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## YALE LAW & POLICY REVIEW

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### “Contrived”: The Voting Rights Act Pretext for the Trump Administration’s Failed Attempt to Add a Citizenship Question to the 2020 Census

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## I. INTRODUCTION: A PRETEXT . . . FOR WHAT?

In March 2018, Commerce Secretary Wilbur Ross announced that the Trump Administration would add a question to the 2020 census asking the citizenship status of all persons in the United States. The question, Secretary Ross asserted, would generate “complete and accurate [citizenship] data”<sup>2</sup> that the Department of Justice (DOJ) could use to better enforce Section 2 of the Voting Rights Act of 1965 (VRA)<sup>3</sup>—a law that sometimes requires states and localities to draw districts in which voters of color make up a majority of the voting age population (so-called “majority-minority” districts).<sup>4</sup>

From the start, there were reasons to be skeptical that VRA enforcement motivated the Secretary’s decision. For one, a question asking the citizenship status of all persons in the United States had not appeared on the decennial census form provided to every household in the fifty-five years since the VRA was signed into law. In turn, DOJ has never used or claimed to need the kind of individual-level citizenship data Secretary Ross now claimed would be key to its enforcement duties. Secretary Ross also ignored Census Bureau career staff’s insistence that already available citizenship data (like Social Security records) could better serve the DOJ in its VRA enforcement duties. And it was frankly difficult to believe that the Trump Administration—which, at the time, had yet to file a single case under Section 2 of the VRA—suddenly viewed minority voting rights as a priority.

In June 2018, the ACLU sued the Commerce Department in New York federal court on behalf of various immigrant rights’ groups to enjoin Secretary Ross’s decision. The case was consolidated with a related suit brought by various states and municipalities,<sup>5</sup> proceeded to trial,

<sup>2</sup> .Memorandum from Sec’y of Commerce Wilbur Ross to Under Sec’y for Econ. Affairs Karen Dunn Kelley, *Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire* 8 (Mar. 26, 2018), [https://www.commerce.gov/sites/default/files/2018-03-26\\_2.pdf](https://www.commerce.gov/sites/default/files/2018-03-26_2.pdf).

<sup>3</sup> .See 42 U.S.C. §§ 1973 *et seq.*

<sup>4</sup> .See *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

<sup>5</sup> .Specifically, the case was consolidated with a related suit brought by 18 states, the District of Columbia, several major U.S. cities, and the U.S. Conference of Mayors. Two similar suits were filed later in federal courts in Maryland and California.

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and ultimately brought to the Supreme Court. In a ruling issued on the last day of its term, in June 2019, the Supreme Court concluded that Secretary Ross reached his decision to add a citizenship question unlawfully.<sup>6</sup> Writing for the Court, Chief Justice John Roberts held that “the VRA enforcement rationale—the sole stated reason [for the decision to add a citizenship question]—seem[ed] to have been *contrived*.”<sup>7</sup>

These were strong words from the Court: a clear acknowledgment that the Administration lied, and for that reason, did not meet the relatively low bar that demands all agency action be justified by reasoned decision-making.<sup>8</sup> Further, the Court confirmed the findings of the three federal district judges who reviewed the Secretary’s decision, including the judge overseeing the ACLU suit, who concluded that the VRA was “a *post hoc* rationale for a decision that [the] Secretary had already made for other reasons.”<sup>9</sup> Chief Justice Roberts agreed that the VRA rationale was false, a mask for the *real* reasons why Secretary Ross sought to add a citizenship question to the decennial census. But strikingly, neither the Chief Justice nor the three federal district courts that enjoined Secretary Ross’s decision identified those reasons.<sup>10</sup>

The courts’ silence begs an obvious question—even if the citizenship question does not appear on the 2020 census questionnaire. What was the Trump Administration’s real motivation to add it in the first place? And once it sought to add the question, why did it hide behind a “contrived” justification?

