

NATIONAL REDISTRICTING FOUNDATION

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The National Redistricting Foundation (“NRF”) submits these comments in response to the U.S. Department of Commerce’s (the “Commerce Department” or “Department”) request for comment on the 2030 Census proposed residence criteria and proposed regulations for demographic questions (hereinafter, “NPRM”).¹

The National Redistricting Foundation fights for fair electoral districts across the country. The NRF works toward fair representation by combating district maps that entrench partisan or racial bias and by challenging government action that threatens to undermine the redistricting process. A fair and accurate decennial census is fundamental to fair redistricting; census data determine congressional reapportionment among the states and are used by states to draw new electoral districts at the congressional, state, and local levels. It is absolutely essential to get this right.

On September 10, 2026, in an abrupt reversal of 230 years of policy and practice, the U.S. Census Bureau (the “Census Bureau” or “Bureau”) and U.S. Secretary of Commerce Howard Lutnick (the “Secretary”) proposed a legislative rule that would fundamentally alter the 2030 Census. If promulgated, this rule would exclude millions of noncitizens from the apportionment count, include a citizenship question that will significantly drive down participation, miscount or exclude tens of millions by requiring tax data to “evidence” a person’s “usual residence,” establish an arbitrary enumeration period that will miscount millions more, and remove demographic questions on race and ethnicity that provide data necessary for public and private entities. These changes will ultimately hinder the Census Bureau’s ability to appropriately conduct its required “actual Enumeration” of the total population of the States.

We urge the Census Bureau, the Commerce Department, and the Secretary of Commerce to withdraw the NPRM and reject all proposed changes. Not only will these changes result in an inaccurate census count, but they violate the Bureau’s constitutional mandate and federal law, fall outside the Secretary’s authority, and are arbitrary and capricious.

¹ Decennial Census of the Population of Americans; Proposed Residence Criteria and Proposed Regulations for Demographic Questions, 91 Fed. Reg. 57524 (Sept. 10, 2026) (to be codified at 15 C.F.R. pts. 60, 70).

1. An Accurate and Complete Census is Essential to Congressional Reapportionment, Congressional and State Legislative Redistricting, and the Allocation of Federal Funds.

Article I, Section 2, Clause 3 (the “Census Clause”) of the United States Constitution mandates that the federal government shall conduct an “actual Enumeration” of the United States population every ten years.² As amended by Section 2 of the Fourteenth Amendment, this “Enumeration” must count “the whole number of persons in each state,” regardless of such persons’ status as citizens or noncitizens.³

Pursuant to the Census Clause, representatives in the U.S. House of Representatives “shall be apportioned among the several States . . . according to their respective Numbers,” based upon the decennial census.⁴ Apportionment must be “based on total population,” regardless of citizenship.⁵ An “actual Enumeration” for apportionment is the decennial census’s sole constitutional objective. States use population data from the decennial census to draw congressional and state legislative districts of equal population, as required by the U.S. Constitution.⁶ Indeed, every state across the country uses total population as the basis to draw both congressional and state legislative districts, a practice confirmed as proper by the U.S. Supreme Court as recently as 2016.⁷

In addition, federal government agencies utilize data from the decennial census, including population data, to allocate more than \$2.8 trillion in federal funds involving over 353 different federal programs.⁸ This includes funding for public schools under Title I of the Elementary and Secondary Education Act and for federal transportation planning programs, some of which are calculated based on the population of urbanized areas. Decennial census data also affect funding for a wide range of other programs, including special education, Head Start, Medicaid, the Children’s Health Insurance Program, child care assistance, foster care, adoption assistance, home energy assistance, and the supplemental nutrition program for women, infants, and children.

2. The Constitution Requires Counting All Persons for Apportionment.

The Fourteenth Amendment instructs that “[r]epresentatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”⁹ And the original Apportionment Clause,

² U.S. CONST. art. I, § 2, cl. 3.

³ *Id.* amend. XIV, § 2.

⁴ *Id.* art. I, § 2, cl. 3.

⁵ See *Evenwel v. Abbott*, 578 U.S. 54, 64–68 (2016).

⁶ See e.g., *Redistricting and Use of Census Data*, NAT’L CONF. STATE LEGISLATURES (updated Oct. 30, 2025), <https://perma.cc/5M5V-MWQC> (discussing State legal requirements around the use of federal census data for drawing congressional, legislative, and other electoral districts).

⁷ *Evenwel*, 578 U.S. at 60.

⁸ U.S. CENSUS BUREAU, *Census Bureau Data Guide More Than \$2.8 Trillion in Federal Funding in Fiscal Year 2021* (last revised Dec. 26, 2023), <https://perma.cc/2YY6-V265>; see also Sean Moulton & Janice Luong, *Census Matters: Why an Accurate Count Is Essential to Funding Our Communities*, PROJECT ON GOV’T OVERSIGHT (Oct. 28, 2025), <https://perma.cc/8YKS-DMEY> (census-directed funding by state).

⁹ U.S. CONST. amend. XIV, § 2.

later modified by the Fourteenth Amendment, provided for an “actual Enumeration” every ten years with subsequent apportionment based on the “whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”¹⁰

The Census Bureau has consistently included non-citizens in the apportionment count throughout history,¹¹ and the apportionment population has never separated non-citizens from other categories of population.¹² Changes to the apportionment count have historically followed a pattern of expansion and inclusion, as demonstrated by the 1870 Census’ counting of “the whole number of persons in each State,” no longer diminishing enslaved people to “three fifths of all other persons,” and the 1940 Census’ inclusion of all Native Americans as there were “no longer Indians not subject to taxation.”¹³

3. Excluding Noncitizens From the Census Count Exceeds the Secretary’s Statutory Authority, and Would be Arbitrary and Capricious.

The Secretary’s proposal to exclude undocumented immigrants and all other noncitizens other than lawful permanent residents from the apportionment count would reduce the count by approximately 16.1 million U.S. residents.¹⁴ That exclusion will have a substantial impact on the apportionment of Representatives among the several States, and the resulting loss of congressional representation is a distinct injury felt harshly by a State, and by voters within that State.¹⁵

Excluding non-citizens who are not lawful permanent residents from the count would also likely lead to the undercounting of U.S. citizens and lawful permanent residents, particularly those living in mixed-status households—households with some citizen or lawful permanent resident members and some non-citizen, non-lawful permanent resident members. Undocumented immigrants and other noncitizens do not live in a vacuum—more than 16.7 million Americans live in mixed-status households, 6.1 million of whom are children under the age of 18 who are American citizens.¹⁶ The Census Bureau’s own research shows that excluding noncitizens from the apportionment count, especially if combined with the proposed use of a citizenship question, would be likely to cause members of many of these mixed households to

¹⁰ *Id.* art. I, § 2, cl. 3.

¹¹ Jeffrey S. Passel and D’Vera Cohn, *How removing unauthorized immigrants from census statistics could affect House reapportionment*, PEW RSCH. CTR., July 24, 2020, <https://perma.cc/W822-XSUE>.

¹² U.S. CENSUS BUREAU, *1820 Apportionment Results and Notes*, <https://perma.cc/8666-WZU4>; *see also* U.S. CENSUS BUREAU, *Frequently Asked Questions (FAQs)*, <https://perma.cc/A3NK-TN5W>.

¹³ An Act providing for the taking of the seventh and subsequent Censuses of the United States, ch. 11, 9 Stat. 428 (1850); U.S. CONST. amend. XIV, § 2; U.S. CENSUS BUREAU, *1940 Apportionment Results and Notes*, <https://perma.cc/T78T-Y3N8>.

¹⁴ Stephanie Kramer & Jeffrey S. Passel, *What the Data Says About Immigrants in the U.S.*, PEW RSCH. CTR. (Aug. 21, 2025), <https://perma.cc/23XZ-VSHA> (discussing 2023 population estimates).

¹⁵ *Dep’t of Com. v. U.S. House of Representatives*, 525 U.S. 316, 331 (1999) (citations omitted).

¹⁶ *U.S. Citizen Children Impacted by Immigration Enforcement*, AM. IMMIGR. COUNCIL (June 24, 2021), <https://perma.cc/CFE4-KUQB>.

either underreport or simply not respond to the enumeration at all, putting in jeopardy the Bureau's ability to count millions of U.S. citizens.¹⁷

The Secretary addresses none of these issues, nor the federal government's historic inclusion of noncitizens in the apportionment count, and does little to support his claim of authority to exclude noncitizens who are not lawful permanent residents from the apportionment count. Moreover, the Secretary's attempts to justify his authority to make the proposed changes under the Fourteenth Amendment, federal statutes, or both, are unpersuasive, relying on an unfounded reinterpretation of the word "persons" in the Constitution and a series of out-of-context citations to federal case law. And even if the Secretary had the authority, his proposal is so divorced from the conduct of an "actual Enumeration" and so devoid of reasoning that it cannot help but fail.¹⁸

a. The Secretary Lacks Statutory Authority to Exclude Residents from the Census Count Based on Citizenship or Immigration Status.

i. The Exclusion Fails to Bear a Reasonable Relationship to the Accomplishment of an Actual Enumeration and Will Result in an Inaccurate Count.

Article I, Section 2, Clause 3 of the Constitution, as amended by Section 2 of the Fourteenth Amendment, requires that the Census Bureau conduct an "actual Enumeration" of "the whole number of persons in each State." The federal government must conduct the decennial census in a manner "consistent with the constitutional language and the constitutional goal of equal representation."¹⁹ Simply put, the Census Clause requires that all "persons" residing in each State are counted in the decennial census, regardless of their citizenship or tax status. Where the Secretary's decisions concern "the population count itself," the Secretary's decision must bear a "reasonable relationship to the accomplishment of an actual enumeration."²⁰ It does not.

The proposed exclusion of millions of noncitizens based on their immigration status fails to bear a "reasonable relationship to the accomplishment of an actual enumeration" of "all persons" in the United States.²¹ Contrary to the Fourteenth Amendment's mandate that "[r]epresentatives shall be apportioned among the several States according to their respective

¹⁷ J. David Brown & Misty L. Heggeness, *Citizenship Question Effects on Household Survey Response* 1, 21–22, Center for Economic Studies Working Papers, Working Paper CES-24-31, U.S. CENSUS BUREAU, Washington, DC, 2024, <https://perma.cc/2E5N-4PKR> (finding statistically significant negative impacts on response rates due to the inclusion of a citizenship question).

¹⁸ The Secretary also points to several legal challenges brought by States against the inclusion of undocumented immigrants in the decennial census and states that the "notice incorporates for consideration, without necessarily endorsing, the arguments raised in those challenges." 91 Fed. Reg. 57525, 57528 n.4. The Secretary's passing reference to ongoing litigation fails to satisfy the APA's notice and comment requirement.

¹⁹ *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992).

²⁰ *Dep't of Com. v. New York*, 588 U.S. 752, 769 (2019) (quoting *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996)).

²¹ *Id.*

numbers, counting the whole number of persons in each State,”²² the rule would directly and purposefully exclude tens of millions of people from the 2030 Census’s tabulations for apportionment. By its nature, such a rule bears no reasonable relationship to the Constitution’s mandated scope of the enumeration used to apportion congressional Representatives.

ii. The Proposed Definition of “Persons” Runs Headlong into the Constitution’s Plain Text, the Relevant Drafting History, and Over 230 Years of Practice.

The Secretary’s proposed exclusion of noncitizens who are not lawful permanent residents from the apportionment count rests on arguments that have been extensively litigated and soundly rejected over the past half century.²³ Most recently, a battery of courts held that President Trump’s prior effort to exclude noncitizens from apportionment was unlawful.²⁴ While the Supreme Court later vacated the decisions as premature, the Court did not cast any doubt on their merits analysis.²⁵ Indeed, only the dissent in the Supreme Court’s *Trump v. New York* decision discussed the merits, concluding that a policy the Secretary now argues is compelled by the Constitution was “unlawful.”²⁶ No court has ever given credence to the Secretary’s view. For good reason—plain text, legislative history, and past practice all cut against it.²⁷

The lawfulness of the Secretary’s proposed residence rule hinges on whether noncitizens who are not lawful permanent residents are “persons in each State.”²⁸ The obvious answer is yes.²⁹ Regardless of immigration status, a non-citizen “is surely a ‘person’ in any ordinary sense of that term.”³⁰ Unsurprisingly, dictionaries at the time that the Constitution and Fourteenth Amendment were enacted defined “person” to mean a “human being”³¹—as they do now. The original public meaning of the word “person,” indisputably included noncitizens without regard to immigration status, as “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.”³² There is no reason to give “person” the convoluted definition the Secretary attempts to give.

²² U.S. CONST. amend. XIV, § 2.

²³ See *Fed’n for Am. Immigr. Reform v. Klutznick* (“FAIR”), 486 F. Supp. 564, 576 (D.D.C. 1980).

²⁴ *New York v. Trump*, 485 F. Supp. 3d 422, 475 (S.D.N.Y. 2020), *vacated*, 592 U.S. 125 (2020); *City of San Jose v. Trump*, 497 F. Supp. 3d 680, 706 (N.D. Cal. 2020) (per curiam), *vacated*, 592 U.S. 1160 (2020); *Useche v. Trump*, No. 8:20-CV-02225, 2020 WL 6545886, at *10 (D. Md. Nov. 6, 2020), *vacated*, 592 U.S. 1161 (2020).

²⁵ See *Trump v. New York*, 592 U.S. at 134 (“[W]e express no view on the merits of the constitutional and related statutory claims presented.”).

²⁶ *Id.* at 143 (Breyer, J., dissenting).

²⁷ The Secretary moreover lacks the authority to engage in constitutional interpretations and treat it as controlling. See *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 117 (2022); see also *e.g.*, *Mobility Workx, LLC v. Unified Pats., LLC*, 15 F.4th 1146, 1150 (Fed. Cir. 2021); *Jones Bros., Inc. v. Sec’y of Lab.*, 898 F.3d 669, 673 (6th Cir. 2018). The Secretary may not by regulation render his authorizing statute unconstitutional, nor rewrite it under his interpretation.

²⁸ U.S. CONST. amend. XIV, § 2.

²⁹ See *New York v. Trump*, 485 F. Supp. 3d at 435; *FAIR*, 486 F. Supp. at 576.

³⁰ *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

³¹ *City of San Jose*, 497 F. Supp. 3d at 718 (collecting sources).

³² *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (alteration in original) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)) (citing *Gibbons v. Ogden*, 9 Wheat. 1, 188 (1824)).

