrary. Most obviously, the January 3–April 1 window ignores people whose location during those months differs from where they ordinarily live: "snowbirds," people with multiple residences, farmworkers and other seasonal or migrant workers, college students, and others who spend much of the winter away from home. For them, a fixed winter window could yield a different residence than where they live and sleep most of the time over the course of the year. The Proposed Rule offers no analysis of the size or geographic distribution of those effects.

The Proposed Rule's reliance on tax records raises related questions. The Bureau states that a person's usual residence "should be consistent with, and evidenced by," tax records, including tax returns and W-2 forms. *Id.* at 57,529. But a W-2 or Form 1040 generated in early 2030 reflects 2029 activity and would miss anyone who moved or changed jobs at year's end. The Proposed Rule also says that the defined enumeration period does not prevent the Bureau from gathering information after April 1, and that it intends to consider later-filed tax records insofar as they are probative of residence during the January 3–April 1 period. *Id.* at 57,526. But the Proposed Rule does not explain how much weight tax records will receive,

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Population: 1960, Vol. I, Characteristics of the Population at XIV (Mar. 1963) https://perma.cc/347V-DGJN (1960); U.S. Dep't of Comm. & Bureau of the Census, *Census of Population: 1950, Vol. II, Characteristics of the Population* at X (Dec. 1962), https://perma.cc/LB2Q-TDXP (1950).

how the Bureau will proceed when a tax address differs from the place where a person actually resides, or how it will treat persons who lack usable tax records. Those questions matter most for the populations described above, and for people who moved between years. The result could be systematic undercounts of some groups and overcounts of others.

The Proposed Rule also introduces a separate requirement that the relevant days be spent "lawfully" at a residence. Proposed § 60.2 provides that a person spends a day at a residence only if the person spends "at least one hour physically and lawfully present there that day," and permits a person to spend a day at more than one residence. *Id.* at 57,529, § 60.2(b). But the Proposed Rule does not adequately explain what "lawfully" means in this context, what information or methodology the Bureau would use to determine whether a person was lawfully present at a particular residence on a particular day, or what independent work that requirement performs apart from the immigration-status provisions of § 60.4. The one-hour threshold creates additional ambiguity for people who regularly spend time at more than one address. A child who splits time between two parents' homes, for example, could meet the threshold at both residences on many of the same days.

These gaps also violate the Bureau's own Statistical Quality Standards. U.S. Census Bureau, *U.S. Census Statistical Quality Standards* (Sept. 29, 2026), §§ A1–A2, D3, available at https://perma.cc/XH2G-9FTD. Requirement A1-2, for example, requires program planning to describe revisions to existing programs, including changes to key estimates, methods, and procedures, and to identify planned studies measuring the effects of those changes on key estimates and time series. *Id.* at § A1-2. The Proposed Rule identifies no such analysis: nothing showing that the January 3–April 1 window reliably measures usual residence, no comparison with the "lives and sleeps most of the time" standard, and no assessment of how the change would shift population geographically. And the midpoint of a congressional term has nothing to do with where a person usually lives.

The Proposed Rule thus fails to address important aspects of the problem bearing on whether the new criteria will reliably identify where people live or will systematically shift population among the states, including:

- What research, analysis, or study did the Census Bureau conduct in selecting the January 3–April 1, 2030 period for assessing usual residence, and what evidence supports its conclusion that residence during that period is an appropriate measure of usual residence as of Census Day?

- How does that change impact population estimates, and what bridging analysis has the Bureau conducted so that localities can distinguish population change from the residence-rule change? *See* U.S. Census Bureau, *U.S. Census Statistical Quality Standards* (Sept. 29, 2026), §§ A1–A2.
- What precise role will tax records play in determining residence, and for which individuals? How will the Census Bureau address circumstances in which a person's tax address or other administrative records differ from the place that person actually resides?
- How did the Bureau evaluate tax records' ability to cover the target population and identify current residences, given that tax records may have stale or mailing (not physical) addresses?
- What analysis, if any, did the Bureau conduct before proposing that "[a] person is considered to have spent a day at a residence if he or she spent at least one hour physically and lawfully present there that day"? 91 Fed. Reg. at 57,529 § 60.2(b); *see* U.S. Census Bureau, *U.S. Census Statistical Quality Standards* (Sept. 29, 2026), §§ A1-2–A1-4, B2-2, B2-3.1, D3.
- Section 60.2 of the Proposed Rule mandates the Census Bureau to assess the residence in which the individual has "*lawfully* spent the greatest number of days. . . ." 91 Fed. Reg. at 57,529 § 60.2(a) (emphasis added). What does "lawfully" mean in this context? What information or methodology will the Census Bureau use to determine whether a person is "lawfully" residing at a residence? And what function does "lawfully," as used in Section 60.2 of the Proposed Rule, perform independently of the immigration-status provisions of Section 60.4?
- Has the Census Bureau analyzed which populations are less likely to have usable tax records, or tax records that accurately reflect their residence during the proposed enumeration period?
- What information does the Census Bureau have about populations that are likely to be away from their usual residence for substantial portions of the January 3–April 1 period, and has it assessed how the proposed criteria would affect the geographic allocation of these populations?

