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Department of Commerce  
14th and Constitution Avenue NW, Room 6616  
Washington, DC 20230

August 7, 2018

**Re: 2020 Census Federal Register Notice; 83 Fed. Reg. 26643, Docket No. USBC-2018-0005**

To Whom It May Concern:

Muslim Advocates, a civil rights organization dedicated to ensuring freedom and justice for Americans of all faiths, writes to express its deep concern about the notice issued by the United States Census Bureau (“Census Bureau”), published June 8, 2018, regarding adding a question about citizenship on the decennial census.<sup>1</sup> Under this notice, the Census Bureau will, for the first time since 1950, ask everyone living in the United States whether they are a U.S. citizen on the 2020 Census. This will result in a significant undercount of minority communities, especially members of populations that the Trump administration has explicitly targeted, such as immigrants and Muslims.

The Census Bureau’s notice is simply another extension of this administration’s targeting of immigrants through policies that are discriminatory and unlawful. The inclusion of the citizenship question will undoubtedly deter noncitizens from participating in the 2020 Census, leading to an undercount of immigrant and minority groups. This, in turn, could lead to fewer federal funds for programs that benefit those populations and lower congressional representation for districts with significant minority populations. The only purported rationale offered for the inclusion of the question—enforcement of the Voting Rights Act (“VRA”)—is unfounded given that the American Community Survey has been used for that purpose for the last 18 years. Against this background, the Census Bureau’s notice simply underscores that the inclusion of a citizenship question on the census is politically motivated and treads on well-established constitutional and statutory protections.

As explained in greater detail below, the inclusion of the citizenship question on the 2020 Census is not only arbitrary and unnecessary, it is also unlawful and unconstitutional. The Census Bureau should immediately withdraw the notice and return to a short-form decennial census without a citizenship question.

#### **I. The inclusion of a citizenship question would reverse decades of federal policy**

For the first time since 1950, the Census Bureau intends to ask respondents to report the number of United States citizens in every household in the country. The government decided to

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<sup>1</sup> 83 Fed. Reg. 26643.

remove the citizenship question in the 1960 census in part because innovations in survey methods revealed a more accurate way of counting the country’s non-citizen population.<sup>2</sup>

For decades, the Census Bureau has opposed the inclusion of a question about citizenship status based on its longstanding expert conclusion that the inclusion of such a question would impair accuracy and would exacerbate the undercounting of immigrant communities of color. In 1980, in response to a lawsuit seeking to compel the Census Bureau to demand that all Americans disclose their immigration status, the Census Bureau opposed adding a citizenship question, arguing that “any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count. . . . Questions as to citizenship are particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate.”<sup>3</sup> In 2016, four former Census Bureau Directors who served under Democratic and Republican administrations filed an amicus brief before the U.S. Supreme Court in which they stated that a citizenship question on the census “would invariably lead to a lower response rate” and would “seriously frustrate the Census Bureau’s ability to. . . determin[e] the whole number of persons in each state.”<sup>4</sup>

Departing from almost seven decades of settled practice, in March 2018, Commerce Secretary Wilbur Ross—at the request of the Department of Justice—announced that the 2020 Census will inquire about the citizenship of every resident in the United States.<sup>5</sup> The purported reason for this is to more effectively enforce Section 2 of the Voting Rights Act (“VRA”),<sup>6</sup> which prohibits the use of any voting qualification or practice that results in the denial or abridgment of the right to vote based on race or color.<sup>7</sup> Secretary Ross’s memo has provided no legitimate explanation as to why data on citizenship is needed on an individual level to enforce voting rights laws and why the current data obtained through the American Community Survey, which contains an identical question about citizenship status, is inadequate.

Secretary Ross’s announcement on the inclusion of the citizenship question on the 2020 census was met with strong opposition. Former census directors,<sup>8</sup> members of Congress,<sup>9</sup>

<sup>2</sup> Dartunorro Clark, *Trump wants to ask about citizenship on the census. Here’s why the U.S. stopped in 1960.*, NBC News (Apr. 17, 2018), <https://www.nbcnews.com/politics/politics-news/trump-wants-ask-about-citizenship-census-here-s-why-u-n864246>.