The Secretary’s absurd proposal relies on the idea that non-citizens who are not lawful permanent residents are not “inhabitants” or “members of the body politic,” or do not have their “usual residence” in the United States, because of their immigration status. But this is both factually and legally baseless. As Justice Gorsuch recently recognized, the assumption that immigration status determines residency status is false: it is entirely possible for immigrants to “make their permanent home here, but to do so in defiance of federal immigration laws.”³³ If such immigrants “are not domiciled here, then where *are* they domiciled? And if the answer is nowhere, how can we reconcile that conclusion with th[e Supreme] Court’s longstanding recognition that every person is domiciled somewhere?”³⁴ The Secretary offers no explanation for why legal immigration status rather than factual residency would be determinative of whether someone is a “person[] in each State” so as to be counted.

Looking at the Constitution more broadly confirms this problem with the proposed rule. For one, the use of “persons” instead of the narrower word “citizens” conveys that these terms have a different meaning.³⁵ Likewise, the use of “persons” followed by specific subsets demonstrates that “persons” means all persons not specifically excluded.³⁶ “Citizen” is further used in the Constitution as a status for “Person[s],” not as its equivalent.³⁷ Consequently, “[t]he absence of an exception for noncitizens demonstrates their inclusion.”³⁸ The ordinary definition of “person” and the four corners of the Constitution are enough to reject the Secretary’s strained interpretation.

Legislative history and over two hundred years of practice by the legislative and executive branches of the federal government further confirm that apportionment was never meant to exclude noncitizens based on their immigration status, but rather that the Constitution requires that the apportionment must include noncitizens.³⁹ Extensive historical evidence shows the “Framers’ clear intent to apportion based on the number of persons residing in each state”—not the number of voters, citizens, or lawful permanent residents.⁴⁰ Indeed, Congress rejected a proposal that would have apportioned representatives according to respective legal voters after it “encountered fierce resistance from proponents of total-population

³³ *Trump v. Barbara*, 146 S. Ct. 2438, 2546–47 (2026) (Gorsuch, J., dissenting).

³⁴ *Id.*

³⁵ See U.S. CONST. amend. XIV, § 2 (using both words); see also *City of San Jose*, 497 F. Supp. 3d at 716 (“differences in terminology reflect differences in meaning”); cf. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (where a constitutional provision applies to “persons,” then “all persons within the territory of the United States” are within such provision).

³⁶ See U.S. CONST. amend. XIV, § 2 (excluding “Indians not taxed”); *id.* art I, § 2, cl. 3 (same, and referencing enslaved people as “all other Persons”).

³⁷ See U.S. CONST. art. I, § 2, cl. 2 (using “Citizens” as a qualification requisite for a “Person” holding office); *id.* art. I, § 3, cl. 3 (same); *id.* art. II, § 1, cl. 5 (same).

³⁸ *City of San Jose*, 497 F. Supp. 3d at 717; see also *Trump v. New York*, 592 U.S. at 144–45 (Breyer, J., dissenting) (“Congress clearly knew how to exclude a certain population.”).

³⁹ *City of San Jose*, 497 F. Supp. 3d at 723; see also *FAIR*, 486 F. Supp. at 576 (similar).

⁴⁰ *City of San Jose*, 497 F. Supp. 3d at 722 (collecting sources); see, e.g., *THE FEDERALIST* NO. 54 (James Madison) (“It is a fundamental principle of the proposed Constitution, that . . . the aggregate number of representatives allotted to the several States is to be . . . founded on the aggregate number of inhabitants.”).

apportionment.”⁴¹ And contemporaneous statements confirm that the drafters intended their language to include immigrants regardless of citizenship or immigration status.⁴²

Historical practice again runs counter to the Secretary’s construction. As recently as 2019, the Supreme Court acknowledged that the prevailing viewpoint that the Constitution requires the counting of *all persons*—regardless of citizenship and immigration status—“is guided by . . . Government practice that ‘has been open, widespread, and unchallenged since the early days of the Republic.’”⁴³ The executive branch, like Congress, “has consistently maintained that all residents of each state must be counted, regardless of their legal status or citizenship.”⁴⁴ Indeed, “every census since the first one in 1790 has endeavored to count all residents of the country, regardless of their status.”⁴⁵ This has been reinforced by the Department of Justice’s (“DOJ”) consistent interpretation “that the Constitution requires including undocumented immigrants in the apportionment base.”⁴⁶ The Secretary should reject the adoption of an interpretation of the Constitution “that would seem to render every census since 1790 unconstitutional.”⁴⁷

Among the many faults of the Secretary’s legal reasoning, it is worth noting that invoking the Fourteenth Amendment’s elimination of the Three-Fifths Clause does not support the Secretary’s position as asserted. Rather, the proposed rule would reenact the very diminishment of disfavored minorities that the Fourteenth Amendment sought to exterminate. Indeed, the plain text and application of the Census Clause prior to the Fourteenth Amendment make clear that the Founders fundamentally understood enslaved people to be “persons.” Otherwise, such a modification would not have been necessary. That even those who participated in the cruelty of slavery understood enslaved people to be “persons” indicates the original public meaning of the word “persons” was defined to include all human beings.

iii. The Secretary Lacks the Statutory Authority to Exclude Noncitizens From the Apportionment Count Under Regular Modes of Statutory Interpretation.

The Secretary also lacks the statutory authority to exclude noncitizens from the apportionment count, regardless of the interpretation of the term “persons.” Administrative agencies only possess the authority that Congress has provided to them,⁴⁸ and the exercise of

⁴¹ Evenwel, 578 U.S. at 66.

⁴² See Cong. Globe, 39th Cong., 1st Sess. 432 (1866) (Representative Bingham) (“Under the Constitution as it now is and as it always has been, the entire immigrant population of this country is included in the basis of representation.”); see *City of San Jose*, 497 F. Supp. 3d at 689–90 (collecting similar quotes).

⁴³ *Dep’t of Com. v. New York*, 588 U.S. at 770 (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 572 (2014)).

⁴⁴ *City of San Jose*, 497 F. Supp. 3d at 693.

⁴⁵ *Id.* (quoting *Enumeration of Undocumented Aliens in the Decennial Census: Hearing on S. 99-314 Before the Subcomm. on Energy, Nuclear Proliferation, & Gov’t Processes of the S. Comm. on Governmental Affairs*, 99th Cong. 19 (1985) (statement of Census Director John Keane)) (cleaned up).

⁴⁶ *Id.* (pointing to DOJ memorandums during the Carter, Reagan, and H.W. Bush administrations).

⁴⁷ *Dep’t of Com. v. New York*, 588 U.S. at 769.

⁴⁸ *NFIB v. DOL, OSHA*, 595 U.S. 109, 117 (2022); see also *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”).

any delegated authority is likewise constrained to the type and scope intended by Congress.⁴⁹ The plain reading of Title 13, which establishes the U.S. Census Bureau within the Department of Commerce, its legislative history, its historic interpretation by the Census Bureau, and its context in the broader statutory reapportionment scheme all point to one answer: the Secretary does not hold the power to exclude any persons residing in the United States from the apportionment count or the census itself. Moreover, the Secretary claims a sizable level of discretion, never-before-exercised, that would upset the fundamental balance of powers between the Executive and Legislative branches and within our federalist structure.

Statutory interpretation of an agency's authority "begin[s] with the text."⁵⁰ Yet the Secretary has disregarded the text of the Census Bureau's authorizing statute, treating the text of Title 13 and the Constitution "not as the source and ceiling of the [Secretary's] authority . . . but rather as a difficulty to overcome."⁵¹

1. Congress's Explicit Requirement that the Secretary Count and Report the "total population" of the States Precludes the Secretary's Proposal.

In setting the scope of the decennial census, Congress intended to include all State residents, regardless of citizenship and immigration status. Title 13 clearly states that the Secretary's statutory duty is to apportion the U.S. House of Representatives according to "[t]he tabulation of *total population* by States."⁵² The phrase "total population" is not a one-off: Congress similarly sets the scope for census counts taken between decennial censuses as requiring a count of the "total population."⁵³ Congress's reference to "total population" is unambiguous and confirms its intent to count all residents in the decennial census and the apportionment count regardless of citizenship and immigration status.⁵⁴

Exploration of the broader statutory apportionment scheme supports this view. For example, 2 U.S.C. § 2a(a) requires that the President transmit to Congress "a statement showing the whole number of persons . . . as ascertained under the . . . decennial census of the population," and the legislative history of section 2a(a) shows that Congress intended that the President's calculations would include "aliens" and "unlawful immigrants." The question of whether to include undocumented immigrants in the apportionment count was explicitly debated in both the House and the Senate during the consideration of the Reapportionment Act, and amendments that would have excluded those persons were rejected.⁵⁵

⁴⁹ See *City of Arlington v. FCC*, 569 U.S. 290, 299 (2013).

⁵⁰ *Centro de Trabajadores Unidos v. Bessent*, 167 F.4th 1218, 1230 (D.C. Cir. 2026) (quoting *Gentiva Health Servs. v. Becerra*, 31 F.4th 766, 775 (D.C. Cir. 2022)).

⁵¹ *E.P.A. v. EME Homer City Generation, L.P.*, 572 U.S. 489, 526 (2014) (Scalia, J., dissenting).

⁵² 13 U.S.C. § 141 (emphasis added).

⁵³ See *id.* § 181(a), (b).

⁵⁴ See *e.g.*, Total, BLACK'S LAW DICTIONARY (4th ed. 1968) ("Whole, not divided, lacking no part, entire, full, complete, the whole amount" or "Utter, absolute"); Population, MERRIAM-WEBSTER'S DICTIONARY ("the whole number of people or inhabitants in a country or region" or "the total of individuals occupying an area or making up a whole").

⁵⁵ *City of San Jose*, 497 F. Supp. 3d at 740 (internal citations omitted) (collecting amendment votes and floor debates).

This understanding of congressional authority aligns 2 U.S.C. § 2a(a) with 13 U.S.C. § 141, which requires tabulation of “total population” and controls the Census Bureau’s gathering and reporting of the information conferred by the President to Congress in section 2a(a). Because section 2a(a) requires the President to include noncitizens—including undocumented immigrants—in his report to Congress,⁵⁶ it would be illogical to interpret section 141 as allowing the Secretary to report to the President less information than the President is then required to report to Congress under section 2a(a).

2. The Secretary’s Proposal Exceeds the Authority Delegated by Congress, Which is Focused on Administration of the Census, Not Control of Its Scope.

Through Title 13, Congress expressly confers upon the Secretary the authority to conduct the decennial census “in such form and content as he may determine,”⁵⁷ but that authority does not extend to the regulatory action the Secretary proposes here. The Secretary’s authority to use discretion with respect to the form and content of the decennial census applies to the *taking* of the decennial census under section 141(a), not—as the Secretary proposes—the *reporting* of the population data, for which Congress has not conferred similar discretionary authority.

Even if the Secretary had discretion over reporting of the census count, Congress did not authorize the Secretary to make broad policy determinations about *who* may be counted, included in the census, or included in the apportionment count. Rather, the Secretary has limited authority, subject to the statute, to determine *how best* to count everyone, and identify the best *methods* to reach everyone.

To wit, the statute clarifies that the Secretary’s authority over the “form” and “content” of the decennial census “includ[es] the use of sampling procedures and special surveys.”⁵⁸ Sampling procedures and special surveys are supplementary procedural methods used by the Census Bureau to collect population information, although they may not be used to determine population counts for purposes of apportionment.⁵⁹ The terms “form” and “content” are thus appropriately read in context to provide discretion in matters of data gathering, not to authorize substantive changes to what is being counted.

Title 13 sets out the subject matter of the decennial census in statute, and then delegates to the Secretary the specifics of collecting and analyzing those subjects. To the extent the Secretary is afforded discretionary authority, it is for the means of data collection, or the collection and publication of statistics *supplementary* to those mandated.⁶⁰ Any policymaking

⁵⁶ See New York, 485 F. Supp. 3d at 477; City of San Jose, 497 F. Supp. 3d at 734.

⁵⁷ 13 U.S.C. § 141(a).

⁵⁸ *Id.*

⁵⁹ See 13 U.S.C. § 191; Dep’t of Commerce, 525 U.S. at 338.

⁶⁰ 13 U.S.C. § 195 (authorizing the Secretary to use “sampling” except for the determination of population for purposes of apportionment of Representatives in Congress); *id.* § 193 (authorizing the Secretary to “make surveys and collect such preliminary and supplementary statistics related to the main topic of the census as are necessary to the initiation, taking, or completion thereof.”).

authority conferred on the Secretary focuses on the powers necessary to administer the survey,⁶¹ not any broader policy determinations that Congress has withheld for itself.

Congress gave the Secretary meaningful substantive authority over the scope of a census in only one instance. Section 191 provides that the Secretary must conduct the censuses authorized under Title 13 within “each State, the District of Columbia, the Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and the Commonwealth of Puerto Rico, and as may be determined by the Secretary, such other possessions and areas over which the United States exercises jurisdiction, control, or sovereignty.”⁶² The discretion that Congress conferred on the Secretary in Section 191 clearly does not also apply to the proposed rule, which would permit the Secretary to exclude residents within the required jurisdictions, reinforcing that the Secretary has not been delegated any discretion over whether noncitizen residents should be counted in the “total population” of the State.

The Secretary cannot alternatively rely on the more general rulemaking authority granted under 13 U.S.C. § 4. General rulemaking authority is not the same as congressional authorization, and even in instances where Congress has granted broad rulemaking power, that power is likewise—and necessarily—constrained by Congress.⁶³ In this case, the Secretary may not rely on his general rulemaking authority under section 4 to render the more specific rulemaking authority under section 141 superfluous.⁶⁴

Moreover, it is hard to imagine that Congress would have intended for the Census Bureau to engage in the complex arena of immigration law in this way. The Census Bureau is a statistical agency whose expertise lies in the collection, analysis, and publication of large masses of data,⁶⁵ not in the varied distinctions and complexities of U.S. immigration law.

3. The Secretary’s Reliance on Supreme Court Precedent is Misplaced.

The Secretary grasps for support from two Supreme Court precedents to establish the authority claimed in the NPRM, but those likewise fall flat.⁶⁶ First, pointing to *Wisconsin v. City of New York*, the Secretary asserts “virtually unlimited discretion” over the conduct of the census.⁶⁷ But *Wisconsin* emphasized that the Secretary’s actions must be “consistent with the constitutional language and the constitutional goal of equal representation,” and that case involved the manner by which the Secretary strove to enumerate all “people,” not a restrictive definition of who the Secretary would even attempt to count.⁶⁸ Moreover, the *Wisconsin* Court

⁶¹ See generally 13 U.S.C. §§ 5-8, 13, 16; 13 U.S.C. § 182.