The true motivation for the citizenship question is now obvious: the Trump Administration sought to bolster white political power at the expense of communities of color. It did so in two separate ways. First, adding a citizenship question to the 2020 census would dramatically

<sup>6</sup> .*Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019).

<sup>7</sup> .*Id.* at 2575 (emphasis added).

<sup>8</sup> .*See* 5 U.S.C. § 706(2).

<sup>9</sup> .*New York v. Dep’t of Commerce*, 351 F. Supp. 3d 502, 570 (S.D.N.Y. 2019). A district court in California later concluded that Secretary Ross’s rationale “was a mere pretext . . . [that] did not supply the true basis of [his] decision.” *California v. Ross*, 358 F. Supp. 3d 965, 1040 (N.D. Cal. 2019). A third judge in the District of Maryland reached the same conclusion. *See Kravitz v. Dep’t of Commerce*, No. 18-cv-1041, 2019 WL 1510449, at \*52 (D. Md. 2019).

<sup>10</sup> .*See, e.g., New York*, 351 F. Supp. 3d at 569 (stating that while “promoting enforcement of the VRA was *not* [Secretary Ross’s] real reason for the decision,” the court was “unable to determine—based on the existing record, at least—what [his] real reasons for adding the citizenship question were”).

reduce response rates in noncitizen households, exacerbating the “differential undercount”—“the gap between the overcount of whites and the undercount of communities of color”<sup>11</sup>—with dramatic consequences for immigrant communities with respect to apportionment, redistricting, and allocation of federal resources. The trial records across three separate cases, the agency’s administrative record, and stunningly candid documents from subsequent litigation revealed by happenstance and congressional testimony leave no doubt on the point.<sup>12</sup> And while successful challenges to the policy kept the citizenship question off the 2020 census, some damage may already be done, as many people in targeted communities likely (and understandably) feel confusion and residual fear over its saga.<sup>13</sup>

Still, a second central, but perhaps less-understood, reason also played a role: the Trump Administration almost certainly sought data needed for willing states and localities to redraw districts based on *citizen voting-age population* (CVAP), rather than *total population*. True to the Fourteenth Amendment, states presently draw legislative lines based on the “*whole number of persons*” within their borders.<sup>14</sup> This means that people such as noncitizens, children, and incarcerated persons both count and have their interests represented by legislators “*whether or not they qualify as voters.*”<sup>15</sup> The rule ensures that “voters in

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<sup>11</sup> .Janai Nelson, *Counting Change: Ensuring An Inclusive Census for Communities of Color*, 119 COLUM. L. REV. 1399, 1427 (2019).

<sup>12</sup> .See, e.g., Michael Wines, *A Census Whodunit: Why Was the Citizenship Question Added?*, N.Y. TIMES (Dec. 2, 2019), <https://www.nytimes.com/2019/11/30/us/census-citizenship-question-hofeller.html>.

<sup>13</sup> .See, e.g., Pew Research Center, *Most Adults Aware of 2020 Census and Ready to Respond, but Don’t Know Key Details* 5 (Feb. 20, 2020) (noting 56% of U.S. adults “incorrectly believes a citizenship question is on the questionnaire,” while 25% are “not sure”), <https://www.pewsocialtrends.org/2020/02/20/the-u-s-census-and-privacy-concerns/>; Edith Honan, *Citizenship question dropped from census, but advocates fear ‘damage has been done’*, ABC NEWS (July 12, 2019) (“[L]awyers and immigration rights advocates who opposed adding the question [said] that, like a bell that can’t be unring, the mere discussion of it, coupled with the president’s Muslim ban and policies on immigrants at the southern border, has left people on edge.”), <https://abcnews.go.com/Politics/citizenship-question-dropped-census-advocates-fear-damage/story?id=64225417>.

<sup>14</sup> .U.S. CONST. amend. XIV, § 2 (emphasis added).

<sup>15</sup> .*Evenwel v. Abbott*, 136 S. Ct. 1120, 1129 (2016) (emphasis added)..