E. The proposed rule threatens census accuracy and has not been adequately justified.

1. *If adopted, the Proposed Rule risks undermining census participation and accurate household reporting.*

The Supreme Court has recognized "a strong constitutional interest in [the] accuracy" of the decennial census. *Utah v. Evans*, 536 U.S. 452, 478 (2002). The Census Bureau has likewise long recognized that efforts to ascertain citizenship through the decennial census can discourage participation and thereby reduce the accuracy of the population count. *See Dep't of Com.*, 588 U.S. at 761.

When the first Trump Administration proposed adding a citizenship question to the 2020 decennial form, Census Bureau researchers found that doing so would reduce self-response and degrade the population count.[17] *See, e.g.*, J. David Brown et al., *Predicting the Effect of Adding a Citizenship Question to the 2020 Census*, Demography (2019) 56:1174 (July 17, 2019). For similar reasons, all six living former directors of the Census Bureau—who served in both Republican and Democratic administrations—wrote a letter to then-Commerce Secretary Ross warning that a citizenship question "would put the accuracy of the enumeration and success of the census in all communities at grave risk."[18] Similarly, former heads of the U.S. Department of Justice's Civil Rights Division noted in an amicus brief that until the Trump Administration proposed adding a citizenship question, "the Census Bureau had long taken the position that asking all respondents on the decennial census about their citizenship will inevitably jeopardize the overall accuracy of the population count."[19]

That position dates to at least 1980, when the Census Bureau's director opposed a bill to add a citizenship question to the decennial form not just because it would harm response rates from unlawful residents, but also because it "would make it more difficult for [the Census Bureau] to get the cooperation that [it] needs from members of [the] minority groups who are legal citizens or legally resident aliens in this country," which would in turn harm "the credibility and public confidence in—

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[17] Pema Levy, *New Documents Show the Census Bureau Ignored Its Own Experts When It Added a Citizenship Question*, Mother Jones (July 24, 2018), https://perma.cc/54E3-P99X.

[18] Letter to Sec'y of Com. from Former Directors of the U.S. Census Bureau, Jan. 26, 2018, available at https://perma.cc/8VCH-VJNS.

[19] Br. of John R. Dunne, et al., as Amicus Curiae for Respondents, No. 18-966, *Dep't of Com. v. New York*, at 15 (Apr. 1, 2019) (internal quotation marks omitted).

and, indeed, the accuracy of" the final decennial enumeration.[20] The Census Bureau took this same position in litigation shortly thereafter, reiterating that a citizenship question would harm the accuracy of the enumeration and "would inevitably trigger hostility, resentment and refusal to cooperate" in minority communities.[21] A few years later, the Census Bureau again explained to Congress that adding a citizenship question "involves legal considerations for which the Census Bureau has neither expertise nor responsibility," and "could have a major effect on census coverage."[22]

The Proposed Rule itself acknowledges the relationship between questionnaire content and census participation. In support of removing certain demographic questions, the Bureau states that "the more questions that are included on the decennial census questionnaire, the lower the overall response rate," and reasons that reducing response burden will increase response rates and enable the Bureau to obtain "a more complete population count directly from respondents." 91 Fed. Reg. at 57,527. But the Proposed Rule never applies that logic to its own suggestion that the Bureau could add a status question to the short-form questionnaire. *Id*. at 57,526.

The Proposed Rule does not say whether the Bureau will determine citizenship and immigration status through administrative records, a question on the census form, or both. *Id*. A question would have the deleterious effects described above, as the Bureau's own research shows. And whatever the method, the Proposed Rule identifies no research on whether its use of this information would depress participation. Telling the public that responses will be linked to immigration records in order to strip representation from communities where immigrants live is unlikely to increase participation. This absence of testing cannot be reconciled with the Bureau's Statistical Quality Standards. *See infra* at 26–27.

To preserve the accuracy of the decennial census, the Census Bureau should assess whether linking responses to citizenship or immigration-status information will deter self-response, household reporting, or cooperation with census operations, including among mixed-status households and even citizens and lawful permanent residents. It should also assess whether responding households will leave members

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[20] *1980 Census: Counting Illegal Aliens, Hr'g before the Subcomm. on Energy, Nuclear Proliferation, and Federal Servs. of the S. Comm. on Governmental Affs.*, 96th Cong. 68–69, 2d Sess. (Mar. 26,1980) (statement of Vincent Barabba, Director, Census Bureau).

[21] *Fed'n for Am. Immigr. Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980).

[22] *Enumeration of Undocumented Aliens in the Decennial Census: Hrg. Before the Subcomm. on Energy, Nuclear Proliferation & Fed. Servs. Of the S. Comm. on Gov't Affairs*, 99th Cong., 1st Sess., 31–32 (Sept. 18, 1985) (statement of John G. Keane, Director, Census Bureau).

off. For example, a respondent in a mixed-status household may list citizen members while omitting undocumented ones, and lower response among undocumented adults could lead to an undercount of their citizen children.

The Proposed Rule is similarly silent on how the Bureau would respond to any reduction in self-response. The Bureau has previously recognized that lower self-response requires additional "non-response follow up" (NRFU), increasing costs and potentially reducing data quality. *See Dep't of Com.*, 588 U.S. at 763–64. The Bureau should therefore estimate any effect of the proposed changes on self-response and identify the resulting operational consequences, including additional NRFU operations, staffing, costs, and any resulting effects on enumeration accuracy.