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

<sup>4</sup> Brief of Former Directors of the U.S. Census Bureau as Amici Curiae Supporting Appellees at 25, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

<sup>5</sup> Memorandum from Sec’y of Commerce Wilbur Ross to Under Sec’y of Commerce for Econ. Affairs Karen Dunn Kelley, *Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire* (Mar. 26, 2018), [https://www.commerce.gov/sites/commerce.gov/files/2018-03-26\\_2.pdf](https://www.commerce.gov/sites/commerce.gov/files/2018-03-26_2.pdf) (hereinafter “Ross Memo”).

<sup>6</sup> *Id.*

<sup>7</sup> 52 U.S.C. § 10301(a).

<sup>8</sup> See *supra* note 4.

<sup>9</sup> Letter from Five Senators to Wilbur Ross (Jan. 5, 2018), [https://www.feinstein.senate.gov/public/\\_cache/files/3/7/376f8dcd-7f35-4913-9e80-cd1e48e3b312/7E4C59B2988E2CC14866543EDD7E01A6.2018.01.05-census-citizenship-letter.pdf](https://www.feinstein.senate.gov/public/_cache/files/3/7/376f8dcd-7f35-4913-9e80-cd1e48e3b312/7E4C59B2988E2CC14866543EDD7E01A6.2018.01.05-census-citizenship-letter.pdf).

mayors,<sup>10</sup> attorneys general,<sup>11</sup> and civil rights organizations<sup>12</sup> all strongly advised against adding a citizenship question when it was initially recommended by the Department of Justice. That opposition has only intensified over time: several court challenges have already been filed over the proposed inclusion of the question, including by state attorneys general, municipalities, and civil rights organizations.<sup>13</sup>

## II. The inclusion of the citizenship question on the 2020 Census is unsound policy

Asking every household and every person in the United States about their citizenship status in the current political climate—when there is no programmatic basis or need to do so—will cause hundreds of thousands of people in our communities to avoid the census for fear of being targeted by this administration. By reversing this long-standing and well-reasoned policy, the Census Bureau is threatening its own status as a nonpartisan, apolitical, and independent agency.

### *a. Immigrant communities of color, including American Muslims communities, will be undercounted*

Inclusion of the citizenship question would undoubtedly exacerbate the problems of non-response and undercounting in immigrant communities of color, including American Muslim communities. The Census Bureau has long recognized that racial and ethnic minorities are less likely to respond to the census than the overall population.<sup>14</sup> In testimony before Congress, Secretary Ross himself acknowledged that “there will be some decline” as a result of the citizenship question because “certain parts of the population might find it challenging” and that there may be some “folks who may not feel comfortable answering [the citizenship question].”<sup>15</sup>

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<sup>10</sup> Letter from One-Hundred-and-Sixty-One Mayors to Wilbur Ross (Feb. 6, 2018), <http://www.usmayors.org/wp-content/uploads/2018/02/20180206-census-letter.pdf>.

<sup>11</sup> Letter from Twenty Attorneys General to Wilbur Ross (Feb. 12, 2018), <https://www.brennancenter.org/sites/default/files/legal-work/Multi-State-Attorney-General-Letter-re-2020-Census.pdf>

<sup>12</sup> Letter from Civil Rights Organizations to Wilbur Ross, *Protect the Census: Oppose DOJ Request to Add a Citizenship Question to the 2020 Census* (Jan. 10, 2018), <https://www.brennancenter.org/sites/default/files/legal-work/Leadership-Conference-Letter-Oppose-DOJ-Citizenship-Question.pdf>.