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each district have the power to elect a representative who represents the same number of constituents as all other representatives.”<sup>16</sup>

This representational equality principle is under relentless attack, not only from conservative activists but from the current Administration, who would like to see the number of possible voters used as the relevant redistricting metric. Their calculus is political: by erasing millions of residents from the count used to draw legislative maps, they hope to shift political power away from the racially diverse areas where many nonvoting immigrants live to more sparsely populated, rural, and homogeneously white places with a greater proportion of eligible voters. Almost four years on, it is exceedingly clear that the Trump Administration tried to facilitate this exclusionary practice by including a citizenship question on the census to obtain certain data that it believed was needed for CVAP-based apportionment.

It is therefore crucial both to name and to understand the Trump Administration’s CVAP-related purpose because, as recent events continue to show, the battle over who we count as part of our democracy is far from over. Since its loss at the Supreme Court, the Administration has sought to achieve the same objectives by other means. In July 2019, shortly after the Supreme Court’s citizenship question decision, President Trump ordered executive agencies to provide the Census Bureau available citizenship data in a transparent attempt to supply willing states with CVAP data to use in apportionment. This CVAP-based approach would literally leave millions uncounted and without representation in American democracy, dramatically diluting the political power of immigrant communities and communities of color. And it would do so purposefully.

Despite its decisive losses in federal courts, the Trump Administration is persisting in its efforts to disempower communities it sees as politically unfavorable. In July 2020, as this article went to print, the Administration went even further, announcing a policy to exclude undocumented immigrants from the population figures used to apportion seats among states in the House of Representatives.<sup>17</sup> This approach would be a radical departure from the way apportionment has been conducted throughout American history and contradicts the plain text of

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<sup>16</sup> .*Id.* at 1126 (quoting Brief for the United States as Amicus Curiae Supporting Appellees at 5, *Evenwel*, 136 S. Ct. 1120 (No. 14-940)).

<sup>17</sup> See Memorandum on Excluding Illegal Aliens from the Apportionment Base, 85 Fed. Reg. 44,679 (July 21, 2020).

the Constitution.<sup>18</sup> It has unsurprisingly been the subject of immediate litigation, in which the authors again act as counsel.<sup>19</sup>

This new policy makes the actual motivation for the failed citizenship question effort even clearer. As the citizenship question would have, excluding undocumented immigrants from the apportionment count will reduce response rates and exacerbate the differential undercount of communities of color.<sup>20</sup> Deleting millions of noncitizens from the apportionment count is a straightforward attempt, lacking even the pretext of the citizenship question, to reduce the political power of more racially diverse states.<sup>21</sup> If the Trump Administration wanted to show the citizenship question's true goal, it could not have done so more effectively than it has by openly moving to excise undocumented noncitizens from the apportionment count.

The fight over the citizenship question also shows that the broader civil rights community—and litigators in particular—must play a critical role both in calling out this threat and preventing it from coming to pass.

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<sup>18</sup> See U.S. CONST. art. I, § 2, cl. 3 (“Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers . . .”); U.S. CONST. amend. XIV, § 2 (“Representatives 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.”).

<sup>19</sup> The authors are presently counsel, with others, in *New York Immigration Coalition v. Trump*, No. 1:20-cv-05871-JMF (S.D.N.Y.). Other suits have been filed in California, the District of Columbia, Maryland, and Massachusetts.

<sup>20</sup> While the Memorandum still envisions that the Census will enumerate all persons regardless of legal status, it is inevitable that responses will suffer particularly among undocumented persons as a result of the Memorandum, especially when combined with the Census Bureau's last-minute decision to cease data collection and non-response follow-ups one month early. See U.S. Census Bureau, *Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count* (Aug. 3, 2020), <https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html>.

<sup>21</sup> See, e.g., Jeffrey S. Passel & D'Vera Cohn, *How removing unauthorized immigrants from census statistics could affect House reapportionment*, Pew Research Ctr. (July 24, 2020), <https://www.pewresearch.org/fact-tank/2020/07/24/how-removing-unauthorized-immigrants-from-census-statistics-could-affect-house-reapportionment/> (predicting a loss of House seats for California, Florida, and Texas). Indeed, the Memorandum explicitly anticipates a loss of seats for at least one state. See Memorandum, 84 Fed. Reg. at 44,680.