Research by the Bureau's own staff provides more reason for concern. A 2024 study using data from the Bureau's randomized 2019 Census Test found that adding a citizenship question had little effect on overall response rates but disproportionately discouraged responses from households containing noncitizens. *See* J. David Brown & Misty L. Heggeness, *Citizenship question effects on household survey response*, J. of Pol'y Analysis and Mgmt. (45 ed., Mar. 20, 2026), https://doi.org/10.1002/pam.70004 (based on internal Bureau research). For example, self-response declined by 3.06 percentage points among households with Individual Taxpayer Identification Number holders and 1.98 percentage points among households with Latin American-born noncitizens with Social Security numbers. *Id.* These findings suggest that overall response rates can mask significant effects on particular households, increasing the risk of undercounting populations already difficult to enumerate.

The Proposed Rule likewise leaves unanswered whether it will depress self-response or accuracy, and how those effects could be mitigated, including:

- Has the Census Bureau tested the effect that using immigration-status information to implement the Proposed Rule could have on self-response, household reporting, and census accuracy, including where status is determined through administrative-record linkage?
- If the Bureau is considering adding a legal-status question to the decennial questionnaire, what effect does it expect such a question to have on self-response and household-roster completeness, and what research supports that assessment?
- What cognitive, field, or other testing has the Census Bureau conducted, or plans to conduct, on any immigration-status or citizenship question?

- Has the Census Bureau studied to what extent respondents are able to accurately report the immigration status for other members of the household, or for other households in the case of proxy respondents?
- What are the Census Bureau's processes for when there are discrepancies between a household's responses and administrative records, whether concerning the number or immigration status of household members?

2. The Proposed Rule does not adequately explain its proposed uses of administrative records.

The Proposed Rule separately contemplates using administrative records to determine which foreign citizens will be included in the apportionment population and states that the Bureau could, "in addition," include a legal-status question on the "short-form decennial questionnaire." 91 Fed. Reg. at 57,526. In support of the administrative-record approach, the Bureau emphasizes its "enormously broad access to administrative records," describes its holdings as "nearly exhaustive of the civilian Federal government's holdings," and points to a "highly-advanced data linkage infrastructure" that has "improved in recent years." *Id.* But the Proposed Rule provides little information about the records, and no information about the linkage methodology, validation, or error rates on which those determinations would depend. Without that information, commenters cannot meaningfully evaluate whether the contemplated methods are sufficiently reliable for the proposed use.

The Bureau's own standards require disclosure of exactly this information. *See* U.S. Census Bureau, *Statistical Quality Standards* (Sept. 29, 2026). Standard B2-2 calls for a study plan evaluating the reliability of acquired administrative data, while Standard B2-3.1 identifies missing-data rates, population coverage, and record accuracy as relevant quality measures. *Id.* at §§ B2-2, B2-3.1. The Bureau's record-linkage standards also require testing and evaluation of linkage procedures. Standard C4-4 specifically provides that linkage accuracy must be documented through statistical evidence of match quality, including estimated false match and false nonmatch rates or appropriate substitutes. *Id.* § C4-4. The Proposed Rule identifies none of these evaluations and does not explain how linkage or classification errors could affect state apportionment counts.

As for implementation, the Proposed Rule provides no substantive information about how the Census Bureau will use administrative records to make immigration-status determinations. The Census Bureau would have to determine which administrative records establish particular statuses, the relevant date for determining status, how records would be linked to census responses, how conflicting

or missing information would be resolved, and how individuals would be treated when available records do not permit a definitive determination or when incomplete responses make record linkage impossible. It would also have to address differences within the subject population, including how administrative records may apply differently to mixed-status households. *See* J. David Brown & Misty L. Heggeness, *Citizenship question effects on household survey response*, J. of Pol'y Analysis and Mgmt. (45 ed., Mar. 20, 2026), https://doi.org/10.1002/pam.70004 (based on internal Bureau research); *see* J. David Brown et al., *Predicting the Effect of Adding a Citizenship Question to the 2020 Census*, Demography (2019) 56:1191–93 (July 17, 2019). Each of these decision points could affect the accuracy and geographic distribution of the resulting population count.

To permit evaluation of the proposed use of administrative records, the Bureau must address the following questions:

- What specific immigration-status categories will the Census Bureau use to implement § 60.4 of the Proposed Rule and how will each category be defined?
- What administrative records will the Census Bureau use to identify each immigration status, and what information in the administrative records will establish that status?
- What dates or reference periods will be used to determine an individual's immigration status? Relatedly, how will the Census Bureau account for changes in status, such as naturalization, including changes occurring between the date an administrative record was created or last updated and enumeration day?
- How will the Census Bureau treat conflicting records, conflicts between administrative records and any information reported by a census respondent, or inability to link records due to response incompleteness?
- If the Bureau uses probabilistic methods to reconcile conflicting records, what thresholds will it use?
- What proportion of individuals does the Bureau expect to classify reliably under proposed § 60.4, and how does that proportion vary across states and population groups? What treatment will the Bureau apply to individuals whose status cannot be determined reliably?
- What testing has the Census Bureau conducted to estimate false-positive and false-negative classification rates, and how do those rates vary across data sources, states, and population groups?