⁶² 13 U.S.C. § 191.

⁶³ *Merck & Co.*, 385 F. Supp. 3d at 92-93.

⁶⁴ See *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)).

⁶⁵ See U.S. CENSUS BUREAU, *U.S. Census Bureau at a Glance* at 1, <https://perma.cc/AR6J-98FB>.

⁶⁶ 91 Fed. Reg. 57525 (discussing *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Wisconsin v. City of New York*, 517 U.S. 1 (1996)).

⁶⁷ 517 U.S. 1, 4 (1996).

⁶⁸ *Id.* at 11-13, 15 (quoting *Franklin*, 505 U.S. at 806).

acknowledged it “d[id] not . . . decide the precise bounds of the authority delegated to the Secretary through the Census Act.”⁶⁹

The Secretary’s heavy reliance on *Franklin v. Massachusetts* to claim the authority to set residence criteria regarding a person’s “usual residence”—to exclude persons without sufficient ties or allegiance to the United States from the census—fares no better. While the Secretary points to *Franklin* to argue that “usual residence” can have meaning beyond mere physical presence, and could be used to draw in “some element of allegiance or enduring tie to a place,”⁷⁰ the *Franklin* decision allowed the Census Bureau to *expand* the definition of “usual residence” to include those who are not currently physically present in any State, not to refuse to count anywhere those who are, in fact, physically present in a State.⁷¹ Moreover, the determination in *Franklin* rested on a conclusion that overseas government employees were, in fact, merely temporarily away from home, analogizing them to “persons who are institutionalized in out-of-state hospitals or jails for short terms” or “high school students away at boarding school.”⁷² The Secretary provides no factual basis to conclude that all non-lawful permanent resident non-citizens are similarly present only temporarily in the United States. In fact, millions of such non-citizens remain in the United States for years.⁷³ Regardless of legal status, these are people who “have long chosen to make this Nation their permanent home,”⁷⁴ and *Franklin* provides no support for refusing to count them.

iv. The Secretary Lacks the Statutory Authority to Exclude Millions of U.S. Residents From the Apportionment Count Under the Major Questions Doctrine.

The Secretary’s attempt to reverse centuries of practice and exclude non-citizens who are not lawful permanent residents from the apportionment count by administrative fiat also violates the major questions doctrine. Based on separation of powers principles and a practical understanding of legislative intent, the major questions doctrine counsels against reading statutes to empower agencies to decide highly consequential questions absent a clear and express delegation in the statutory text.⁷⁵ The major questions doctrine flows from the commonsense reality that Congress would not grant extraordinary levels of authority through vague or subtle language.⁷⁶

The Secretary’s proposed exclusion of non-citizens who are not lawful permanent residents from the apportionment count is assuredly a major question. The Secretary seeks to make a fundamental and highly consequential change to the very basis of representative government in this country, based on a contested interpretation of longstanding statutory language that has never been interpreted in the way the Secretary now does. As noted above, the

⁶⁹ *Id.* at 4.

⁷⁰ 91 Fed. Reg. 57526.

⁷¹ 505 U.S. at 806.

⁷² *See id.* at 804-05.

⁷³ *See, e.g.,* Jeffrey S. Passel & Jens Manuel Krogstad, *What we know about unauthorized immigrants living in the U.S.*, PEW RSCH. CTR. (July 22, 2024), <https://perma.cc/F6HZ-YXAJ>.

⁷⁴ *Barbara*, 146 S. Ct. at 2546 (Gorsuch, J., dissenting).

⁷⁵ *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (quoting *Utility Air*, 573 U.S. at 524).

⁷⁶ *Id.* at 723 (quoting *Whitman*, 531 U.S. at 468).

Secretary fails to honestly contend with the text and history of section 141, Title 13, or 2 U.S.C. § 2a(a), and the Bureau has never exercised the power to exclude noncitizens who are not lawful permanent residents from the census. Just as established practice informs our understanding of the powers granted by general statutory language, “so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.”⁷⁷

The Secretary completely fails to engage with the magnitude of his proposed rule, its impact on the heart of the American political system, or the staggering economic and political impacts it would have. The proposed rule would directly exclude approximately 16.1 million U.S. residents, and threatens the incidental exclusion of at least another 6.1 million—and would do so in direct contradiction of both the Constitution and 2 U.S.C. § 2a(a)’s mandate that the enumeration be of the “whole number of persons,” as well as 13 U.S.C. § 141’s mandate that the decennial census count the “total population.”

The Secretary claims for himself and the Executive Branch the authority to decide which groups of people should be included in the decennial census, a move that would shift federal representational weight across the country—shifting at least two, and as many as six, congressional seats between the States (and possibly more given the uncertainty),⁷⁸ and allowing the Secretary to unilaterally change the allocation of members of the Electoral College among the States.⁷⁹

The proposed rule would also manipulate Congress’s control of the purse⁸⁰—affecting approximately \$135 billion in federal grant disbursements.⁸¹ Regulations affecting billions of dollars of federal spending, impacting millions of people, unquestionably present “a question of deep ‘economic and political significance.’”⁸²

Congress clearly did not intend to leave such consequential determinations to the Commerce Department, let alone the Census Bureau. The Census Bureau is a statistical agency that administers a nationwide survey. That its expertise is focused on information gathering and analysis and survey administration is supported by the requirement in Title 13 that the Director of the Census have “experience in the collection, analysis, and use of statistical data.”⁸³ Nothing

⁷⁷ *Id.* at 725 (quoting *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941)).

⁷⁸ See Jeff Adelson & Albert Sun, *Trump’s Census Proposal Could Cut House Seats From Red States*, N.Y. TIMES (Sept. 18, 2026), <https://perma.cc/6X6Q-RSYD> (aggregating two estimates that identify changes in up to six congressional districts across both estimates).

⁷⁹ *Wisconsin*, 517 U.S. at 5 (citing U.S. CONST. art. II, § 1, cl. 2).

⁸⁰ *Biden v. Nebraska*, 600 U.S. 477, 505 (2023) (citing U.S. CONST. art. I, § 8, cl. 7; *Off. Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427 (1990)).

⁸¹ See U.S. CENSUS BUREAU, *U.S. Population Estimated at 334,233,854 on Jan. 1, 2023* (Dec. 29, 2022), <https://perma.cc/3F24-E8AP> (establishing the 2023 population at 334,233,854 people); Stephanie Kramer & Jeffrey S. Passel, *What the Data Says About Immigrants in the U.S.*, PEW RSCH. CTR. (Aug. 21, 2025), <https://perma.cc/23XZ-VSHA> (estimating the 2023 undocumented immigrant population as approximately 16.1 million people); U.S. CENSUS BUREAU, *Census Bureau Data Guide More Than \$2.8 Trillion in Federal Funding in Fiscal Year 2021* (last revised Dec. 26, 2023), <https://perma.cc/SLU6-S3KG>.

⁸² *Biden*, 600 U.S. at 505–06 (quoting *King v. Burwell*, 576 U.S. 473, 485 (2015)); *West Virginia*, 597 U.S. at 716 (quoting 84 Fed. Reg. 32529).

⁸³ 13 U.S.C. § 21.

in Title 13 suggests the broad expertise needed for making the policy judgments the proposed rule attempts to undertake. And “[w]hen [an] agency has no comparative expertise’ in making certain policy judgments, . . . ‘Congress presumably would not’ task it with doing so.”⁸⁴ Indeed, determining the basis for apportionment is so fundamental to the Constitutional structure that Congress itself has long concluded that even *it* does not have the authority the Secretary claims in the proposed rule,⁸⁵ making the Secretary’s claim of authority to do this himself “all the more suspect.”⁸⁶

Ultimately, the Secretary fails to establish his agency’s authority to regulate this major question. To overcome the major questions doctrine, “something more than a merely plausible textual basis for the agency action is necessary,” there must be clear congressional authorization.⁸⁷ The Secretary necessarily fails this test.

b. The Secretary’s Sparse Reasoning for the Non-citizen Exclusion Ensures that a Final Rule would be Arbitrary and Capricious and Impairs Effective Comment.

The Secretary’s decision to exclude millions of noncitizens from the apportionment count would undoubtedly be arbitrary and capricious. The Administrative Procedure Act forbids agency rulemaking that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁸⁸ Under the ‘arbitrary and capricious’ standard, an agency is responsible for not only conducting an appropriate examination of the relevant data, but must also provide “a satisfactory explanation for its action, including ‘a rational connection between the facts found and the choice made.’”⁸⁹ Agency action violates the APA “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, . . . is so implausible that it could not be ascribed to a difference in view or the product of agency expertise,”⁹⁰ or when a reasonable explanation for the agency’s decision is indiscernible.⁹¹ Where an agency action marks a reversal in policy, the agency must provide “a reasoned analysis for the change”⁹² and must openly acknowledge the change in position and demonstrate good reasons for the new policy.⁹³ Where prior policies relied on “factual finding,” “an agency’s decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so.”⁹⁴ And

⁸⁴ West Virginia, 597 U.S. at 729 (quoting Kisor, 588 U.S. at 578).

⁸⁵ See e.g., City of San Jose, 497 F. Supp. 3d at 740 (discussing Congress’s belief during the enactment of the 1921 Reapportionment Act that it “lacked the constitutional authority to exclude ‘aliens from the enumeration for the purpose of apportionment of Representatives among the States’”).

⁸⁶ West Virginia, 597 U.S. at 732 (quoting Gonzalez, 546 U.S. at 267–68).

⁸⁷ *Id.* at 723 (citing Utility Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014)).

⁸⁸ 5 U.S.C. § 706(2)(A).

⁸⁹ Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

⁹⁰ *Id.*

⁹¹ Judulang v. Holder, 565 U.S. 42, 64 (2011).

⁹² FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514 (2009) (quoting State Farm, 463 U.S. at 42).

⁹³ Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221 (2016) (quoting Fox Television Stations, 556 U.S. at 515).

⁹⁴ Fox Television Stations, 556 U.S. at 537.

reasoned decisionmaking requires just that, reasoning; “conclusory statements do not ‘reasonably’ explain agency action.”⁹⁵

The reasoning behind the Secretary’s decision is practically indiscernible. The Secretary asserts a novel interpretation of the Constitution’s use of the word “persons,” but he does not explain why the Bureau has adopted a different interpretation for decades or what has changed to justify such a fundamental change now. Nor does the Secretary provide any factual or legal basis for his conclusion that non-citizens who are not lawful permanent residents cannot be “true inhabitants, members of the body politic, or persons with a ‘usual residence’ in the United States,” or that they possess an insufficient “tie and allegiance to the United States.”⁹⁶

Further, the Secretary fails to neutrally apply this newfound requirement to other groups the proposed rule would include in the apportionment count. He provides no explanation for why he believes all lawful permanent residents, or even all citizens of the United States, satisfy either the newfound constitutional or the statutory criteria he has identified. He relies on conclusory statements that lawful permanent residents meet the latter two criteria, but he provides no explanation, reasoning, or evidence for his assertion. And he entirely fails to address citizens in any way, despite the varied ways in which citizens might fall outside of the Secretary’s undefined criteria.

Tellingly, the Secretary does not apply an analogous permanent “inhabitant” analysis when deciding where U.S. citizens and lawful permanent residents will be treated as residing. Citizens and lawful permanent residents are treated as residing at the “residence at which they have lawfully spent the greatest number of days during the [three-month] census enumeration period.”⁹⁷ Thus, a citizen who has been in a State for only a few months and plans to leave imminently will apparently be counted there, while a non-citizen who has lived in a State for years and intends to remain indefinitely will not. Even given the Secretary’s focus on “inhabitants” rather than the actual Constitutional and statutory text, he does not explain why the indefinitely present non-citizen is not an inhabitant, but the temporarily present citizen is. The only possible basis for the distinction is the Secretary’s additional requirement that the person have “*lawfully*” spent time at a residence to be enumerated there. But the Secretary provides no legal basis for that addition, which does not follow from his focus on “inhabitants.” He does not, apparently, intend to apply that requirement in other, non-immigration contexts, such as to squatters, tenants in eviction proceedings, or homeless citizens camping illegally. And even as to non-citizens, that “lawfully” present requirement is inadequate to justify the proposed rule because there are many non-citizens who are lawfully present but not lawful permanent residents, such as student visa-holders, who would be excluded from apportionment under the proposed rule.

The Secretary’s explanation for excluding millions of noncitizens from the apportionment is plainly insufficient. Even where the Secretary does not wholly rely on

⁹⁵ *Rhode Island v. Trump*, 781 F. Supp. 3d 25, 46 (D. R.I. 2025) (citing *Amerijet Int’l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (quoting *Butte Cnty., Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010))).

⁹⁶ 91 Fed. Reg. 57526.

⁹⁷ 91 Fed. Reg. 57529.

conclusory statements, his reasoning is so far from reasoned decisionmaking that it is plainly implausible.

Finally, the proposed rule does not make clear whether the Secretary intends to enumerate non-citizens who are not lawful permanent residents but then exclude them from the apportionment count, or whether he intends instead to forgo any enumeration of such non-citizens entirely. The legal and practical implications of the two possibilities are different, although both would be unlawful, and the text of the proposed rule seems to point in both directions. In particular, section 60.2(a) defines “usual residence” to require that the person have “lawfully” spent time at a place to reside there, which seems to provide no residence rule for undocumented immigrants, making it impossible to enumerate them at all. On the other hand, section 60.4(b) says only that non-citizens who are not lawful permanent residents are “[n]ot counted for apportionment,” which seems to suggest that they will be counted for other purposes, particularly by comparison to section 60.5, which says that overseas citizens are “[n]ot counted in the stateside census,” a seemingly broader exclusion. The proposed rule does not resolve this ambiguity, explain how non-citizens who are not lawful permanent residents could be enumerated without being counted for apportionment, or assess the downstream effects on the government and other data users—including States that draw congressional and legislative districts based on total population⁹⁸—of entirely refusing to enumerate tens of millions of people who are in fact living within the United States.

4. The Secretary’s Proposed Requirement That a Person’s “Usual Residence” “Be Consistent With, And Evidenced By, Their Tax Records” is Contrary to the Constitution, Outside of the Secretary’s Statutory Authority, Without a “Reasonable Relationship” to the Mandate of an Actual Enumeration, and Would Be Arbitrary and Capricious.

The Secretary’s proposal in section 60.2 of the NPRM that a person’s “usual residence” “should be consistent with, and evidenced by, their tax records” (the “tax rule”) must be rejected. Because IRS records are incomplete, focus on mailing rather than residential addresses, and contain numerous inconsistencies, the rule has the potential to exclude tens of millions and miscount millions more.