<sup>13</sup> See Compl. *New York Immigration Coalition v. U.S. Dep’t of Commerce*, No. 1:18-cv-05025 (S.D. N.Y. Jun. 6, 2018); Compl. *La Unión Del Pueblo Entero v. Ross*, No. 8:18-cv-01570 (D. Md. May 31, 2018); Compl. *City of San Jose, et al v. Ross*, No. 5:18-cv-02279 (N.D. Cal. Apr. 17, 2018); Compl. *Kravitz v. U.S. Dep’t of Commerce*, No. 8:18-cv-01041 (D. Md. Apr. 11, 2018); Compl., *State of New York, et al v. U.S. Dep’t of Commerce et al*, No. 1:18-cv-02921 (S.D. N.Y. Apr. 3, 2018).

<sup>14</sup> United States Census Bureau, *Census Bureau Releases Estimates of Undercount and Overcount in the 2010 Census* (May 22, 2012), [https://www.census.gov/newsroom/releases/archives/2010\\_census/cb12-95.html](https://www.census.gov/newsroom/releases/archives/2010_census/cb12-95.html).

<sup>15</sup> Hearing to Review the FY2019 Budget Request for the U.S. Department of Commerce, Hr’g Before U.S. S. Subcomm. On Commerce, Justice, Science and Related Agencies, 115 Cong. (May 10, 2018) (testimony by Wilbur Ross, Sec. of Commerce), *video available at* <https://www.appropriations.senate.gov/hearings/review-of-the-fy2019-budget-request-for-the-us-dept-ofcommerce>.

According to an analysis from the Brookings Institution, the inclusion of the citizenship question will likely result in 11.2 million people opting out of the 2020 Census.<sup>16</sup> In addition, pre-census focus groups conducted by the Census Bureau have revealed that immigrant respondents, especially those who are undocumented, are concerned about the confidentiality of their information.<sup>17</sup> According to anecdotal information from those focus groups, the inclusion of questions about citizenship led respondents to give false names or incorrect birthdates, leave family members out of questionnaires, or abandon interviews before they were finished.<sup>18</sup> Respondents were “spontaneously expressing concerns to researchers and field staff about confidentiality and data access relating to immigration.”<sup>19</sup>

American Muslim communities will especially be harmed by the inclusion of the citizenship question. Most U.S. Muslims are racial minorities, and a vast majority are either immigrants or children of immigrants.<sup>20</sup> Nearly one-in-five U.S. Muslims are not U.S. citizens, and almost a third of foreign-born U.S. Muslims are non-citizens.<sup>21</sup> In addition, Muslims are more likely than the general population to belong to lower income households,<sup>22</sup> which are historically considered hard to count on the census.<sup>23</sup>

An undercount of these already under-resourced communities will undoubtedly impair public trust, local economies, and fair redistricting. Undercounting of Muslim and immigrant communities will affect not only congressional apportionment for the next decade, but will also affect the amount of federal funding available for these communities and the results of large research studies that depend on Census data. An undercount as a result of this policy will therefore further marginalize and harm immigrant communities of color.

*b. Immigrants’ confidentiality concerns are exacerbated by citizenship question*

The proposed addition of a citizenship question on the 2020 Census—especially when viewed in the context of this administration’s statements and policies—appears to be part of a broader agenda to discriminate against, and deny basic rights to, immigrants and communities of color. The administration has explicitly targeted such communities through its policies, which

<sup>16</sup> Robert Shapiro, *Trump’s Census policy could boomerang and hurt red states as well as blue states*, The Brookings Institution (Mar. 30, 2018), <https://www.brookings.edu/blog/fixgov/2018/03/30/trump-census-harms-red-blue-states/>.

<sup>17</sup> See Mikelyn Meyers, *Respondent Confidentiality Concerns and Possible Effects on Response Rates and Data Quality for the 2020 Census*, United States Census Bureau, <https://www2.census.gov/cac/nac/meetings/2017-11/Meyers-NAC-Confidentiality-Presentation.pdf>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Pew Research Center, *U.S. Muslims Concerned About Their Place in Society, but Continue to Believe in the American Dream* (Jul. 26, 2017), pg. 31, 35, <http://assets.pewresearch.org/wp-content/uploads/sites/11/2017/07/09105631/U.S.-MUSLIMS-FULL-REPORT-with-population-update-v2.pdf>.