The Bureau must also account for the purposes for which each administrative record was collected. Different agencies collect information using different definitions and reference periods. A tax address, for example, may not identify where a person actually lives, while an immigration record may establish a particular status at one point but not during the relevant census period. The Bureau should identify the purpose of each principal source, the definitions and periods it uses, and the evidence that it is sufficiently current and reliable for the determination at issue.

The Bureau's contemplated use of administrative records raises separate obligations under the Privacy Act of 1974. The Act requires agencies to maintain records "with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." 5 U.S.C. § 552a(e)(5). The Bureau should explain how its proposed immigration-status determinations will comply with those requirements. *See id*.

Staleness is a real risk. Records that accurately reflected an individual's citizenship or immigration status when created can become outdated over time. For example, an individual may naturalize and have no reason to update citizenship information previously supplied to a motor-vehicle agency for years.[23] This problem is particularly salient for data maintained by the Social Security Administration (SSA). As SSA's Office of the General Counsel has explained, citizenship data maintained by SSA "merely represents a snapshot of the individual's citizenship status at the time of their interaction with SSA" and does not "provide definitive information about an individual's citizenship status."[24] SSA has accordingly disclaimed its records as a measure of citizenship, stating "SSA is not the agency responsible for making citizenship determinations" and "SSA is not the custodian of U.S. citizenship records."[25] The Bureau should explain how it will identify and correct for comparable forms of staleness in each administrative source it proposes to use.

Finally, the Proposed Rule contemplates reliance on "third-party commercial data," 91 Fed. Reg. at 57,526, but does not identify the datasets the Bureau may use or the standards by which their reliability will be evaluated. The Census Bureau must identify them and explain how it will assess their coverage, accuracy, timeliness,

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[23] *See, e.g.*, Alexa Ura, *Texas will end its botched voter citizenship review and rescind its list of flagged voters*, The Tex. Trib. (April 26, 2019), https://perma.cc/E29D-JJTK.

[24] Letter from SSA Off. of Gen. Counsel to Fair Elections Ctr., July 13, 2023, at 2, available at https://perma.cc/9BQJ-XUJN.

[25] *Id*.

match quality, and fitness for each residence or immigration-status determination for which they would be used.

F. The Proposed Rule departs from longstanding Bureau practice without justification.

The Proposed Rule makes significant changes to longstanding Census Bureau practices without providing the factual, methodological, and operational information necessary to evaluate them. The Administrative Procedure Act (APA) requires agencies to provide a reasoned basis for their decisions and sufficient information to permit meaningful public scrutiny. *See* 5 U.S.C. § 553(b)–(c); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In short, an agency must "'disclose the basis' [for] its action," *Dep't of Com.*, 588 U.S. at 780 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–69 (1962)), and provide "genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public," *id.* at 785. Where, as here, the Bureau proposes to depart from longstanding practices and prior agency conclusions, it must confront the evidence underlying those prior positions and explain the factual and methodological basis for its new ones.

The APA requires an agency to provide notice of its proposed rulemaking and to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b)–(c). That opportunity must be meaningful. Here, meaningful participation is impeded in two related ways: the Proposed Rule omits important information concerning how several of its central proposals would operate and the evidence supporting them, and the Bureau has provided less than the ordinary 60-day period to comment on a rule it calls a "significant regulatory action." 91 Fed. Reg. at 57,528.

First, the Proposed Rule does not disclose sufficient information to persuade that the Bureau has in fact applied the requisite care to its proposal. As explained above, the failure to disclose that information falls short of the Bureau's Statistical Quality Standards. *See* U.S. Census Bureau, *U.S. Census Statistical Quality Standards* (Sept. 29, 2026), §§ A1-2, A1-4. For example, the Bureau relies on what it describes as "a highly-advanced data linkage infrastructure" that "has . . . improved in recent years as the Census Bureau has continued to develop and integrate new technologies." 91 Fed. Reg. at 57,526. But the Proposed Rule does not identify those technologies, describe the relevant data-linkage infrastructure, provide expected match or error rates, or identify analyses showing that the infrastructure can reliably make the classifications contemplated. Without that information, commenters cannot

meaningfully assess whether the proposed methods can produce accurate population counts, how errors may vary across states and population groups, or whether reasonable alternatives would avoid those errors.

The Bureau's Statistical Quality Standards require disclosure of that information. Requirement A1-4 requires administrative-data projects to identify the target population, assess its coverage by administrative records, and describe the "[m]ethods of integrating data sources" and "[a]nalysis methods." U.S. Census Bureau, *U.S. Census Statistical Quality Standards* (Sept. 29, 2026), § A1-4. Requirement A1-2 similarly requires among other things "a description of the steps taken to prevent unnecessary duplication with other sources of information." *Id.* § A1-2. The Proposed Rule's assertion that its infrastructure has "improved" due to "new technologies" provides little basis to evaluate whether those requirements are met. 91 Fed. Reg. at 57,526.

The Bureau's transparency standards similarly require methodological documentation sufficient for policymakers and stakeholders to measure the effects of the changes to key estimates. U.S. Census Bureau, *U.S. Census Statistical Quality Standards* (Sept. 29, 2026). But the Proposed Rule's vague description of the infrastructure and technologies on which it relies cannot be reconciled with Standard F, which "aims to provide sufficient transparency into the Census Bureau's information products so that qualified users can reproduce the estimates and results in the products." *Id.* § F2. Sub-Requirement F2-2.3 requires that "[d]escriptions of the methodology, including the methods used to collect and process the data and to produce estimates, must be readily accessible," and enumerates examples of what is required. *See id.* § F2-2.3. Any changes to the Bureau's methodologies must at a minimum comply with those Statistical Quality Standards, and the Proposed Rule does not.