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When Secretary Ross announced his decision in March 2018, much of the “smoking gun” evidence of a “contrived” rationale was unknown to few outside the soon-to-be defendants’ inner circle. The full scope of the Administration’s efforts to force a citizenship question onto the census at the expense of the count’s accuracy only became clear in the course of protracted, often contentious discovery. And even then, some of the most damning evidence for the policy’s true purpose was revealed by chance in an unrelated case, when lawyers who worked on both matters obtained documents showing that the late Dr. Thomas Hofeller, a prominent Republican redistricting “expert,”<sup>22</sup> originated the VRA rationale that Secretary Ross ultimately adopted for the specific purpose of favoring “Republicans and Non-Hispanic Whites” in redistricting.<sup>23</sup>

Written by advocates who successfully challenged the citizenship question, this article details the two most obvious rationales for the Trump Administration’s “contrived” attempt to change the 2020 census questionnaire. First, it surveys the course of litigation against the citizenship question—as well as some of the crucial evidence gleaned along the way—to explain that, at a minimum, the Administration sought to exacerbate an undercount among immigrant communities and communities of color. This undercount would have redounded to those communities’ detriment by diminishing their democratic representation and political clout. Second, the article explains how the citizenship question also likely formed part of a long-term project to fundamentally change the rules of American democracy by letting states count only *voters* for redistricting purposes, not all *persons*, at the expense of urban areas with large noncitizen communities. Finally, the article looks forward at a time of renewed and persistent efforts to restrict noncitizen participation in the census. With the benefit of hindsight, litigation over the citizenship question offers a case study in the capacity of impact litigation to promote both transparency and public education against harmful policies based on false or manufactured rationales. The article closes by briefly highlighting some lessons that can be taken from this litigation and offers a few thoughts on where activists and litigators can proceed.

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<sup>22</sup> .Michael Wines, *Deceased G.O.P. Strategist’s Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html>.

<sup>23</sup> .See Letter Motion to Show Cause at 55-63, *State of New York v. Dep’t of Commerce*, No. 1:18-cv-2921-JMF, Dkt. No. 587-1 (S.D.N.Y. May 30, 2019), <https://www.documentcloud.org/documents/6077735-May-30-2019-Exhibit.html#document/p63/a504019>.

## II. SECRETARY ROSS'S *REAL* RATIONALE—TARGETING COMMUNITIES OF COLOR

On December 12, 2017, General Counsel of the DOJ's Justice Management Division Arthur Gary wrote the Commerce Department to "formally request" that the Census Bureau put "a question regarding citizenship" on the 2020 census form.<sup>24</sup> The letter claimed that the citizenship data DOJ had long used in discharging its VRA enforcement duties, which presently comes from the American Community Survey (ACS) annually sent to 3.5 million U.S. households, was not "ideal" for that purpose.<sup>25</sup> Three months later, Secretary Ross published a decisional memo announcing that the 2020 census form would include a citizenship question and claiming that the decision was made as a result of a process that was initiated "[f]ollowing the receipt of the [December] DOJ request."<sup>26</sup> He also testified to Congress that Commerce's decision "respond[ed] *solely* to Department of Justice's request."<sup>27</sup>

Secretary Ross's decision was momentous; there had not been a question on citizenship on the census questionnaire sent to all American households in seventy years.<sup>28</sup> Since 1950, when a citizenship-related question has been asked at all—either in the census "long form" questionnaire from 1970-2000 or the current annual American Community Survey ("ACS")—it has only been sent to a fraction of the population.<sup>29</sup> Even before 1950, the Census Bureau

<sup>24</sup> .Letter from Arthur Gary, Gen. Counsel, DOJ, to Ron Jarmin, Dep't of Commerce re: Request to Reinstate Citizenship Question on 2020 Census Questionnaire (Dec. 12, 2017), <https://assets.documentcloud.org/documents/4340651/Text-of-Dec-2017-DOJ-letter-to-Census.pdf>.