<sup>21</sup> *Id.* at 34.

<sup>22</sup> *Id.* at 42.

<sup>23</sup> The Leadership Conference Education Fund, *Will You Count? Households with Low Incomes in the 2020 Census* (Jul. 1, 2018), <http://civilrightsdocs.info/pdf/census/2020/Low-Income-Families-HTC.pdf>.

include banning nationals of Muslim-majority countries from entering the United States,<sup>24</sup> increasing arrests of undocumented immigrants in the United States,<sup>25</sup> cancelling the Deferred Action for Childhood Arrivals program,<sup>26</sup> ending the designation of Temporary Protected Status (“TPS”) for nationals of El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan, and failing to re-designate Somalia, Syria, and Yemen for TPS.<sup>27</sup> During his campaign, then-candidate Donald Trump was considering instituting a “Muslim registry” aimed to track immigrants from Muslim-majority countries inside the United States.<sup>28</sup>

President Trump’s administration has stigmatized immigrants, Muslims, and other minorities through its anti-immigrant policies. Given this climate of fear and intimidation, immigrant communities of color are understandably distrustful of the government. This distrust has led to fears that census data may be shared with other governmental agencies to aid them in enforcing Trump’s immigration policies.

Although federal law prohibits the Census Bureau from sharing an individual’s information with other agencies,<sup>29</sup> census information has been used for nefarious purposes in the past. Information from the 1940 census was used to aid the internment of Japanese Americans during World War II.<sup>30</sup> In addition, the Census Bureau came under scrutiny when, in the aftermath of September 11, 2001, it gave specially tabulated population statistics about neighborhoods that were home to large numbers of Arab-Americans to the Department of Homeland Security.<sup>31</sup> These examples show that the federal government, particularly one that has a documented record of hostile towards racial minority and immigrant communities, may use census information to inflict further harm on those communities.

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<sup>24</sup> See Muslim Advocates, *Total and Complete Shutdown* (Apr. 2018), [https://www.muslimadvocates.org/wp-content/uploads/MuslimBan\\_Report4-2.pdf](https://www.muslimadvocates.org/wp-content/uploads/MuslimBan_Report4-2.pdf).

<sup>25</sup> Kristen Bialik, *ICE arrests went up in 2017, with biggest increases in Florida, northern Texas, Oklahoma*, Pew Research Center (Feb. 8, 2018), <http://www.pewresearch.org/fact-tank/2018/02/08/ice-arrests-went-up-in-2017-with-biggest-increases-in-florida-northern-texas-oklahoma/>.

<sup>26</sup> Vanessa Romo, Martina Stewart & Brian Naylor, *Trump Ends DACA, Calls on Congress To Act*, National Public Radio (Sept. 5, 2017), <https://www.npr.org/2017/09/05/546423550/trump-signals-end-to-daca-calls-on-congress-to-act>.

<sup>27</sup> U.S. Department of Justice, *Temporary Protected Status: The Most Recent TPS Notices*, [https://www.justice.gov/eoir/temporary-protected-status#most\\_recent](https://www.justice.gov/eoir/temporary-protected-status#most_recent).

<sup>28</sup> Mica Rosenberg & Julia Edwards Ainsley, *Immigration hardliner says Trump team preparing plans for wall, mulling Muslim registry*, Reuters (Nov. 15, 2016), [https://www.reuters.com/article/us-usa-trump-immigration-idUSKBN13B05C?feedType=RSS&feedName=politicsNews&utm\\_source=Twitter&utm\\_medium=Social](https://www.reuters.com/article/us-usa-trump-immigration-idUSKBN13B05C?feedType=RSS&feedName=politicsNews&utm_source=Twitter&utm_medium=Social).

<sup>29</sup> See 13 U.S.C. §§ 9, 214.

<sup>30</sup> JR Minkel, *Confirmed: The U.S. Census Bureau Gave Up Names of Japanese-Americans in WW II*, Scientific American (Mar. 30, 2007), <https://www.scientificamerican.com/article/confirmed-the-us-census-b/>.