Nor does the Proposed Rule identify empirical research or testing supporting its most consequential methodological judgments. It identifies no testing supporting the newly proposed January 3–April 1 residence period, even though, as the Bureau knows, the census has always used a single reference date (since 1930, April 1). Nor does it assess how using immigration-status information would affect participation, test a citizenship or immigration-status question, explain how its record-classification system would work, estimate linkage or classification errors, address resulting geographic disparities, or model how its changes would affect state population counts.

The Bureau's departure from its own standards confirms what the Rule's text suggests: its proposals have not been adequately tested, and the Bureau does not yet know how it will carry them out. The Proposed Rule's vagueness is therefore not just a transparency problem. It is an evidentiary defect.

Second, the time afforded for public comment compounds these problems. Executive Order 12,866 provides that agencies "should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days." *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Sept. 30, 1993), § 6(a)(1). The Bureau initially allowed 33 days. Even as extended to November 2, 2026, the period is only 53 days. *See Decennial Census of the Population of Americans; Proposed Residence Criteria and Proposed Regulations for Demographic Questions; Extension of Comment Period*, 91 Fed. Reg. 63,207 (Oct. 5, 2026). Neither the Proposed Rule nor the extension notice explains why a shorter period is warranted for a rule that the Bureau itself considers a "significant regulatory action" and that proposes substantial changes to the conduct of the decennial census. *See* 91 Fed. Reg. 57,524, 57,528.

As part of the public-comment period, the Bureau should make available the studies, testing, validation analyses, methodological documentation, modeling, and other factual materials (if any) on which it relies to support the proposed changes. It should identify the materials with sufficient specificity to permit public evaluation, explain how they support the Bureau's proposed methodological pivots, and address material evidence—including the Bureau's own prior research and conclusions—that points in a different direction. Where relevant analyses have not yet been conducted, the Bureau should say so and do that work before adopting the proposed changes. Once the Bureau supplements the record with the required material technical or empirical information, it should extend or reopen the comment period to allow the public a meaningful opportunity to evaluate and respond.

II. Part 70 Would Significantly Alter The Collection And Availability Of Demographic Data.

The Bureau should also withdraw Part 70 in its entirety. Proposed § 70.2 would prohibit questions about race, ethnicity, and sexual orientation on the decennial questionnaire or any other questionnaire "used for the enumeration of the population." 91 Fed. Reg. at 57,530. That would break with more than two centuries of practice in asking for demographic data, degrade census data, and hamper enforcement of federal law. The Bureau acknowledges that "demographic questions have been asked in every census since 1790," *id.* at 57,527 (quoting *Dep't of Com.*, 588

U.S. at 769), but nevertheless proposes to prohibit collection of race, ethnicity, and sexual orientation without adequately assessing the consequences of that change. The Bureau does not come close to justifying so sweeping a change. Indeed, its own impact analysis concedes that no comparably accurate source exists.[26]

Part 70 is unlawful in many respects, but this comment focuses on three: (a) the Rule ignores the governmental and statistical uses of decennial demographic data and the lack of adequate substitutes for it; (b) its privacy and response-burden rationales are unsupported; and (c) it fails to consider alternatives.

A. The Proposed Rule fails to adequately consider the governmental and statistical uses of decennial demographic data.

Part 70 rests on an unduly narrow view of the census's purpose. While the Proposed Rule acknowledges that the census has historically collected demographic information and that Congress has authorized the Secretary to "obtain such other census information as necessary," it discounts those functions because collecting demographic information does not, "by itself," advance what the Bureau describes as the census's "fundamental, Constitutional purpose" of apportionment. 91 Fed. Reg. at 57,527 (quoting 13 U.S.C. § 141(a)). That reasoning ignores the many governmental and statistical functions Congress and the Bureau have long assigned to decennial census data.

As the Supreme Court explained in *Department of Commerce*, census data is used not only to apportion representatives, but also "to allocate federal funds to the States and to draw electoral districts," and the census "additionally serves as a means of collecting demographic information" used for purposes including "computing federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies." 588 U.S. at 760 (quoting *Baldrige v. Shapiro*, 455 U.S. 345, 353–54 n.9 (1982)).

James Madison, who helped draft Article I and later oversaw the 1800 Census as Secretary of State, urged the new Congress to "embrace some other subjects besides the bare enumeration of the inhabitants." Such information, he said, was what "all legislatures had wished for" but "never . . . obtained," calling the census "an

[26] U.S. Census Bureau, *Preliminary Regulatory Impact Analysis: Decennial Census of the Population of Americans; Proposed Residence Criteria and Proposed Regulations for Demographic Questions*, Dkt. No. 260903-0005 at 13–15 (Sept. 10, 2026), https://perma.cc/S3PB-4T4K.

opportunity of marking the progress of the society, and distinguishing the growth of every interest." *Baldrige*, 455 U.S. at 353 n.9 (citation omitted). Congress obliged. By the early twentieth century, the census had become "a full-fledged instrument to monitor the overall state of American society." Margo J. Anderson, *The American Census: A Social History* 88 (2d ed. 2015). The Proposed Rule acknowledges this history but does not assess the consequences of abandoning it. *But see* U.S. Census Bureau, *U.S. Census Statistical Quality Standards* (Sept. 29, 2026), § A1-2 (requiring that the Bureau identify "[w]hen and how frequently users need the data," "[t]he usefulness of the revisions for conducting analyses and for informing policymakers and stakeholders," and "[a] description of stakeholder requirements and expectations").