The addresses counted in the decennial census and used for apportionment have always been residential. The 1790 Census Act defined where a person was to be enumerated as their “usual place of abode” or “usual[] reside[nce].”⁹⁹ Throughout the 230-year history of the census, this focus on residential address has remained consistent and has never been checked by a person’s tax records.¹⁰⁰

⁹⁸ See *Evenwel*, 578 U.S. at 58.

⁹⁹ Act of Mar. 1, 1790, § 5, 1 Stat. 101, 103.

¹⁰⁰ Act of Feb. 28, 1800, § 5, 1 Stat. 11, 13; Act. of Mar. 26, 1810, § 5, 2 Stat. 564, 567; Act of Mar. 14, 1820, § 5, 1 Stat. 548, 552; Act of Mar. 23, 1830, § 5, 1 Stat. 383, 386; Act. of Mar. 3, 1839, § 5, 3 Stat. 331, 335; *1850 Census: Instructions to Marshals and Assistant Marshals*, IPUMS Ctr. for Data <https://perma.cc/7CVD-2PM8>; U.S. DEP’T OF INTERIOR, CENSUS OFFICE, Eighth Census - Instructions to U.S. Marshals 13 (May 23, 1850), <https://perma.cc/S2YJ-3VG9>; U.S. DEP’T OF INTERIOR, CENSUS OFFICE, Ninth Census - Instructions to Assistant Marshalls 9 (May 1, 1870), <https://perma.cc/6GRW-R4MH> (defining “usual place of abode” as “the house or usual lodging place”); U.S. DEP’T OF INTERIOR, CENSUS OFFICE, 1880

Nor is the Secretary's tax rule consistent with how the Census Bureau normally utilizes administrative records in the decennial census. For example, in the 2020 Census, administrative data was used throughout the process for various purposes, but its relation to returned questionnaires was never controlling.¹⁰¹

The intended scope of the rule is also shrouded in secrecy, leaving only speculation about the Secretary's reasoning for it or how he envisions it functioning, and impairing the ability of commenters to intelligently comment on it. The only reference to "tax-return information" in the NPRM is made in endnote 7, which concerns the enumeration period and merely signals that the Secretary intends to use tax data with significant discretion.¹⁰² Leaked comments made by the Department of Commerce in response to concerned comments by Treasury Department officials may shed some light, but again these comments only signal an intention to exercise significant discretion over the rule.¹⁰³ The Department provides no explanation as to when tax records will overrule questionnaire responses, or whether inconsistencies will result in respondents not being counted.

Census Instruction to Enumerators (May 1, 1880), <https://perma.cc/SL6C-TSVK>; U.S. DEP'T OF INTERIOR, CENSUS OFFICE, Eleventh Census of the United States - Instructions to Enumerators 21 (Mar. 1, 1889), <https://perma.cc/4KSR-CEPX>; U.S. DEP'T OF INTERIOR, CENSUS OFFICE, Twelfth Census of the United States - Instructions to Enumerators (June 1, 1900), <https://perma.cc/9S6R-EYQV>; U.S. CENSUS BUREAU, Thirteenth Census of the United States - Instructions to Enumerators (Mar. 15, 1910), <https://perma.cc/ZP3M-W677> (defining usual place of abode as "the place where [a person] may be said to live or belong, or the place which is their home . . . the place where a person regularly sleeps"); U.S. CENSUS BUREAU, Fourteenth Census of the United States - Instruction to Enumerators (Nov. 1, 1919), <https://perma.cc/ZS6B-J3A5>; U.S. CENSUS BUREAU, Fifteenth Census of the United States - Instructions to Enumerators (Apr. 1, 1930), <https://perma.cc/4B8V-5CPL> (same); U.S. CENSUS BUREAU, Sixteenth Census of the United States - Instructions to Enumerators (Jan. 2, 1940), <https://perma.cc/GR5D-36R9> (same); U.S. CENSUS BUREAU, 1950 Census Instructions to Enumerators (Technical Documentation) (last revised Oct. 8, 2021), <https://perma.cc/8WJH-RHXV>; 1960 Census: Instructions to Respondents, IPUMS Ctr. for Data, <https://perma.cc/S7FD-NTN3> (individuals were told to list "[e]veryone who usually lives [in the home], whether related to [the respondent] or not," as well as "[a]ll persons staying [in the home] who have no other home"); U.S. CENSUS BUREAU, "Appendix A.- AREA CLASSIFICATIONS, app-1--app-3, ND, <https://perma.cc/D9AC-NNKY> (for the 1970 Census, "in accordance with census practice dating back to 1790," each individual was to be counted at their "usual place of residence, which is generally construed to mean the place where [t]he[y] live[] and sleep[] most of the time . . . not necessarily the same as [their] legal residence, voting residence, or domicile"); U.S. CENSUS BUREAU, APPENDIX E.-Facsimiles of Respondent Instructions and Questionnaire Pages, E-7, 1980, <https://perma.cc/5TX3-H3GX> (applying to the 1980 Census); U.S. CENSUS BUREAU, APPENDIX E.-Facsimiles of Respondent Instructions and Questionnaire Pages, E-9, 1990, <https://perma.cc/65X5-YX7S>; U.S. CENSUS BUREAU, 2000 Census (Technical Documentation) (last revised Nov. 23, 2021), <https://perma.cc/M9EN-WEFU>; U.S. CENSUS BUREAU, 2010 Census Questionnaire (Technical Documentation) (2010), <https://perma.cc/J96P-3WMH>; U.S. CENSUS BUREAU, Residence Criteria and Residence Situations for the 2020 Census of the United States (2020), <https://perma.cc/BCC2-QKAY>.

¹⁰¹ U.S. CENSUS BUREAU, Administrative Data Used in the 2020 Census 8 (2021) ("Administrative data were not used to replace any manual or OCR captured data, just to provide a confidence level about it.").

¹⁰² 91 Fed. Reg. 57528.

¹⁰³ Josh Kovensky & Layla A. Jones, *Exclusive: Commerce Overruled Treasury Concerns in Push to Narrow Census Count*, TALKING POINTS MEMO (Sept. 17, 2026), <https://perma.cc/TZ4S-7SDM> (showing a DOC response that they "do not want to limit administrative records to serving only as 'corroborating evidence' of usual residence, as there are certain situations where administrative records are the only and/or best available evidence.").

However tax records are used, the IRS is no substitute for the decennial census. Indeed, requiring tax records to show a respondent's usual residence will result in an undercount of tens of millions of U.S. residents. The IRS does not have tax documents for tens of millions of U.S. residents—a review of American Community Survey (“ACS”) Vintage data shows a gap of around 45 million people, with the IRS data reflecting only about 292 million while comparable ACS data reflects about 337 million people.¹⁰⁴

The data gaps fall in both predictable and unpredictable patterns: for instance, low-income citizens who are not required to file a tax return will be undercounted if IRS data is relied upon to ensure someone is counted. This harm will be most acute in communities where more residents fall below the filing threshold or are not claimed as dependents on returns, especially children and low-income adults. Because the decennial census has an important role in determining eligibility for hundreds of federal funding programs, reliance on IRS data will further strip those communities, and the States they are in, of millions or billions in federal funding. In communities like Radford City, Virginia, for example, federal funding based on population would drop by over 40%; in Tuscaloosa County, Alabama, that funding would drop by over 30%.¹⁰⁵ The impact will be compounding—States with large proportions of their population that already rely on federally funded programs are less likely to have as many tax filers, and will be left with even fewer resources if they are undercounted due to the proposed rule.

Other discrepancies are less obvious: for instance, counties with colleges and universities will see their populations become grossly distorted—in some counties, the population drops off by as much as 30-40% when relying on IRS data, instead of the more comprehensive census data gathered through the ACS. Across the 38 largest flagship and land-grant universities in these counties, individuals reflected in IRS data account for just 73.5% of the ACS population estimate, versus 85.8% in all other counties.¹⁰⁶ This mass exclusion would significantly impact apportionment and federal funding.

Plainly put, tax data does not match census data. The Census Bureau itself has recognized the insufficiency of administrative records like tax records for the decennial census. In 2020, the Bureau modeled a count based on 31 different types of administrative documents that included tax records, and the results heavily distorted the population, actually including *more* noncitizens while undercounting citizens by about three million.¹⁰⁷

In many entirely foreseeable circumstances, moreover, tax records will not match a person's actual, current “usual residence” as of April 1, leading to severe miscounting or undercounting. Depending on how the Bureau uses tax records, the tax rule will miscount or fail to count respondents who moved after submitting their tax records. Unlike the decennial census, filers are not required to use their residence as the address on their tax documents—only a mailing address is required, meaning many filers will use their work address, tax preparer's

¹⁰⁴ Nat'l Redistricting Fdn, *Census IRS Rule Threatens College Town Representation*, NRF POL'Y LAB (Oct. 16, 2026), <https://perma.cc/NXM7-XRZP>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Kovensky & Jones, *supra* note 103.

address, or a P.O. box. The use of tax records may further confuse the counting of dependents—for example, a divorced parent living separately from their child may still claim that child as a dependent, even though the child’s “usual residence” is elsewhere.

Relying on tax records means that an incorrect or out-of-date address, or a slight misspelling of a name could mean someone is not counted appropriately. Honest mistakes would compound into a drastic undercount. The error rate would balloon as the records of those who file taxes after the deadline, file taxes in a State other than their residence on April 1, 2030, or are not required to file taxes at all, disappear from the count. These issues are entirely foreseeable,¹⁰⁸ yet the Secretary offers no explanation as to the safeguards that will—indeed, must—be put in place to catch errors and ensure the Bureau continues to meet its mandate to conduct an “actual enumeration” that does not miss or miscount giant swaths of Americans.

Moreover, the tax filing period is misaligned with the NPRM’s newly proposed enumeration period. The IRS deadline for taxes is April 15, which can be extended for some to as late as October 15. Millions of Americans file outside of the enumeration period; one estimate found that 19% of filers wait until April 15 to file.¹⁰⁹ And while the Secretary suggests that the incorporation of those later tax returns solves this issue, this again does not account for earlier moves from their usual residence as of April 1.¹¹⁰

Further impacts may be unknown. Unlike the typically expert-driven, evidence-based approach historically taken by the Census Bureau when amending the residence criteria, there is no indication that the Census Bureau has engaged experts on the tax rule or engaged in any testing on its implementation or impact.¹¹¹

a. Any Requirement That “Usual Residence” “Be Consistent With, and Evidenced By” Tax Records Fails to Bear a Reasonable Relationship to the Accomplishment of an Actual Enumeration.

The NPRM and proposed rule leave it unclear what the Bureau plans to do if tax records do not correspond with questionnaire responses, whether because of contradictory information or a lack of tax records for a given respondent. It is therefore impossible for NRF or any other commenter to intelligently comment on the problems that any given approach might involve. To the extent the Secretary proposes to give controlling weight to tax records over questionnaire responses during the decennial census, however, such an approach fails to bear a “reasonable

¹⁰⁸ See, e.g., Jasleen Singh and Spencer Reynolds, *Homeland Security’s “SAVE” Program Exacerbates Risks to Voters*, BRENNAN CTR. FOR JUST. (July 21, 2025), <https://perma.cc/ET2B-9YUG> (“overreliance on [DHS citizenship lookup database] for the purposes of voter list maintenance can lead to errors, false negatives, and wrongful voter purges”).

¹⁰⁹ *Annual Report Finds 29% of Americans Procrastinate Filing Their Taxes*, IPX1031 (2026), <https://perma.cc/SBF5-VLAU>.

¹¹⁰ See also Barry Johnson, *Using Tax Records to Verify Residence Could Put 2030 Census Accuracy at Risk*, TAX POL’Y CTR. (Oct. 5, 2026), <https://perma.cc/E6HQ-UWS6>.

¹¹¹ Compare U.S. CENSUS BUREAU, *Administrative Data Used in the 2020 Census* 1, 22–24 (Aug. 11, 2021), <https://perma.cc/T3S5-LSLP> (synthesizing a massive list of administrative records used in specific Census Bureau operations) with 91 Fed. Reg. 57529 (“A person’s ‘usual residence’ should be consistent with, and evidenced by, their tax records”).

relationship to the accomplishment of an actual enumeration.”¹¹² If the Secretary is attempting to exclude respondents without tax records or with inconsistent tax records, the tax rule fails for the same reason as the exclusion of noncitizens: it would fail to count individuals who are, under any definition, “persons in” the United States. Excluding at least 45 million U.S. residents for an undefined purpose is unmoored from the text and purpose of the Enumeration Clause and, by its nature, bears no reasonable relationship to the accomplishment of an actual enumeration.

The Secretary’s tax rule similarly fails if its purpose is to replace residence data provided by respondents with the addresses provided in tax records. The Constitution’s design for the enumeration and the subsequent apportionment of congressional representatives is focused on residence. Tax records ask for a taxpayer’s mailing address, not their residential address, which will miscount millions of respondents, including at times in a separate State.

b. The Constitution Precludes the Secretary’s Requirement That Tax Records Be Dispositive as to a Person’s Usual Residence.

The Constitution directs that the “Enumeration” shall be of “persons,” not taxpayers.¹¹³ Allowing the Secretary to limit the 2030 Census to respondents with tax records with a matching address, or treat tax records as dispositive to a person’s usual address, would be inapposite to the Constitution’s plain text. The Constitution uses the very specific term “Enumeration” to indicate that the census is, fundamentally, a unique count of the population that cannot simply be replaced or limited by administrative data that fails to account for all residents.¹¹⁴

The history of the apportionment clause also weighs against allowing tax records to play a defining role in apportionment. Any attempt to treat tax records as dispositive, particularly in light of the fact that individuals with a defined level of limited income are not required to submit certain tax records, would directly tie the census and the apportionment of congressional representatives to wealth—a factor that was explicitly rejected in the development of the apportionment framework.¹¹⁵ Allowing wealth to play a determining role in apportionment would counteract one “of the basic purposes of the Census Clause. . . . that comparative state political power in the House would reflect comparative population, not comparative wealth.”¹¹⁶

¹¹² Dep’t of Com., 588 U.S. at 769 (quoting *Wisconsin*, 517 U.S. at 19).

¹¹³ U.S. CONST. art. I, § 2, cl. 3.

¹¹⁴ See Nora Gordon & Krista O’Connel, *Why Does the Census Matter for State and Local Governments? (UPDATED)*, ECONOFACT (Aug. 31, 2020), <https://perma.cc/6JYN-R9VW> (“The U.S. decennial census is unique because it is an actual enumeration of the total population living in the United States, rather than a sample.”).