<sup>31</sup> See Lynette Clemetson, *Homeland Security Given Data on Arab-Americans*, New York Times (Jul. 30, 2004), <https://www.nytimes.com/2004/07/30/us/homeland-security-given-data-on-arab-americans.html>; *Freedom of Information Documents on the Census: Department of Homeland Security Obtained Data on Arab Americans From Census Bureau*, Electronic Privacy Information Center, <https://epic.org/privacy/census/foia/>.

*c. Adding a citizenship question undermines a fair and independent census*

While the census has not been entirely free from political meddling in its history,<sup>32</sup> an apolitical and independent census is nonetheless vitally important for our democracy. The census is at the core of our representative system of government. Census data is used to distribute congressional seats to states, to make decisions about community services, and to distribute federal funds to local, state, and tribal governments each year. Because of its critical functions for our democracy, the census results must remain fair, accurate, and trustworthy.

The addition of a citizenship question, given the current political climate, is undoubtedly political. The Census Bureau claims that it is intended to protect the voting rights of vulnerable communities—but those communities have no reason to trust that assertion in an administration-generated climate of xenophobia, hostility towards immigrants, large-scale deportations, and aggressive immigration enforcement.

### **III. Census Bureau’s inclusion of a citizenship question is unlawful**

In seeking to add a citizenship question to the census, the Census Bureau is engaged in discrimination against immigrant communities of color, including Latinos, Asian-Americans, and Arab-Americans thereby violating the U.S. Constitution’s guarantee of equal protection. The inclusion of the citizenship question also violates the paramount constitutional objective of the decennial census—to count every person residing inside the United States, regardless of citizenship status.

*a. The citizenship question violates the Constitution’s equal protection guarantee*

The Fifth Amendment of the U.S. Constitution prohibits the federal government from discriminating against individuals living in the United States on the basis of race, ethnicity, national origin, and citizenship.<sup>33</sup> Under the Fifth Amendment’s equal protection guarantee, government action motivated by racial animus is subject to strict scrutiny, and courts may look beyond a facially-neutral policy to consider, e.g., “[t]he specific sequence of events leading up [to] the challenged decision,” “[d]epartures from the normal procedural sequence,” and “statements by the members of the decisionmaking body.” See *Vill. Of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 267-68 (1977).

As discussed above, the addition of the citizenship question appears to be part of the administration’s larger anti-immigrant agenda that has focused on alienating and targeting immigrants and communities of color. The President, his closest advisors, and senior leaders in

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<sup>32</sup> U.S. House of Representatives Committee on Oversight and Government Reform, *Census History: Counting Every Person Once, Only Once and in the Right Place* (May 11, 2009), <https://oversight.house.gov/wp-content/uploads/2012/02/2009-05-11census.pdf>.

<sup>33</sup> U.S. Const. amend. V. While the Fifth Amendment does not contain an equal protection clause as in the Fourteenth Amendment, it is well settled that the Fifth Amendment’s Due Process Clause does encompass an implicit equal protection component. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

his administration have all repeatedly made statements expressing anti-immigrant, racist sentiment, including statements directly connected to the citizenship question.<sup>34</sup> In addition, adding a citizenship question reverses, without reasoned explanation, almost seven decades of settled and well-considered practice, and in direct contradiction to factual findings that underlay the Census Bureau’s previous practice. Immigrant communities of color will undoubtedly suffer discriminatory effects of this policy due to the undercount resulting from the inclusion of the citizenship question.<sup>35</sup> By adding a citizenship question to the census, this administration seeks to diminish the political power and influence of immigrant communities of color and reduce the levels of funding, benefits, and other resources that these groups receive. The Census Bureau and the Department of Justice, therefore, have acted with discriminatory animus towards immigrant communities of color, including Latinos, Asian-Americans, and Arab-Americans.