That history makes the Rule's silence even more conspicuous. As the Proposed Rule recognizes, the census has been collecting information about the race of United States inhabitants since 1790,[27] 91 Fed. Reg. at 57,527, and race and ethnicity are among the subjects historically collected through the decennial census, *id*. Yet the Rule says nothing about how that information is used.

Any final rule must also explain why the Bureau has abandoned its own recent research. In 2024, the Office of Management and Budget (OMB) revised Statistical Policy Directive No. 15 after "several large-scale, rigorous studies conducted by the Census Bureau." *Revisions to OMB's Statistical Policy Directive No. 15: Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity (SPD-15)*, 89 Fed. Reg. 22,182, 22,184 (Mar. 29, 2024). That process "relied heavily on research conducted by Federal agencies over the last decade, especially the U.S. Census Bureau's 2015 National Content Test." *Id*. That test alone involved a nationally representative sample of 1.2 million housing units. *Id*. SPD-15 concluded that "[w]herever possible, race and/or ethnicity data should be collected through self-report, where the respondents directly provide their own race and/or ethnicity." *Id*. The Proposed Rule does not mention any of this work.[28]

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[27] Nat'l Academies of Sci., Eng'g, and Med., *Assessing the 2020 Census: Final Report* 262 (Teresa A. Sullivan and Daniel L. Cork eds., 2023), https://nap.nationalacademies.org/catalog/27150/assessing-the-2020-census-final-report.

[28] Adopting Part 70 would undermine SPD-15 in other ways. For example, SPD-15 added a Middle Eastern or North African (MENA) category, in part as a response to "MENA groups and members of the public . . . long voic[ing] the need for a separate MENA minimum category" in federal race and ethnicity data. *See* 89 Fed. Reg. 22,182. Because the 2030 census will be the first decennial census conducted after SPD-15 went into effect, and because the MENA category is not reflected in the Best Race file that the Bureau will likely use in the

Part 70 also fails to grapple with the role the decennial race and ethnicity data play in redistricting and enforcement of federal voting-rights law. That omission is striking: Proposed § 70.3 itself directs the Bureau to prioritize population-count accuracy for purposes of "apportionment and (re)districting." 91 Fed. Reg. at 57,530.

Nor does the Bureau address how Part 70 would undermine enforcement of the Fourteenth and Fifteenth Amendments. Enforcing the Voting Rights Act, for example, requires accurate census data, including demographic data. *See* Nathaniel Persily, *The Right to Be Counted*, 53 Stan. L. Rev. 1077, 1109 (2001) (accurate data necessary to enforce Section 2 of the VRA). Block-level demographic data—collected only as part of the decennial census—is necessary to enforce those provisions, including to show "that a community of minority voters" is "sufficiently numerous and compact to constitute a majority in a reasonably configured district," *Louisiana v. Callais*, 608 U.S. 85, 118–19 (2026). Indeed, the Supreme Court has *faulted* parties for using "old census data" because doing so did not "accurately represent[] the districting process." *Allen v. Milligan*, 599 U.S. 1, 34 (2023). Along similar lines, eliminating these questions from the decennial questionnaire would undermine Congress's ability to enact legislation to enforce the Fourteenth and Fifteenth Amendments. The Supreme Court has instructed that "while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions." *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 557 (2013). But assessing "current conditions" requires current (and accurate) data. The census is by far the best and most accurate source of that data. The Proposed Rule does not show that other sources of information, including the ACS, can provide data of comparable geographic granularity and precision.

Removing these questions would also impair the Bureau's, and the public's, ability to measure the accuracy of the census and of studies that rely on it. In 2020, for example, the Bureau looked to race and ethnicity data to assess coverage errors, finding statistically significant undercounts for certain groups (Black or African American alone or in combination, American Indian or Alaska Native alone or in combination, the Some Other Race alone or in combination, and Hispanic or Latino) and statistically significant overcounts for others (White alone or in combination, Non-Hispanic White alone, and Asian alone or in combination populations). *See* Eric Jensen & Timothy Kennel, U.S. Census Bureau, *Detailed Coverage Estimates for the*

alternative, removing race and ethnicity questions will inevitably lead to outdated, incomplete, and inaccurate data concerning race and ethnicity, no matter how sophisticated the Bureau's data-linkage methods are.

2020 Census Released Today (Mar. 10, 2022), https://perma.cc/LTW3-9K8S. The Proposed Rule does not explain how the Bureau would conduct comparable coverage analysis without these data.

The Proposed Rule responds to some of these concerns by suggesting other sources of demographic information might fill the gap Part 70 would leave. It emphasizes the Bureau's increasing use of administrative records and notes that Part 70 would not restrict race and ethnicity questions on the ACS or other surveys not used for enumeration. 91 Fed. Reg. at 57,527–28. But other sources are likely not adequate substitutes for race and ethnicity information collected through the decennial census. The relevant sources differ from decennial census data in potentially important respects, including coverage, sampling error, geographic specificity, frequency, and the way the information is collected. The Proposed Rule does not compare those characteristics or determine whether alternative sources can produce information comparable to the data Part 70 would eliminate.