¹¹⁵ See *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964) (citing *The Records of the Federal Convention of 1787* (Farrand ed. 1911) 660) (“The Convention . . . overwhelmingly agreed to a resolution offered by Randolph to base future apportionment squarely on numbers and to delete any reference to wealth.”).

¹¹⁶ *Utah*, 536 U.S. at 477 (citations omitted).

c. The Secretary Lacks the Statutory Authority to Require That “Usual Residence” “Be Consistent With, And Evidenced By,” Tax Records Both Under Regular Modes of Statutory Interpretation and the Major Questions Doctrine.

The Secretary’s proposed tax rule is fundamentally misaligned with Congress’s requirement that the Secretary tabulate the total population of the States. The Secretary claims the authority to enact the tax rule by a general reference to 13 U.S.C. § 141,¹¹⁷ but both section 141 specifically and Title 13 more broadly impose restrictions that the Secretary is attempting to exceed. By excluding individuals who do not have IRS records, or whose IRS records are inconsistent, the Secretary claims authority over the scope of the decennial census that his statutory authorization does not reflect.

Any treatment of tax records as dispositive of a person’s “usual residence” violates section 141’s mandate that the Secretary “take a decennial census of population.”¹¹⁸ The direct enumeration is the core of section 141, and it may not be subordinated or replaced by the Secretary’s arbitrary treatment of tax records as controlling over the answers of respondents. Doing so would render the census “inoperative or at the least insignificant,” contrary to the rule that each of a statute’s provisions must be read “so that no part will be inoperative or superfluous, void or insignificant.”¹¹⁹

Section 141 explicitly treats as supplementary tools such as “the use of sampling procedures and special surveys,” or the gathering of “other census information as necessary.”¹²⁰ The Secretary’s proposed use of tax records is neither “sampling”¹²¹ nor a “special survey[],”¹²² and must therefore be considered “other census information.” However, the Secretary gives no explanation of or justification for the tax rule, and thus fails to establish the rule as “necessary.” Indeed, the authorization “to obtain such other census information as necessary” does not suggest that the Secretary may use that information to exclude persons counted for the census, nor that he may seek out that information in order to subordinate the information gathered in the decennial count. Such information may *supplement* the data already gathered, not *subtract* from it.¹²³

The Secretary’s proposed tax rule also fails when reviewed under the major questions doctrine. Without any discussion of the provision, the Secretary suddenly discovers “an

¹¹⁷ 91 Fed. Reg. 57529.

¹¹⁸ 13 U.S.C. § 141.

¹¹⁹ *United States v. Harris*, 838 F.3d 98, 106 (2d Cir. 2016) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

¹²⁰ 13 U.S.C. § 141.

¹²¹ *See* *Utah*, 536 U.S. at 465–68 (describing “sampling” as the use of a smaller population and a statistical method to extrapolate from the part to the whole).

¹²² *See* 13 U.S.C. § 196 (describing special censuses).

¹²³ *See, e.g., Utah*, 536 U.S. at 472–73 (Census Bureau may use hot-deck imputation to “fill[] in certain gaps in its information and resolve[] certain conflicts in the data”); U.S. CENSUS BUREAU, Administrative Data Used in the 2020 Census at 7–9 (2021) (explaining how administrative data was used in the 2020 Census for Non-ID Processing, checking data quality assurance, supplementing missing data, correcting misspellings, and assisting with special enumerations of hard-to-count communities, but never “to replace any manual or OCR captured data”).

unheralded power’ representing a ‘transformative expansion in [his] regulatory authority’¹²⁴ that contradicts the statutory and constitutional text and historical practice. The tax rule “create[s] a novel and fundamentally different” decennial census,¹²⁵ one that could result in the exclusion of 45 million U.S. residents from apportionment.¹²⁶ In so doing, the Secretary breaks with 230 years of tradition by centering “usual residence” on another data source, which may supplant the census’s actual enumeration in favor of ambiguous IRS data.

The Secretary completely fails to acknowledge the magnitude of this proposed change, and the impact it would have on the heart of the American political system. As discussed above, the potential exclusion of 45 million U.S. residents from the apportionment count would likely shift at least six congressional seats between the States,¹²⁷ manipulating the distribution of power among the States in both Congress and the Electoral College,¹²⁸ as well as the distribution of approximately \$336 billion in federal funds.¹²⁹

The tax rule’s designation as a major question is not lessened even if tax records are only dispositive of *where* respondents are counted. While more difficult to estimate, the tax rule would still shift millions of people away from their usual residence to an arbitrary mailing address that may even cross state lines.

Simply put, the Secretary does not have the discretion to affect apportionment, future redistricting, and federal funding by fundamentally changing the records used to either exclude individuals from the count or to shift individuals from one state to another—all without any explanation to which commenters could respond.

d. The Secretary’s Failure to Provide Reasoning for the Requirement That “Usual Residence” “Be Consistent With, and Evidenced By” a Person’s Tax Records Would Be Arbitrary & Capricious.

The Secretary’s requirement that “usual residence” be “evidenced by, and consistent with, [a respondent’s] tax records” is perhaps the clearest possible example of an arbitrary and capricious agency action. At a minimum, “an agency must cogently explain why it has exercised its discretion in a given manner.”¹³⁰ The agency’s proposed rule fails to meet this minimal standard, declining to allocate even a bare sentence to address its tax rule that could exclude or miscount millions from the constitutionally mandated enumeration and result in losses of

¹²⁴ West Virginia, 597 U.S. at 724 (quoting *Utility Air*, 573 U.S. at 324).

¹²⁵ Biden, 600 U.S. at 496.

¹²⁶ See Nat’l Redistricting Fdn, *supra* note 104.

¹²⁷ See Jeff Adelson & Albert Sun, Trump’s Census Proposal Could Cut House Seats From Red States, N.Y. TIMES (Sept. 18, 2026), <https://perma.cc/6X6Q-RSYD>.

¹²⁸ Wisconsin, 517 U.S. at 5 (citing U.S. CONST. art. II, § 1, cl. 2)

¹²⁹ See Nat’l Redistricting Fdn, *supra* note 104; U.S. CENSUS BUREAU, *Census Bureau Data Guide More Than \$2.8 Trillion in Federal Funding in Fiscal Year 2021* (last revised Dec. 26, 2023), <https://perma.cc/SLU6-S3KG>.

¹³⁰ *State Farm*, 463 U.S. at 48 (citing *Atchison*, 412 U.S. at 806; *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972); *NLRB v. Metro. Ins. Co.*, 380 U.S. 438, 443 (1965)).

federal representation and up to billions of dollars in federal grants for states and communities.¹³¹

Moreover, the Secretary's proposal will necessarily result in the application of inconsistent evidentiary requirements to different classes of respondents. The Census Bureau will be unable to cross-reference IRS records with approximately 45 million residents, meaning those with tax records will be subject to a separate, arbitrary standard from those without. Remarkably, the Secretary has himself explicitly indicated that this requirement will not be universally applied.

The Secretary's tax rule is even internally inconsistent. While the NPRM explains that "'usual residence' is the residence at which" a person has "lawfully spent the greatest number of days during the census enumeration period,"¹³² tax records focus on mailing address, which does not necessarily correspond with where a person spends the most time in that discrete period.

5. The Secretary's Proposed Enumeration Period is Outside the Secretary's Statutory Authority, Without a "Reasonable Relationship" to the Mandate of an Actual Enumeration, and Arbitrary and Capricious.

The Secretary next proposes a novel "census enumeration period" that will "run from January 3 to April 1 during decennial census years."¹³³ This proposal will result in a potential miscount of millions of U.S. residents and will fail to count respondents where they are *currently* living "as of" April 1.¹³⁴ More than 10% of Americans change their residence every year,¹³⁵ and over 2% of Americans move to a different State every year.¹³⁶ This creates a substantial risk that people will be counted at a residence they no longer inhabit "as of" April 1. For example, if a respondent moves from Florida to Colorado on March 1, 2030, they would in theory be answering the census questionnaire correctly if they list Florida as their usual residence, but that answer is factually incorrect for apportionment purposes.

In particular, the Secretary's enumeration period will miscount millions of "snowbirds"—individuals from colder northern States who temporarily migrate to warmer southern States or elsewhere during the winter months. Snowbirds can constitute a sizable population even for larger States: the State of Florida in 2004 took in approximately 920,000 snowbirds during the winter months.¹³⁷ These migration patterns can also have huge localized

¹³¹ Compare U.S. CENSUS BUREAU, Administrative Data Used in the 2020 Census 22–24 (Aug. 11, 2021), <https://perma.cc/T3S5-LSLP> (synthesizing a massive list of administrative records used in specific Census Bureau operations, including Frame Development, NRFU, Special Enumerations, CQR, and many others) with Proposed Rule, 91 Fed. Reg. 57529 ("A person's 'usual residence' should be consistent with, and evidenced by, their tax records").

¹³² 91 Fed. Reg. 57529.

¹³³ *Id.* at 57526.

¹³⁴ 13 U.S.C. § 141(a).

¹³⁵ U.S. CENSUS BUREAU, Percentage of Population that Moved in the Past Year (2025), <https://perma.cc/ZZ3E-QFUX>.

¹³⁶ U.S. CENSUS BUREAU, Percentage of Population that Moved in the Past Year: Same State and Different State Moves (2025), <https://perma.cc/ZWD3-8HXJ>.

¹³⁷ *UF Study: New York Leads in Snowbirds Moving Temporarily to Florida*, UNIV. FLA. NEWS ARCHIVES (Nov. 22, 2024), <https://perma.cc/W74U-X8KN>.

impacts: the city of Phoenix, Arizona, for example, alone receives approximately 400,000 snowbirds each year.¹³⁸ And these numbers are only growing—in 2024, 34% of Americans were either contemplating or already making plans to snowbird during the winter months.¹³⁹

The enumeration period is also likely to miscount working communities that migrate between States by season, such as the agricultural workforce who often travel between States to secure more consistent and higher wages according to the time of year.¹⁴⁰ For example, seasonal farmworkers may be in North Carolina in July through August for blueberry season, then move to Michigan in August through October for apple harvesting, only to then migrate to Florida for the strawberry harvesting season between November and March.¹⁴¹

The Secretary does nothing to address this significant potential for miscounts.

The proposed enumeration period further breaks with historical practice. Since the first Census Act of 1790, no matter how long the enumeration has taken, its focus has been to enumerate where the population lived on a singular date.¹⁴² The federal government has never entertained anything like the Secretary’s proposal, yet the Secretary does not acknowledge the lengthy historical practice his proposal breaks from.

a. The Secretary Lacks the Statutory Authority to Enact an Enumeration Period Other Than the April 1 Date Specified in 13 U.S.C. § 141(a).

The Secretary’s proposed enumeration period conflicts with the plain text of 13 U.S.C. § 141. The Secretary only broadly points to 13 U.S.C. §§ 4 and 141 to support his claim of never-before-exercised authority to enact an enumeration period, without further explanation.¹⁴³

The text of 13 U.S.C. § 141(a) directs the Secretary to “take a decennial census of population as of the first day of April of such year.”¹⁴⁴ The operative term for purposes of the enumeration period is “as of,” which has been regularly interpreted as an equivalent of “on.”¹⁴⁵

¹³⁸ Art Smith, Snowbirds Are Onto Something with Annual Migration, *THE MARIETTA TIMES* (Jan. 10, 2026), <https://perma.cc/PW8G-NKKBK>.

¹³⁹ Rogers Sands, *Scores of Americans Plan to ‘Snowbird’ This Winter*, *FORBES* (Jan. 16, 2024), <https://perma.cc/R9EE-AQ7L>.

¹⁴⁰ Zhengfei Guan, et al., *The Migration Pattern of Florida Seasonal Workers*, *UNIV. FLA. INST. FOOD & AGRIC. SCI.* 1, 1 (2018), <https://perma.cc/S8ZE-YXNR>.

¹⁴¹ *Id.*

¹⁴² Act of Mar. 1, 1790, § 5, 1 Stat. 101, 103 (identifying the counting date as the first Monday in August) ; Act of Feb. 28, 1800, § 5, 1 Stat. 11, 13 (same); Act of Mar. 26, 1810, § 5, 2 Stat. 564, 567 (same); Act of Mar. 14, 1820, § 5, 1 Stat. 548, 552 (same); Act of Mar. 23, 1830, § 5, 1 Stat. 383, 386 (same); Act of Mar. 3, 1839, § 5, 3 Stat. 331, 335 (same); Act of May 23, 1850, § 19, 428, 431 (requiring that the 1850 Census, and those to follow, shall “commence on the first day of June next, and be taken *with reference to that day*” (emphasis added)); Act of June 18, 1929, § 6, 21, 23 (requiring the census to be taken “as of the 1st day of April”); Act of Aug. 28, 1957, § 141, 481, 483 (same).

¹⁴³ 91 Fed. Reg. 57529.

¹⁴⁴ 13 U.S.C. § 141(a).

¹⁴⁵ See *Bank v. Verde Energy USA, Inc.*, 2021 WL 4097313 at *2 (2d Cir. 2021) (citing *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, LLC*, 214 F.2d 872, 875–76 (7th Cir. 2000) (“as of” means “on”); Bryan A. Garner, *GARNER’S MODERN AMERICAN USAGE* 68 (3d ed. 2009) (“as of” should be replaced with “on”); *As of*, *OXFORD ENG. DICTIONARY*, <https://perma.cc/LW58-RREE> (last visited Oct. 27, 2026) (“as of” means “as things stood on (a date)”)).

Whether the date specified by “as of” is the beginning, ending, or sole focus of a statute is dependent on the surrounding language and context.¹⁴⁶ In the context of section 141(a), the enumeration date is clearly intended to be *on* April 1, 2030.

It would be unreasonable to presume that Congress intended the enumeration period to be anything other than that which it specified. By setting the day for the decennial census, section 141(a) sets the day when respondents must provide their substantive answers.¹⁴⁷ In ordering that the decennial census shall be taken “as of” April 1, Congress clearly intended to count the population as it exists *on* April 1.