Because this policy must be reviewed under the strict scrutiny standard of review, the Constitution requires that the inclusion of the citizenship question be narrowly tailored to serve a compelling governmental interest.<sup>36</sup> The government’s sole stated rationale, enforcing Section 2 of the VRA, does not provide a compelling interest, and the citizenship question is not narrowly tailored to serve that purported interest.<sup>37</sup> For over half a century, the federal government has enforced the VRA, without any citizenship question on the decennial censuses. The Department of Justice and private plaintiffs have successfully litigated claims under the VRA using available citizenship data from the American Community Survey. Neither the Department of Justice nor the Census Bureau have explained why the citizenship data currently available is inadequate to enforce the VRA. Rather than aid the enforcement of Section 2 of the VRA, the citizenship question will in fact undermine its enforcement by causing the decennial census to undercount the communities who are intended to be among the primary beneficiaries of the VRA.

The government’s unfounded rationale indicates that the stated reason for requesting citizenship data from every household in the country is merely pretext for discriminatory animus towards immigrants and communities of color. Because the inclusion of the citizenship question does not advance a compelling, or even legitimate, governmental interest, it violates the Fifth Amendment’s equal protection guarantee.

*b. The citizenship question violates the Census Clause of the Constitution*

The Constitution requires that the federal government conduct an “actual Enumeration” of the population every ten years by determining the “whole number of persons”—regardless of

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<sup>34</sup> Kansas Secretary of State Kris Kobach lobbied to add the citizenship question to the 2020 census for the purpose of ensuring that “aliens” are not “counted for congressional apportionment purposes.” See Robbins & Benner, *Documents Show Political Lobbying in Census Question About Citizenship*, NY Times (Jun. 9, 2018), <https://www.nytimes.com/2018/06/09/nyregion/kobach-bannon-lobbying-census-question-on-citizenship-documents.html>.

<sup>35</sup> *Supra* Part II.A.

<sup>36</sup> See *Graham v. Richardson*, 403 U.S. 365 (1971).

<sup>37</sup> See Joseph Fishkin, *The Administration is Lying About the Census*, Balkinization (Mar. 27, 2018), <https://balkin.blogspot.com/2018/03/the-administration-is-lying-about-census.html>.

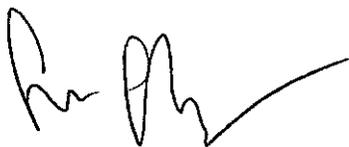
citizenship status in the country and within each state.<sup>38</sup> Congress has delegated this duty to the Secretary of Commerce, who is responsible for conducting the census in a manner consistent with the constitutional goal of equal representation.<sup>39</sup>

Adding a citizenship question to the 2020 census does not bear a “reasonable relationship to the accomplishment of an actual enumeration of the population” as required by the Constitution.<sup>40</sup> In fact, it does just the opposite: there is, as the U.S. Supreme Court has recognized, “a strong constitutional interest in accuracy” of the census; the inclusion of the citizenship question only serves to undermine that constitutional interest.<sup>41</sup> As stated above, the citizenship question will predictably produce a significant and systemic undercount of certain groups within the United States, especially immigrants of color.<sup>42</sup> Therefore, the citizenship question violates the Constitution’s requirement of an “actual Enumeration” of the “whole number of persons” residing inside the United States.

#### IV. Conclusion

The inclusion of the citizenship question on the 2020 census violates longstanding constitutional and statutory protections, and further alienates immigrant communities of color in this country. It will result in an undercount of minority communities, including American Muslim communities, which will skew the collection of demographic data used in federal funding determinations and will lead to an inequitable distribution of federal resources. We urge the Census Bureau to reconsider its unjustifiable stance, withdraw the notice, and return to a short-form decennial census without a citizenship question.

Respectfully Submitted,



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<sup>38</sup> U.S. Const. art. I, § 2, cl. 3; id. amend. XIV, § 2.

<sup>39</sup> See 13 U.S.C. § 141.

<sup>40</sup> *Wisconsin v. City of New York*, 517 U.S. 1 (1996).

<sup>41</sup> *Utah v. Evans*, 536 U.S. 452, 478 (2002).

<sup>42</sup> *Supra* Part II.A.