Experience from the 2020 Census illustrates the problem. According to GAO's analysis of Census Bureau data, 18 percent of enumerations based on administrative records were missing race, compared with less than 3 percent of self-responses.[29] Other Bureau studies similarly indicate that administrative records are far less effective at tracking race and ethnicity than other demographic information (like age or sex).[30]

The Proposed Rule's suggestion that ACS data might fill the gap also ignores that the ACS depends on decennial census data; without accurate race and ethnicity information from the decennial census, the ACS data on those subjects will necessarily be degraded. Specifically, the Bureau adjusts ACS survey weights using population estimates by race, Hispanic origin, age, and sex to reduce variability and

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[29] *See* U.S. Gov't Accountability Off., *Report to Congressional Requesters, 2020 CENSUS: Coverage Errors and Challenges Inform 2030 Plans*, GAO-25-107160 at 22, https://www.gao.gov/assets/gao-25-107160.pdf.

[30] *See, e.g.*, Renuka Bhaskar, Adela Luque, Sonya Rastogi, & James Noon, U.S. Census Bureau, *Coverage and Agreement of Administrative Records and 2010 American Community Survey Demographic Data*, CARRA Working Paper 2014-14 (Nov. 24, 2014), at 2, 8–12, https://perma.cc/SMN8-BWSP (collecting sources discussing previous research on the 2000 and 2010 Censuses, and finding the trend continued in 2010); Sharon R. Ennis, Sonya R. Porter, James M. Noon, & Ellen Zapata, U.S. Census Bureau, *When Race and Hispanic Origin Reporting are Discrepant Across Administrative Records and Third Party Sources: Exploring Methods to Assign Responses*, CARRA Working Paper 2015-08 (Dec. 18, 2015), https://perma.cc/S5UY-9CSY.

coverage bias.[31] Those population estimates, in turn, incorporate information derived from the decennial census. The Bureau's own Preliminary Regulatory Impact analysis concedes that when deriving intercensal estimates, there are no "comparably accurate, comprehensive, and reliable sources of this information" to decennial census data, and that omitting race and ethnicity from the questionnaire will require the Bureau (and others) to develop estimates "derived from outdated and/or less accurate data" that "would deteriorate the accuracy of the estimation method itself."[32] The damage would thus reach well beyond the decennial tables themselves.

The Proposed Rule also would bar a sexual orientation question that the census does not currently ask, foreclosing one in the future, regardless of what research or data needs emerge. But the Rule fails to justify that preemptive prohibition. Decision-making about new demographic questions to future censuses should be guided by a deliberative process. That should include rigorous research and testing, consultation with federal agencies about their legal and programmatic needs for the data—including needs at small geographic levels—and meaningful engagement with subject-matter experts and impacted communities. That process should also include transparency about what changes are being considered, who requested them, what legal or statistical purposes they are intended to serve, what testing has been conducted, and what subject-matter experts recommend. The Proposed Rule bypasses that process and the Bureau's own data-quality standards. *See, e.g.*, U.S. Census Bureau, *U.S. Census Statistical Quality Standards* (Sept. 29, 2026), § A1-2.

The prohibition also raises important questions about whether and how decennial census data on same-sex couples will continue to be collected and reported. Same-sex couples have been counted on the decennial census through the household relationship question for decades. While this data is not a substitute for sexual orientation measures, it has provided important information about a distinct population of households and families. For the 2020 Decennial Census, the Bureau redesigned the household relationship question specifically to improve the accuracy of same-sex couple counts. The redesign added separate response categories for same-sex and opposite-sex couples—both spouses and unmarried partners—and it introduced consistency checks between the relationship and sex questions. These changes were based on more than a decade of research by Bureau statisticians to

[31] U.S. Census Bureau, *American Community Survey and Puerto Rico Community Survey Design and Methodology*, (4th ed., Dec. 2024), https://perma.cc/D9JL-KLHC.

[32] U.S. Census Bureau, *Preliminary Regulatory Impact Analysis: Decennial Census of the Population of Americans; Proposed Residence Criteria and Proposed Regulations for Demographic Questions*, Docket No. 260903-0005 at 15, https://perma.cc/S3PB-4T4K.

address substantial measurement errors and data-quality problems with previous approaches to the household relationship question design and processing. It is critical that the Bureau not restrict the collection or publication of same-sex couple data through the household relationship question. Doing so would squander that work.

B. The Bureau's explanations are inadequate.

The Bureau provides just two explanations for its change in position: First, prohibiting the collection of demographic data serves confidentiality and privacy concerns, and second that prohibiting that collection will reduce response burdens. Both are legitimate concerns in the abstract. But the Bureau neither measures them nor weighs them against the cost of eliminating race and ethnicity data. And neither concern is specific to race and ethnicity, since every question ostensibly adds disclosure risk and burden.