The Secretary attempts an end run around the plain text of section 141(a), claiming general authority under 13 U.S.C. §§ 4 and 141. But section 141’s directive that the Secretary take the decennial census “in such form and content as he may determine” does not allow him to alter the scope of the census from “the first day of April of such year” to any other date or period. The Secretary’s reference to the Twentieth Amendment as a source for the January 3 beginning date for his proposed enumeration period does nothing to help, as the Twentieth Amendment is wholly unrelated to the Enumeration Clause or the Fourteenth Amendment.¹⁴⁸

The Secretary’s enumeration period similarly fails under the more demanding standard of the major questions doctrine. As with the Secretary’s proposed exclusion of noncitizens and the tax rule, the enumeration period’s replacement of a straightforward enumeration as of a single date with the very different concept of enumeration based on a three-month period poses a major question that Congress would not have intended to delegate to the Secretary, due to its effect on questions of economic and political significance. The date of the decennial census is fundamental to its scope. An average of approximately 110,000 U.S. residents move every day.¹⁴⁹ Changing the date specified in section 141(a) significantly impacts the population data collected and may have significant impacts on the apportionment of congressional representatives, the division of votes in the Electoral College, and the receipt of trillions of dollars of federal funding.

The Secretary has no colorable basis for his assertion of authority to modify the enumeration period.¹⁵⁰ To the contrary, section 141 clearly states that “[t]he Secretary shall . . . take a decennial census of population *as of* the first day of April” and labels that date “the decennial census date.”¹⁵¹ Congress has spoken clearly and unequivocally, leaving no room for conflicting regulatory action.¹⁵²

¹⁴⁶ See *Verde Energy*, 2021 WL 4097313 at *2 (“as of” a date “unambiguously refers to the time period up to *and including*” that date).

¹⁴⁷ See *Watson v. Republican Nat’l Comm.*, 609 U.S. 672, 682 (2026) (“By setting the day for the ‘election,’ these statutes set the day when the electorate must make its choice.”).

¹⁴⁸ 91 Fed. Reg. 57526.

¹⁴⁹ See U.S. CENSUS BUREAU, *supra* note 135 (11.8% of the population moved to a new home in 2024); U.S. CENSUS BUREAU, *New 2024 Population Estimates Show Nation’s Population Grew by About 1% to 340.1 Million Since 2023* (Dec. 19, 2024), <https://perma.cc/C546-JEHV> (2024 U.S. population estimate of 340.1 million people). Assuming this is distributed evenly across the year, that would mean about 110,000 Americans move each day.

¹⁵⁰ *West Virginia*, 597 U.S. at 722.

¹⁵¹ 13 U.S.C. § 141(a) (emphasis added).

¹⁵² *West Virginia*, 597 U.S. at 723 (quoting *MCI Telecomms. Corp.*, 512 U.S. at 219).

b. The Secretary's Proposed Enumeration Period Fails to Bear a Reasonable Relationship to Achieving an Actual Enumeration.

The Secretary's proposed enumeration period further fails to pass muster under the "reasonable relationship" test. The Secretary himself recognizes that the January 3 start date has no basis in the Constitutional provisions related to the enumeration or apportionment, nor even the statutory outline provided by Congress.¹⁵³ And as explained above, the enumeration period will result in an inaccurate headcount of millions by placing them in prior residences or temporary residences in other States.

c. The Secretary's Reasoning for the Enumeration Period is Arbitrary and Capricious.

The Secretary's justification for the proposed enumeration period is minimal and insufficient under the APA's requirement of reasoned decisionmaking. In the first instance, the Secretary does not acknowledge that he is breaking from the Bureau's historical practice or the text of Title 13. His phrasing evinces little understanding that the census has historically collected the "usual residence" of the population *as of* a particular date, and instead treats the Bureau's creation of a "census enumeration period" as actually consistent with historical practice. It is not.

The Secretary further fails to provide "a reasoned analysis for the change."¹⁵⁴ The Secretary's justification that "January 3 is the start of the congressional term during odd-numbered years under the Twentieth Amendment and, thus, the half-way point of the congressional term during even-numbered years"¹⁵⁵ is insufficient. This reasoning founders upon a simple question: what does the Twentieth Amendment have to do with the conduct of the decennial census? The Secretary does not offer an answer to this question, because none can be found. Even if Congress had provided the Secretary the authority to come up with his own enumeration period—which it has not—the Twentieth Amendment's timeline for congressional assemblies was certainly not intended to play any role in that decision.

Nor does the Secretary adequately establish the need for a "census enumeration period." The Secretary provides only conclusory statements about the sufficiency of the period for determining a person's usual residence as of April 1, but provides no facts, supporting evidence, or explanation for his statement or why the statutorily-set date of April 1 is somehow deficient.¹⁵⁶

Moreover, the Secretary's enumeration period fails to live up to his so-called justifications. As described above, under the Secretary's proposal, the enumeration will fail to count a significant number of U.S. residents at their "usual residence" "as of" April 1, 2030, and could instead count them at prior residences or temporary residences, often in the wrong State. The Secretary's enumeration period is far more likely to raise an open-ended question that will confuse respondents and lead to conflicting responses. By asking respondents where their "usual

¹⁵³ 91 Fed. Reg. 57526; *see also* 13 U.S.C. § 141(a).

¹⁵⁴ *Fox Television Stations.*, 556 U.S. at 514 (citations omitted).

¹⁵⁵ 91. Fed. Reg. 57526.

¹⁵⁶ *Id.*

residence” is as of April 1, 2030, the Census Bureau asks a concrete, contemporary question that the average person can answer immediately. By asking respondents where their “usual residence” has *primarily* been during January 3 through April 1, the Bureau forces respondents, especially those who have moved or are more transient, to look back and calculate where their “usual residence” has been.

And at no point does the Secretary consider the enumeration period’s potential for miscounts. As explained above, the enumeration period will miscount “snowbirds” living in other States or abroad during the winter months, individuals who moved to a new residence during the enumeration period, individuals who move frequently for seasonal work, and students returning to their parents’ homes during the school breaks. These are significant communities large enough to affect apportionment and federal funding for States and local communities, and the Secretary must seriously consider this impact.

Finally, the Secretary fails to consider alternative periods. Even assuming that the Secretary could set a new timeframe for enumeration, it is not clear that the Secretary considered whether a different window of time could cure at least some of the issues presented by the January 3 start date by ensuring that people are counted in their full-time residence, rather than a temporary “snowbird” or seasonal residence. Nevertheless, any alternatives would still fail to address the enumeration period’s most fundamental error: that it is not counting people at their residence “as of” April 1, as Title 13 requires.¹⁵⁷

6. The Proposed Use of a Citizenship Question will Result in a Disproportionate Undercount and is Arbitrary & Capricious.

Despite later-professed concerns about response rates, the NPRM does not consider potential decreases in response rates from including a citizenship question on the 2030 Census. The potential for such a decrease is compelling, as evidence consistently shows that inclusion of a citizenship question will result in a disproportionate undercount of persons belonging to or sharing households with certain demographic groups, including immigrants, noncitizens, those with limited English proficiency, and individuals of Hispanic or Latino origin.¹⁵⁸

The Census Bureau has consistently acknowledged that asking all households and respondents to report their citizenship status as part of the decennial census would depress response rates, particularly among certain historically undercounted groups, and would compromise the accuracy and completeness of the census count.

In the 1950s, the Census Bureau determined that citizenship information was not important enough to ask every household and consequently removed the citizenship question from the short-form questionnaire for the 1960 decennial census. Since 1960, the Census Bureau has collected citizenship information only through the long-form questionnaire or the

¹⁵⁷ 13 U.S.C. § 141(a).

¹⁵⁸ Sarah Evans, et al., *2020 Census Barriers, Attitudes, and Motivators Study (CBAMS) Focus Group Final Report*, U.S. Dep’t of Commerce, Census Bureau (Jan. 24, 2019), <https://perma.cc/N8KK-LXA5>; see also U.S. CENSUS BUREAU, *Noncitizen Coverage and Its Effects on U.S. Population Statistics* at 22 (2023), <https://perma.cc/S5TM-XRTG> (19.8% of noncitizens and 30.8% of undocumented immigrants in administrative record data not appearing in the 2020 Census).

American Community Survey, each administered only to a limited sample of the U.S. population. No question concerning citizenship appeared on the short-form questionnaire used to conduct the decennial census from 1960 onward.

Prior to the 1980 decennial census, an interagency council including Bureau officials was tasked with examining the content and coverage of the census questionnaire, and it expressly recommended that a citizenship question not be included on the short-form questionnaire.¹⁵⁹ Before the 1990 decennial census, the Bureau publicly opposed including any citizenship question on the 1990 short-form questionnaire. The Bureau's then-Director warned that a census question on citizenship and legal status could cause the Census Bureau to be adversely "perceived as an enforcement agency," with "a major effect on census coverage."¹⁶⁰ The Director stated the Bureau's conclusion that both undocumented immigrants and legal residents might "misunderstand or mistrust the census and fail or refuse to respond," resulting in reduced census counts.¹⁶¹ In 2010, the Director of the Census Bureau, Robert Groves, explained that "we don't ask citizenship or documentation status, all of the things that may make people uncomfortable are gone from [the census] form."¹⁶²

Echoing the Bureau's long-standing policy, numerous former Census Bureau directors have emphasized that a citizenship question would have depressed response rates and diminished the census's accuracy and completeness. In 2005, Kenneth Prewitt, who served as Census Bureau Director for the 2000 decennial census, explained that any proposed question to distinguish noncitizens from citizens "will be treated with suspicion" and cause "many American citizens as well as noncitizens" to avoid the question.¹⁶³ In 2009, eight former Census Bureau Directors who served both Republican and Democratic administrations jointly declared that the inclusion of a citizenship question would create "problems during door-to-door visits to unresponsive households, when a legalized 'head of household' would avoid enumerators because one or more other household members are present unlawfully."¹⁶⁴

In 2016, four former Census Bureau Directors appointed by presidents of both parties stated in an amicus brief to the U.S. Supreme Court that "a one-by-one citizenship inquiry would

¹⁵⁹ Aff. of Daniel B. Levine, Deputy Dir. of the Census Bureau at ¶ 5, Ex. A to Defs.' Mot. to Dismiss the Action or, in the Alt., for Summ. J., *Fed'n for Am. Immigr. Reform v. Klutznick*, No. 79-3269 (D.D.C. filed Jan. 9, 1983); see also U.S. CENSUS BUREAU, 1980 Census of Population and Housing History at 1-23 (Aug. 1989) (statement to Congress that inquiries about respondents' legal status "would have seriously hampered its efforts to achieve a complete count").

¹⁶⁰ *Enumeration of Undocumented Aliens in the Decennial Census: Hr'g Before the Subcomm. on Energy, Nuclear Proliferation, and Gov't Processes of the S. Comm. on Governmental Affairs*, 99th Cong. 32 (1985) (Statement of John Keane, Dir., Bureau of the Census).

¹⁶¹ *Exclude Undocumented Residents from Census Counts Used for Apportionment: Hr'g Before the Subcomm. on Post Office & Civil Serv.*, 100th Cong. 50 (June 1988) (Statement of John Keane, Dir., Bureau of the Census).

¹⁶² *Video of Robert Groves*, C-SPAN (Mar. 26, 2010), <https://www.c-span.org/video/?292743-6/2010-us-census&start=1902>.

¹⁶³ *Counting the Vote: Should Only U.S. Citizens Be Included in Apportioning Our Elected Rep.*, *Hr'g Before the Subcomm. on Federalism and the Census of the Comm. on Gov't Reform*, 109th Cong. 72 (Dec. 6, 2005) (Statement of Kenneth Prewitt).

¹⁶⁴ Statement of Former Census Directors on Adding a New Question to the 2010 Census at 1-2, CENSUS PROJECT (Oct. 16, 2009), <https://perma.cc/QW5P-BU9K>.

invariably lead to a lower response rate to the Census in general,” and would “seriously frustrate the Census Bureau’s ability to conduct the only count the Constitution expressly requires: determining the whole number of persons in each state in order to apportion House seats among the states.”¹⁶⁵ Citing increased suspicion of government collection of information in general, and particular anxiety among noncitizens, they stated that the addition of a citizenship question would result in “a reduced rate of response overall and an increase in inaccurate responses.”¹⁶⁶

Research and testing on census participation, including work by the Census Bureau, have shown that historically undercounted groups are more likely to be suspicious of the decennial census’s purpose and the government’s use of census data. The Bureau itself has found that questions about citizenship in government surveys are especially sensitive and are likely to trigger and exacerbate concerns about the confidentiality and use of response data.¹⁶⁷ Including a citizenship question in the 2030 Census is therefore expected to reduce participation and depress response rates among these groups.

To the extent that the Bureau’s experience with the citizenship question in sample surveys helps explain its likely impact on the 2030 Census, the available data substantiates concerns that a citizenship question will depress response rates among certain demographic groups. For example, the Bureau measured the relative response rates for citizens and noncitizens to the 2000 short-form census questionnaire, which did not ask about citizenship status, and the 2000 long-form census questionnaire, which did. For noncitizens, the decline in response rate to the long form relative to the short form was 3.3 percentage points greater than it was for citizens. In other words, noncitizens had a disproportionately higher nonresponse rate than citizens to a census survey that inquired about citizenship status. Similarly, in the ACS surveys from 2013 through 2016, nonresponse rates for the citizenship question were materially higher for Hispanics than for non-Hispanic whites, suggesting that Hispanics are less likely to respond to survey questions about citizenship.

Studies conducted after the 2018 attempt to add a citizenship question to the 2020 Census reinforce the logic supporting the decades-long aversion to including a citizenship question. In addition to a general decrease of 4.6% in the number of people projecting they were “extremely” or “very likely” to respond to the 2020 Census following the 2018 announcement of a citizenship question, this decline was notably larger in certain communities: 9.1 percentage points larger for Hispanics, 8.6 percentage points larger for foreign-born residents, 15.8 percentage points larger for those with limited English proficiency, and 15.2 percentage points

¹⁶⁵ Amicus Br. of Former Directors of the U.S. Census Bureau at 25, *Evenwel v. Abbott*, 578 U.S. 54 (2016) (No. 14-940).