<sup>25</sup> .*Id.*

<sup>26</sup> .Memo, *supra* note 2 at 323.

<sup>27</sup> .*New York*, 351 F. Supp. 3d at 546.

<sup>28</sup> .See Susan McFarland, *For the First Time in 70 Years, 2020 Census to Ask About Citizenship*, UPI (Mar. 27, 2018), [https://www.upi.com/Top\\_News/US/2018/03/27/For-first-time-in-70-years-2020-Census-to-ask-about-citizenship/7821522148442/](https://www.upi.com/Top_News/US/2018/03/27/For-first-time-in-70-years-2020-Census-to-ask-about-citizenship/7821522148442/).

<sup>29</sup> .From 1970 to 2000, about one-sixth of all American households received the long form questionnaire, which at that time asked a question about citizenship or birthplace to those households. See Justin Levitt, *Citizenship and the Census*, 119 COLUM. L. REV. 1355, 1360 n.23 (2019). In 2000, the Census Bureau began phasing out the long form survey and instated the ACS, an annual survey sent to just two percent of American households. The ACS, which is not used for enumeration or apportionment purposes, has included a citizenship question since its

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inquired only about the naturalization status of foreign-born persons; “[i]ndeed, the census ha[d] never [directly] asked for the citizenship status of *everyone* in the country” before Secretary Ross proposed doing so in March 2018.<sup>30</sup>

This was well-reasoned policy. For decades, Census Bureau experts warned that adding a question on the citizenship status of all persons would dramatically undermine the accuracy of the population count by driving down response rates of noncitizens, their families, and others who live in their communities.<sup>31</sup> In the lead-up to the 1980 census, for example, Bureau Director Vincent Barabba pragmatically explained that it would be “unrealistic to expect unlawful residents to cooperate fully in an interview dealing with their legal status,”<sup>32</sup> and added that he expected that a citizenship question would also “make it more difficult . . . to get the cooperation [of] minority groups who are legal citizens or legally resident aliens.”<sup>33</sup> And as recently as 2016, former Bureau Directors appointed by presidents of both political parties explained to the Supreme Court that a citizenship question would “lower response to the census in general” and “seriously frustrate the [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.”<sup>34</sup>

Abandoning this well-reasoned policy to add a citizenship question to the census would gravely harm our democracy and millions of people who primarily reside in already-vulnerable communities—for two reasons. First, by the government’s own admission at the time, the

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inception. See *New York*, 351 F. Supp. 3d at 520.

<sup>30</sup> .Thomas P. Wolf & Brianna Cea, *A Critical History of the United States Census and Citizenship Questions*, 108 GEO. L. J. ONLINE 1, 5 (2019).

<sup>31</sup> .See, e.g., *Fed’n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980) (“[A]ccording to the Bureau; any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count.”); see also *Census Equity Act: Hearings Before the Subcomm. on Census & Population of the H. Comm. On Post Office & Civ. Serv.*, 101st Cong. 43-45, 59 (1989) (noting asking about citizenship could result in the Census Bureau being “perceived as an enforcement agency” and would have “a major effect on census coverage”).

<sup>32</sup> .*1980 Census: Counting Illegal Aliens: Hearing on S.2366 before the Subcomm. On Energy, Nuclear Proliferation, and Fed. Services of the S. Comm. on Governmental Affairs*, 96 Cong. 67-68 (1980) (statement of Vincent Barabba, Director, Census Bureau).

<sup>33</sup> .*Id.* at 68-69.