Start with the confidentiality and privacy concerns. The Proposed Rule states that each additional demographic question increases the amount of information potentially available about individual respondents and therefore increases the disclosure risk that the Bureau must mitigate under 13 U.S.C. § 9. 91 Fed. Reg. at 57,527. That may be true in general. But the Bureau has not *measured* the risk, much less shown that it warrants prohibiting these questions. It does not quantify the marginal disclosure risk of collecting race and ethnicity data, compare that risk with the value and uses of those data, or evaluate whether alternative disclosure-avoidance approaches could mitigate it.

The Bureau's own source cuts against it. As the article the Proposed Rule cites explains, "the ability to assess disclosure risk and to measure uncertainty—both essential features of this principle—in no way prescribe or dictate how much risk mitigation is necessary or desirable." Michael B. Hawes *et al., Toward a Principled Framework for Disclosure Avoidance,* Harv. Data Sci. Rev. § 5.1 (Special Issue 6, Aug. 20, 2025), https://hdsr.mitpress.mit.edu/pub/bux70n5u/release/3. The framework calls for weighing risk against mitigation. It does not say that any data should stop being collected. Given the substantial governmental and statistical uses of race and ethnicity data discussed above, the Bureau should quantify the risk, identify the mitigation strategies it considered, and explain why eliminating the questions is preferable to those alternatives.

The same goes for response burden. The Proposed Rule does not measure the burden of these questions against any other, including the legal-status question it specifically contemplates. Why these questions and not others? Americans have

answered a race question since 1790, and the government has never before called them too burdensome. The Bureau must explain the change. It does not.

Separately, the Proposed Rule suggests that race and ethnicity questions may impose a distinctive burden (or an "encumbrance on response") because of their "(potentially) sensitive nature," 91 Fed. Reg. at 57,527, particularly when respondents are legally required to answer census questions, *see* 13 U.S.C. § 221. But the Proposed Rule identifies no empirical evidence showing that the existing race and ethnicity questions materially reduce response rates. That omission is hard to square with the Bureau's extensive recent testing of race and ethnicity question design and its conclusion that revised self-reported questions can produce more accurate race and ethnicity data. The Bureau should identify any evidence supporting its sensitivity rationale and explain how that evidence is reconciled with its recent research and planning for the 2030 Census. *See* 91 Fed. Reg. at 57,526.

C. The Proposed Rule does not address alternatives and leaves many open questions.

The Proposed Rule discusses no alternatives, which suggests the Bureau considered none. Nor does it discuss mitigation strategies that could address its confidentiality and burden concerns short of a categorical ban. That failure alone makes the Proposed Rule arbitrary and capricious. *See State Farm*, 463 U.S. at 48.

Among other things that the Proposed Rule does not address regarding Part 70 are:

- How much response burden does the Bureau attribute specifically to the existing race and ethnicity questions?
- How much response burden does the Bureau attribute specifically to other questions in the decennial census questionnaire?
- Has the Bureau analyzed the relative response burden of the demographic-data questions as compared to the citizenship or immigration-status question the Proposed Rule floats as a possibility?
- What evidence indicates that race-and-ethnicity questions reduce census participation or data quality?
- What alternatives did the Bureau consider before proposing to eliminate the questions?

- Did the Bureau evaluate how other agencies use this data for civil rights enforcement and for administrative reporting? If so, how?
- Did the Bureau evaluate how the proposed changes may impact enforcing the requirements of the following federal statutes? If so, how?
  - The Voting Rights Act
  - The Home Mortgage Disclosure Act
  - The Equal Credit Opportunity Act
  - The Fair Housing Act
  - Title VI
- Did the Bureau evaluate whether the proposed changes may impact the enforcement of other federal statutes?
- Did the Bureau consult with State and local governments on how the proposed changes may impact their efforts to comply with federal law?
- Did the Bureau measure the disclosure risk of collecting this data, including with respect to past censuses that collected the data?
- What are the implications of eliminating questions regarding race and ethnicity for the accuracy and utility of the data?
- How would eliminating these questions impact the quality of other data products, including but not limited to the American Community Survey, that rely on these data as population benchmarks for weighting?

* * *

Part 70 would represent a significant departure from longstanding census practice and from the Bureau's own recent research and planning concerning race, ethnicity, and sexual orientation data. Before finalizing that change, the Bureau should identify the empirical evidence supporting its asserted response-burden, sensitivity, and disclosure concerns; assess the governmental, statistical, redistricting, and civil rights uses of the affected data; determine whether alternative sources can actually replace the information currently collected through the decennial census; and evaluate less disruptive alternatives. On the present record,

the Bureau has not supplied the analysis necessary to justify a categorical prohibition on collecting race, ethnicity, and sexual orientation data through the decennial enumeration.

III. Conclusion

The Proposed Rule suggests the Bureau intends to privilege ideology over evidence as it shapes the 2030 Census. But it offers no sound reason for departing from longstanding census practices. More fundamentally, some of the Proposed Rule's defects cannot be cured by additional evidence or explanation. The Constitution and the Census Act do not permit the Bureau to exclude persons residing in the United States from the apportionment population, regardless of what research, testing, or justification it might offer.

What little evidence the Bureau offers confirms that the proposed changes would threaten the accuracy and reliability of the decennial enumeration, undermine the reliability of other Census Bureau products, and impair important governmental, public, scientific, and economic uses of census data. The Rule's remaining provisions raise independent legal, methodological, and operational concerns that the Bureau has likewise failed to address. For the foregoing reasons, the Census Bureau should withdraw the Proposed Rule in its entirety.

Sincerely,



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