¹⁶⁶ *Id.*

¹⁶⁷ U.S. CENSUS BUREAU, DS-16: Policy on Respondent Identification and Sensitive Topics in Dependent Interviewing (Dec. 9, 2014), <https://perma.cc/8AFL-6W2L> (hereinafter, “DS-16”).

larger for residents responding in Spanish.¹⁶⁸ Undocumented immigrants were found to have been 55% less likely to participate in the 2020 Census if it had included a citizenship question.¹⁶⁹

The current political environment has further substantially increased the risk of census nonresponse to a citizenship question among historically undercounted groups.¹⁷⁰ Aggressive deportation efforts weaponizing existing administrative data¹⁷¹ are stoking fears in immigrant communities about providing personal information to government agencies,¹⁷² leading a significant portion to stop providing information, or even withdrawing personal information for programs as integral to daily life as Medicaid, SNAP, or publicly available housing support.¹⁷³ And even where statutory guardrails exist on paper, respondents are likely to doubt the security of their information due to the Trump Administration's demonstrated willingness to exceed such guardrails to obtain the private information of undocumented communities.¹⁷⁴

Such fears may also lead many respondents to deliberately falsify survey responses. In a set of interviews testing an internet self-response instrument in English and Spanish, numerous respondents "intentionally provided incomplete or incorrect information about household members due to concerns regarding confidentiality, particularly relating to perceived negative attitudes towards immigrants."¹⁷⁵ On the basis of its extensive research, the Bureau's own Center for Survey Measurement ("CSM") found that the "level of deliberate falsification of the household roster, and spontaneous mention of concerns regarding negative attitudes toward immigrants" was "largely unprecedented."¹⁷⁶

¹⁶⁸ Gina Walejko, et al., *Use of Exact Matching to Examine Media's Effect on Intended Behavior the Case of the Addition of the 2020 Census Citizenship Question*, 84 PUB. OP. Q. 4, 1000 (2021), <https://perma.cc/3H2C-4XP7>; see also Robert Bernhardt & Phanindra V. Wunnava, *Does Asking About Citizenship Increase Labor Survey Non-Response*, 36 J. POPULAR ECON. 2457–81 (2023) (adding a citizenship question was a key contributor to the 20 to 40 percentage point increase in refusals).

¹⁶⁹ Edward Kissam, et al., *San Joaquin Valley Latino Immigrants: Implications of Survey Findings for Census 2020*, SAN JOAQUIN VALLEY RSCH. PROJECT (Jan. 2019), <https://perma.cc/6GW8-Y7XL>; see also J. David Brown & Misty L. Heggeness, *Citizenship Question Effects on Household Survey Response*, 45(1) J. POL'Y ANALYSIS & M 1, 2 (2025), <https://perma.cc/U58G-ACK8> ("citizenship question lowers response rates for households with at least one likely undocumented member by a statistically significantly larger amount than for households containing only U.S.-born non-Hispanic Whites" and results in "a statistically significant doubling (0.24 of a person compared to 0.12) [of the household roster omission rate] in households with at least one likely undocumented member").

¹⁷⁰ See Carlyne Im & Luis Noé-Bustamante, *Latinos' Experiences With Immigration Enforcement in the Second Trump Administration*, PEW RSCH. CTR. (Nov. 24, 2025), <https://perma.cc/MU8K-TMCJ>.

¹⁷¹ Jude Joffe-Block, *The Trump Administration is Making an Unprecedented Reach for Data Held by States*, NPR (June 24, 2025), <https://perma.cc/STU3-J73E>.

¹⁷² Edward Kissam, *The Two Million Deportation Myth: How Aggressive ICE Enforcement Distorts Immigration Data*, CTR. FOR MIGRATION STUD. (Jan. 12, 2026), <https://perma.cc/4X3T-Q728>.

¹⁷³ See *id.* ("During 2025, 12% of the immigrants responding to the survey had avoided applying for Medicaid, SNAP, or publicly available housing support because of concern about how providing required information might impact their immigration status. And 11% who were already enrolled in such a program had stopped participating because of such concerns.").

¹⁷⁴ See e.g., Sam Levine, *DHS Officers Raise Concerns Over Potentially Illegal Voter Searches and Unreliable Data, Whistleblower Says*, GUARDIAN (Sept. 14, 2026), <https://perma.cc/5CZ4-2SKS>.

¹⁷⁵ Memorandum from Ctr. for Survey Measurement (CSM) to Assoc. Dir. for Rsch. and Methodology at 2 (Sept. 20, 2017), <https://perma.cc/92PD-BY6S>.

¹⁷⁶ *Id.* at 3.

In preparation for the 2020 Census, the Bureau concluded that the CSM findings demonstrated “an unprecedented groundswell in confidentiality and data-sharing concerns among immigrants or those who live with immigrants” that could “present a barrier to participation in the 2020 Census” and “impact data quality and coverage for the 2020 Census.”¹⁷⁷ According to the Bureau, this is “[p]articularly troubling due to the disproportionate impact on hard-to-count [immigrant] populations.”¹⁷⁸

Moreover, the communities that will be undercounted because of the inclusion of a citizenship question are not only those that the Secretary’s proposed rule would exclude. In addition to undocumented and non-permanent immigrants, adding a citizenship question would generally decrease response rates in Hispanic, foreign-born, English-second-language, and Spanish-speaking communities, all of which are well represented in the citizen and lawful-permanent-resident communities.

a. The Proposed Use of a Citizenship Question Relies on Internally Inconsistent Reasoning and Would Thus Be Arbitrary and Capricious.

The Secretary’s reasoning for *including* a citizenship question is internally inconsistent with his later explanation for *excluding* race and ethnicity demographic questions. The Secretary attempts to justify the exclusion of race and ethnicity questions from the census questionnaire by claiming that (1) the addition of more questions on the questionnaire “lower[s] the overall response rate,” (2) the use of additional questions increases the risk that respondents will be identifiable when census data is published, and (3) the sensitive nature of race and ethnicity questions and their limited utility draw into question their continued need.¹⁷⁹ For each justification, the harms of using a citizenship question are just as great.

Including a citizenship question will necessarily negate any supposed gain in response rates or privacy achieved by excluding race and ethnicity questions. Including a citizenship question is likely to further drive down response rates. Due to the highly sensitive nature of the question and the genuine fears for privacy felt by undocumented respondents or respondents in proximity to undocumented immigrants, a citizenship question will significantly drive down response rates. A question about citizenship is far more sensitive than questions on race and ethnicity, especially in light of the current administration’s systemic mass deportation of undocumented immigrants. Even outside of the current political environment, the Census Bureau has found questions on “citizenship” to be sensitive and “illegal immigration status” to be very sensitive, while race and ethnicity questions have not been identified as sensitive.¹⁸⁰

Moreover, the information’s relatively low value is not worth the risk to the count—experts and courts have called into substantial doubt the “meaning, significance, and

¹⁷⁷ See U.S. CENSUS BUREAU, Nat’l Advisory Comm. on Racial, Ethnic, and Other Populations, Respondent Confidentiality Concerns and Possible Effects on Response Rates and Data Quality for 2020 Census, 15 (Nov. 2, 2017), <https://perma.cc/LM2C-W4GE>.

¹⁷⁸ *Id.*

¹⁷⁹ 91 Fed. Reg. 57527.

¹⁸⁰ U.S. CENSUS BUREAU, DS-16: Policy on Respondent Identification and Sensitive Topics in Dependent Interviewing (Dec. 9, 2014), <https://perma.cc/8AFL-6W2L>.

impact”¹⁸¹ of any attempt by the Census Bureau to categorize American residents by legal status. This is especially true when comparing citizenship data to race and ethnicity data. Race and ethnicity data are used for an expansive array of functions by governments, corporations, and individuals at every level and corner of this country. The Secretary points to no comparable array of uses for a citizenship question. Compared with the abundant uses of race and ethnicity data, the Secretary’s singular, constitutionally and statutorily suspect use calls into question, by his own reasoning, “the need for or usefulness of”¹⁸² a citizenship question.

7. The Secretary’s Proposed Exclusion of Race and Ethnicity Questions Will Harm Public and Private Interests That Rely on the Collected Data and the Secretary’s Reasoning for the Exclusion is Arbitrary and Capricious.

The Secretary’s proposal to preclude the use of race and ethnicity demographic questions breaks with 230 years of historical practice that public and private interests have come to rely on. Data providing the racial makeup of the U.S. population has been consistently collected in every decennial census since the first one in 1790, and the concept of ethnicity was first included in 1970 and has been applied ever since.¹⁸³ Questions about race, ancestry, and ethnicity have grown more detailed over the years, and while answers to questions on race and ethnicity were not always decided by the individual, the data were collected, and individuals were classified.¹⁸⁴ The importance of and need for such detailed data on race and ethnicity is clear and has long been recognized by the Census Bureau.¹⁸⁵ This is further reflected by the 230-year history of questions about race, ancestry, and ethnicity.¹⁸⁶

With a brief explanation of hardly more than one page on the Federal Register, the Secretary would abandon race and ethnicity data on the decennial census questionnaire without addressing the departure from historic practice, necessity of and reliance on this data, or alternative ways to address his apparent concerns.

a. The Secretary’s Proposed Preclusion of Race and Ethnicity Questions is Arbitrary and Capricious.

The Secretary’s attempt to preclude the use of race and ethnicity questions in the 2030 Census is arbitrary and capricious. The Secretary’s apparent rationale for the change is plainly insufficient for reasoned decisionmaking, is internally inconsistent when considered alongside the proposed use of a citizenship question, fails to consider the established reliance on the

¹⁸¹ 91 Fed. Reg. 57527.

¹⁸² *Id.*

¹⁸³ Campbell Gibson & Kay Jung, Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States 1, 5, Population Division Technical Working Papers, Working Paper No. 56, U.S. Census Bureau, Washington, DC, 2002, <https://perma.cc/Q2DT-2WSG>.

¹⁸⁴ *See id.* at 1.

¹⁸⁵ U.S. CENSUS BUREAU, Facsimiles of Respondent Instructions and Questionnaire Pages at E-2 (1990), <https://perma.cc/DY4E-4LA8>.

¹⁸⁶ U.S. CENSUS BUREAU, Decennial Census of Population and Housing Questionnaires & Instructions (Technical Documentation) (last revised Nov. 21, 2021), <https://perma.cc/G9NF-RLZJ> (documenting every census questionnaire since 1790).

longstanding collection of race and ethnicity data, and fails to consider any reasonable alternatives.

The Secretary first suggests that excluding race and ethnicity questions is desirable because inclusion of those questions supposedly lowers the overall response rate, a claim for which the Secretary relies on only two sources,¹⁸⁷ neither of which supports his proposal. The Secretary first points to a Congressional Research Service footnote that looks at the response rates of two documents that are fundamentally different in kind—the 2000 Census short-form questionnaire that asked only eight questions, and the long-form questionnaire that asked 45 questions¹⁸⁸—but this does not support the view that response rates will increase as a result of the Secretary’s proposal. Don Dillman’s report is similarly uninformative and instead suggests that the removal of two questions *will not* assure increased response rates, as “the shortest form . . . did not achieve the highest response rate in the study.”¹⁸⁹ Two questionnaires with identical numbers of questions had notably different response rates, and the report concluded that they could only speculate about the reasons for the different response rates.¹⁹⁰ The Secretary’s reliance on research unresponsive of his overall claim effectively renders his declaration merely conclusory,¹⁹¹ but even if that were not the case, more evidence is needed to show that the Secretary’s proposal would measurably—and positively—affect response rates.

Recent decennial census response rates clearly show that adding or removing two questions on the census short-form will not measurably increase or decrease response rates. The response rate to the 2000 Census, which included eight questions, was 67%.¹⁹² Comparatively, the 2010 Census, which included ten questions, had a response rate of 66.5%, while the 2020 Census, which included nine questions, had a response rate of 67%.¹⁹³ Despite the one- or two-question difference, each census had nearly identical response rates.

Moreover, questions on race and ethnicity do not reduce response rates. In assessing the potential impact of limiting certain questions on the ACS, the Census Bureau found that two measures account for differences in responsiveness: the amount of time it takes to answer a question and the “cognitive burden, sensitivity, and difficulty of each question.”¹⁹⁴ Race and ethnicity questions are ever-present in the lives of U.S. residents and are asked on forms and questionnaires used by federal, state, and local governments, as well as private organizations.

¹⁸⁷ 91 Fed. Reg. 57527 n.8.

¹⁸⁸ U.S. CENSUS BUREAU, 2000 Census (Technical Documentation) (last revised Nov. 23, 2021), <https://perma.cc/992G-TEGY>.

¹⁸⁹ U.S. CENSUS BUREAU, Mail-back Response Rates for Simplified Decennial Census Questionnaire Designs 780 (1992).

¹⁹⁰ *Id.*

¹⁹¹ *See* Hogen, 613 F.3d at 194.

¹⁹² U.S. CENSUS BUREAU, Census 2000 Final Response Rates (last revised Feb. 8, 2022), <https://perma.cc/L96L-ZAW7>.

¹⁹³ U.S. CENSUS BUREAU, 2010 Census (Technical Documentation) (last revised Nov. 23, 2021), <https://perma.cc/C9DT-KHE8>; U.S. CENSUS BUREAU, 2020 Census Response Rate Update: 99.98% Complete Nationwide (Oct. 19, 2020), <https://perma.cc/5ENE-2PYT>.

¹⁹⁴ U.S. CENSUS BUREAU, Reducing Respondent Burden in the American Community Survey 21 (2015), <https://perma.cc/JK9W-J9MT>.

Given the commonality of these questions, it is unsurprising that they are answered quickly.¹⁹⁵ Notwithstanding the Secretary's assertions otherwise, no evidence shows that race and ethnicity questions meaningfully increase the "cognitive burden, sensitivity, and difficulty" of the census questionnaire. Questions on race and ethnicity are commonplace and would not be considered cognitively burdensome or difficult, and the Census Bureau has previously found that race and ethnicity questions are not included amongst "sensitive" or "very sensitive" topics.¹⁹⁶

The Secretary's actual concern for response rates is further called into question by his simultaneous proposed *inclusion* of a citizenship question.¹⁹⁷ By basic math, the Secretary is proposing to remove two interrelated questions and replace them with a citizenship question, negating any decrease in response burden that reducing the number of questions would provide. Further, under the Bureau's own measures of response burden, a citizenship question would substantially increase response burden. Depending on the form it takes, a question about complex legal statuses may require respondents to review official documents and confirm their understanding of their legal status, which will take significantly longer than answering an ethnicity question. Additionally, a citizenship question may increase the "cognitive burden, sensitivity, and difficulty" of the census for respondents. Cognitive burden and difficulty will certainly be increased for respondents operating within the United States' complex immigration system. And, as discussed above, the inclusion of a citizenship question on the census short-form questionnaire would have a significantly negative impact on response rates due to its sensitive nature, as has been recognized by the Census Bureau.¹⁹⁸

The Secretary next attempts to justify the exclusion of race and ethnicity questions by reasoning that having more questions on the form means there is more specific data collected, which necessarily increases the likelihood that respondents will be identifiable upon the publication of census data.¹⁹⁹ However, the Secretary fails to tie the facts to his preferred policy.²⁰⁰ Beyond a general citation that increased data specificity increases disclosure risk, the Secretary does not explain why excluding race and ethnicity questions is the preferred way to reduce disclosure risk. Nor does the Secretary provide any factual evidence that excluding race and ethnicity data from the census will meaningfully decrease disclosure risk.

The Secretary also does not explain why increased use of certain data manipulation is not preferable to respondent privacy. For example, the Secretary could rescind his Departmental Administrative Order precluding the use of differential privacy,²⁰¹ the cutting-edge disclosure avoidance measure the Census Bureau used for the first time in the 2020 Census, which would

¹⁹⁵ See e.g., Jenanan Mohan, et al., *The Impact of Ethnicity Information in Single Best Answer Questions on Student Performance, Item Response Time and Psychometric Properties*, 31 ADVANCES HEALTH SC. EDUC. 1113, 1121 (2026).

¹⁹⁶ U.S. CENSUS BUREAU, DS-16: Policy on Respondent Identification and Sensitive Topics in Dependent Interviewing (Dec. 9, 2014), <https://perma.cc/8AFL-6W2L>.

¹⁹⁷ 91 Fed. Reg. 57526.

¹⁹⁸ U.S. CENSUS BUREAU, DS-16: Policy on Respondent Identification and Sensitive Topics in Dependent Interviewing (Dec. 9, 2014), <https://perma.cc/8AFL-6W2L>.

¹⁹⁹ 91 Fed. Reg. 57527.

²⁰⁰ See *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines*, 371 U.S. at 168).

²⁰¹ U.S. DEP'T OF COM., DAO 216-26, Disclosure Avoidance for Statistical Purposes (June 4, 2026), <https://perma.cc/HRF4-MQ7T>.

significantly decrease the likelihood of disclosure risk. In that rule, the Secretary declared a firm commitment “to striking a balance of accuracy, confidentiality, objectivity, and relevance.”²⁰² Retaining differential privacy and continuing to develop other disclosure avoidance tools, rather than arbitrarily restricting the Census Bureau’s privacy toolbox, is more in line with the Secretary’s commitment. Differential privacy decreases disclosure risk significantly more than the removal of race and ethnicity questions.²⁰³

Again, the Secretary’s proposed inclusion of a citizenship question draws into question his sincerity about privacy concerns. Citizenship data may carry more disclosure risk than race and ethnicity data, which is a self-identified status that is necessarily fluid and has increased variability due to populations representing more than one race.²⁰⁴ Compared to citizenship data, which is based on a precise administrative status that is easily verifiable and may carry personal risk for individuals if their immigration status were to be shared publicly, race data poses a lower risk of database reconstruction and carries less personal risk if shared publicly.

The Secretary’s next justification is the “(potentially) sensitive nature” of race and ethnicity questions, combined with “doubts about the meaning, significance, and impact of attempting to categorize persons by race and ethnicity” and legal requirements of 13 U.S.C. § 221.²⁰⁵ On each point, the Secretary’s reasoning is plainly insufficient, unsupported by facts, based on a fundamental misunderstanding of the applicable law, and grounded in a similarly fundamental misconception about the varied uses of race and ethnicity data and the communities that rely on that data.

The Secretary provides no evidence for his conclusory claim that race and ethnicity questions are sensitive; indeed, the Secretary himself qualifies his claim, noting that these questions are of a “(potentially) sensitive nature.”²⁰⁶ Nor does the Secretary address or distinguish the Census Bureau’s prior findings outlining “sensitive” and “very sensitive” questions, with race and ethnicity being under neither category.²⁰⁷

The Secretary then claims “[s]ubstantial doubts about the meaning, significance, and impact of attempting to categorize persons by race and ethnicity.”²⁰⁸ The Secretary’s framing, however, confuses the issues and fails to engage with the question as he himself has presented it—none of the cases cited minimize *whether* race and ethnicity data should be collected by the decennial census; rather, they examine *how* state actors and plaintiffs may use race and

²⁰² *Id.*

²⁰³ See Layla A. Jones, *Right-Wing Groups Just Got a Big Win on the Census*, TALKING POINTS MEMO (July 13, 2026), <https://perma.cc/G9AF-QG8M> (based on Census Bureau’s own simulations, only 10% of Quarterly Workforce Indicators publishable).

²⁰⁴ U.S. CENSUS BUREAU, *Why We Ask Questions About Race*, <https://perma.cc/2AYX-DZXY> (12.6% of population represents two or more races).

²⁰⁵ 91 Fed. Reg. 57527.

²⁰⁶ *State Farm*, 463 U.S. 43 (quoting *Burlington Truck Lines*, 371 U.S. at 168) (an “agency must examine the relevant data and articulate a satisfactory explanation for its action, including ‘a rational connection between the facts found and the choice made’”); see also *Hogen*, 613 F.3d at 194.

²⁰⁷ U.S. CENSUS BUREAU, *DS-16: Policy on Respondent Identification and Sensitive Topics in Dependent Interviewing* (Dec. 9, 2014), <https://perma.cc/8AFL-6W2L>; see also *Fox Television Stations*, 556 U.S. at 537.

²⁰⁸ 91 Fed. Reg. 57527.

ethnicity data. This claim evinces a fundamental misunderstanding of how the law applies. In fact, the Secretary’s proposal would only hamper future plaintiffs’ ability to allege racial predominance; race and ethnicity data remain central to the legal claims addressed in the decisions the Secretary cites.

Moreover, the Secretary fails to consider the hundreds of ways the federal government, State and local governments, and private parties use race and ethnicity data. Census data impacts every corner and level of the country and, as the Census Bureau recognized in its submission of questions for the 2020 Census, race and ethnicity data is specifically *required* due to the numerous ways various government actors utilize it.²⁰⁹ Race and ethnicity data collected by the decennial census is also used by innumerable private entities, ranging from private plaintiffs using race and ethnicity data to challenge racial discrimination, to health care organizations attempting to address racial or ethnic disparities in health care.²¹⁰

The Secretary provides no evidence suggesting that race and ethnicity data is less used now than it has been at any point in the 230 years the federal government has collected it.²¹¹ And he fails to consider any of the reliance interests engendered by the continued collection—and accordingly, the use—of race and ethnicity data.²¹² The Secretary fails to provide any serious evidentiary weight to his concern that there must be a reconsideration of the continued collection of race and ethnicity data on the short-form. On the whole, his argument is so lacking in evidence, analysis, and merit as to be labeled “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”²¹³

The Secretary’s final claim is that the combined “(potentially) sensitive nature” and “reduced need for or usefulness of” race and ethnicity data “may be a particular encumbrance on response given that, under 13 U.S.C. [§] 221, respondents are *legally required*” to answer census questions “to the best of [their] knowledge.”²¹⁴ But it is within “the Secretary’s authority to require responses to particular demographic questions”—or to let it go.²¹⁵ If the concern is obtaining compelling answers, the Secretary does not consider the less-extreme alternative of making race and demographic questions optional or explain why that would not adequately address that concern. This would serve the Secretary’s goal of avoiding legal consequences for

²⁰⁹ See U.S. CENSUS BUREAU, Questions Planned for the 2020 Census and American Community Survey 11 (2018) (similar explanation for ethnicity).

²¹⁰ See generally David R. Nerenz, Kelly A. Hunt, & José J. Escarce, *Health Care Organizations’ Use of Data on Race/Ethnicity to Address Disparities in Health Care*, 41(1) HEALTH SERVS. RSCH. 1444 (2006), <https://perma.cc/PX7T-XF4V>.

²¹¹ See *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines*, 371 U.S. at 168) (an “agency must examine the relevant data and articulate a satisfactory explanation for its action, including ‘a rational connection between the facts found and the choice made.’”).

²¹² *Dep’t of Homeland Sec.*, 591 U.S. at 30 (quoting *Encino Motorcars*, 579 U.S. at 221–22 (quoting FCC, 556 U.S. at 512)) (an agency must “be cognizant that longstanding policies may have ‘engendered serious reliance interests that must be taken into account’”).

²¹³ *State Farm*, 463 U.S. at 43.

²¹⁴ *Id.*; 13 U.S.C. § 221.

²¹⁵ *Dep’t of Com. v. New York*, 588 U.S. at 833 n.11 (Alito, J., concurring in part, dissenting in part); *Murphy v. Raimondo*, 2024 WL 1427040 at *1 (9th Cir. 2024) (“[T]he Bureau has been granted the authority to fine or refer for prosecution people who refuse to complete the survey.”).

answering questions about race and ethnicity while largely preserving the race and ethnicity data necessary for numerous efforts in the public and private interest.

And, yet again, the Secretary's commitment to this justification is called into question by his proposed inclusion of a citizenship question. Contrary to the "(potentially) sensitive nature" of race and ethnicity questions,²¹⁶ the Census Bureau has found a citizenship question to be "sensitive" or "very sensitive" if targeted at undocumented immigration status.²¹⁷ Unlike the hundreds of use cases for race and ethnicity data, the Secretary here only provides *one* for a citizenship question. And despite the Bureau's own findings that a citizenship question is more sensitive than race and ethnicity questions and the wealth of evidence proving it is less useful, the Secretary expresses no concerns about its surrounding legal requirements.

The Secretary also fails to take into consideration the Bureau's prior reasoning for including race and ethnicity questions on the short-form questionnaire²¹⁸ or explain why its earlier factual findings should not control.²¹⁹ The closest the Secretary comes to addressing these issues is his suggestion that "the meaning, significance, and impact of attempting to categorize persons by race and ethnicity" have been called into question by recent case law and executive action.²²⁰ However, as noted above, the Secretary mischaracterizes those authorities and fails to account for the many ways race and ethnicity data are used throughout the country.

Finally, the Secretary fails to consider alternative approaches that would address his concerns while preserving necessary race and ethnicity data. The Secretary could combine the race and ethnicity questions, as was explicitly suggested by the Bureau after recommendations made by the Federal Interagency Technical Working Group on Race and Ethnicity Standards on SPD 15.²²¹ This would—at least according to the Secretary's own logic— halve the burden of answering race and ethnicity questions. The Secretary also fails to consider removing questions that may be less important to public and private interests, such as the 2020 Census short-form's questions on whether respondents were living in a "house, apartment, or mobile home" that was owned or rented.²²² This question has more limited uses than race and ethnicity data²²³ and would—according to the Secretary's logic—decrease both response burden and disclosure risk.

Agency rulemaking must be "the product of reasoned decisionmaking."²²⁴ The NPRM is anything but. The Secretary not only fails to develop an evidentiary basis, but he misunderstands the law, misstates the facts, and presents an internally inconsistent set of proposals. The Secretary's proposal can only be labeled arbitrary and capricious.

²¹⁶ 91 Fed. Reg. 57527.

²¹⁷ U.S. CENSUS BUREAU, DS-16: Policy on Respondent Identification and Sensitive Topics in Dependent Interviewing (Dec. 9, 2014), <https://perma.cc/8AFL-6W2L>.

²¹⁸ See e.g., U.S. CENSUS BUREAU, Questions Planned for the 2020 Census and American Community Survey 9, 11 (2018) (race and ethnicity questions "required" for numerous reasons).

²¹⁹ Fox Television Stations, 556 U.S. at 537.

²²⁰ 91 Fed. Reg. 57527.

²²¹ 89 Fed. Reg. 22182.

²²² U.S. CENSUS BUREAU, Questions Planned for the 2020 Census and American Community Survey 9, 11 (2018).

²²³ *Id.* at 17.

²²⁴ *State Farm*, 463 U.S. at 52; 5 U.S.C. § 706(2)(A).

8. The Secretary's Justifications for the NPRM are Likely Mere Pretext.

It is not hard to discern from the sequence of events beginning shortly before the public announcement of the NPRM that an ideological and political agenda underpins these proposed changes. First, the Bureau publicized a faulty report on noncitizen voting, written not by career civil servants, but by an external group affiliated with America First Legal, a think tank started by officials from the first Trump Administration.²²⁵ Then, Secretary Lutnick quietly cut the language in the department's scientific integrity policy that banned political interference.²²⁶ Next comes the NPRM, which clearly shows that the Secretary has recklessly abandoned the Bureau's usual expert-driven procedures to instead pursue the political ends of these proposed rules.

The political undermining of the Census Bureau and its critical work runs even deeper. In early 2025, the Secretary terminated the Census Scientific Advisory Committee, which had historically provided the Bureau with the scientific and technical expertise necessary for its mission. And while the impact of these rules "would have typically gone before a formerly apolitical research committee," the Data Stewardship Executive Policy Committee also recently removed language barring political interference and instead has deferred to political appointees.²²⁷ The replacement of expert-driven decisionmaking with uninformed political involvement is reflected in the scope, reasoning, and impact of the NPRM.

And while the Secretary's reasoning for the NPRM on each issue fails even the most minimal level of review, each part is better explained by its potential beneficial impacts for the Republican Party in apportionment and redistricting. The exclusion of millions of noncitizens and the inclusion of a citizenship question are both likely to harm States with Democratic control and significant numbers of Democratic-leaning congressional districts. The tax rule has the potential to shift several congressional seats toward States under Republican control. The enumeration period appears designed to shift "snowbirds" who live in northern States (more typically under Democratic political control) to the States they live in during the winter months, which tend to be politically controlled by Republicans. And the exclusion of race and ethnicity data would hamstring those seeking to enforce federal and state civil rights laws, particularly with respect to vote-dilution or racial gerrymandering claims.

The throughline for each rule is underdeveloped, faulty, and at times completely absent reasoning. This mirrors the kind of rationale shopping conducted in 2018 by then-Secretary Wilbur Ross.²²⁸ Without reasoned decisionmaking to support any component of the NPRM, it is clear that the unstated political priorities of the administration were the driving force. Regardless of the ultimate reasons proffered by the Secretary in the final rulemaking, the NPRM "contains no hint that he was considering" them here.²²⁹

²²⁵ Hansi Lo Wang, Jude Joffe-Block, & Miles Park, *Experts Raise Alarms Over Census Bureau Report Trump is Touting on Noncitizen Voting*, NPR (Aug. 20, 2026), <https://perma.cc/LM6X-WUJT>; see also Vittoria Elliott, *The Census is Overrun With Staffers From a MAGA Think Tank*, WIRED (Sept. 15, 2026), <https://perma.cc/W4YB-MDVR..>

²²⁶ Hansi Lo Wang, *Trump Officials Cut Political Interference Ban After Unusual Census Report*, NPR (Aug. 31, 2026), <https://perma.cc/PK2H-BS5T>.

²²⁷ Kovensky & Jones, *supra* note 103.

²²⁸ *Dep't of Com. v. New York*, 588 U.S. at 783.

²²⁹ *Id.*

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For these reasons and more, we oppose the Department's NPRM.

Respectfully submitted,

A handwritten signature in dark ink, reading "Marina Jenkins". The signature is written in a cursive, flowing style.

Marina Jenkins
Executive Director
National Redistricting Foundation