<sup>34</sup> .Brief of Former Directors of the U.S. Census Bureau as Amici Curiae Supporting Appellees at 25, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

question would cause 6.5 million fewer people to respond to the census,<sup>35</sup> a figure that the Bureau later revised *upwards* to almost nine million.<sup>36</sup> And because census data is used to apportion representation in Congress and draw legislative districts, the resulting undercount would dramatically reduce the representation and curb the political influence of communities with large noncitizen populations and states in which many noncitizens live. For context, a drop in responses of nine million would be the same as if the census skipped New Jersey—a state with twelve seats in Congress and fourteen Electoral College votes.<sup>37</sup> New York, California, Illinois, Florida, Arizona, and Texas were all primed to lose at least a seat in Congress,<sup>38</sup> while immigrant communities would drastically “lose political power” in “intrastate redistricting.”<sup>39</sup>

Second, the census population count determines the allotment of hundreds of billions in annual funding for social service, health, and education programs.<sup>40</sup> A severe undercount would effectively starve vulnerable communities of funding for essential programs like Medicaid, children’s health programs, and Title I for elementary and secondary schools.<sup>41</sup> And as Professor Justin Levitt has explained, “[t]he nature of this loss . . . has substantial ripple effects”:

When vulnerable populations do not respond to the census, it is not just the vulnerable populations who suffer. Everyone in an area with an undercount loses clout and cash. Immigrant farmworkers lose—and so do the rural agricultural communities

<sup>35</sup> .*New York*, 351 F. Supp. 3d at 584.

<sup>36</sup> .See J. David Brown *et al.*, “Predicting the Effect of Adding a Citizenship Question to the 2020 Census” (June 2019), <https://apps.npr.org/documents/document.html?id=6165808-U-S-Census-Bureau-Working-Paper-Understanding>.

<sup>37</sup> .Politico, *Here’s who we think will win the 2020 elections in New Jersey*, (Nov. 19, 2019) (last updated July 6, 2020) <https://www.politico.com/2020-election/race-forecasts-and-predictions/new-jersey/>.

<sup>38</sup> .*New York*, 351 F. Supp. 3d at 594.

<sup>39</sup> .*Id.* at 595.

<sup>40</sup> .See *id.* at 596 (“In [FY2016] at least 320 such programs allocated about \$900 billion using census-derived data.”); see also Andrew Reamer, “Counting for Dollars 2020: The Role of the Decennial census decennial census decennial census in the Geographic Distribution of Federal Funds,” Report of the George Washington University Inst. of Public Policy (Nov. 2019) (placing figure for 2017 as high as \$1.5 trillion), <https://perma.cc/48YZ-9WXT>.

<sup>41</sup> .*New York*, 351 F. Supp. 3d at 596-97.

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dependent on those farmworkers. Urban minorities lose—and so do the suburbs that depend on those cities’ economic agencies. . . . We are firmly tethered to each other by the enumeration.<sup>42</sup>

Ultimately, Secretary Ross’s decision would have drastically reduced the political influence of the same people whose voting rights the Administration claimed to want to protect,<sup>43</sup> lending obvious, commonsense reasons to be skeptical of the Trump Administration’s newly-professed commitment to the VRA. And so it was. Litigation quickly revealed that the VRA enforcement rationale was a fraud to veil the Trump Administration’s true goal of harming communities of color.

A. *Evidence that VRA enforcement was not the real reason for adding a citizenship question*

As the Supreme Court concluded in *Department of Commerce*, the litigation record left scant room for doubt that reasons other than the VRA drove the citizenship question decision, violating the basic requirement that an agency “must ‘disclose the basis of its action.’”<sup>44</sup> Secretary Ross first took steps to add the question “about a week into his tenure,” but no contemporaneous evidence gave even a “hint” that he “consider[ed] VRA enforcement in connection with that project.”<sup>45</sup> In fact, Secretary Ross did the opposite, ignoring the advice of Census Bureau technical advisors that other data found in administrative records “better met” VRA-related goals,<sup>46</sup> and of six former Bureau Directors from bipartisan administrations who wrote to say that adding the question at such a late date in the process would “put the . . . success of the census in all communities at grave risk.”<sup>47</sup> Nor could Secretary Ross’s senior staff later confirm that the VRA drove the

<sup>42</sup> .Levitt, *supra* note 29, at 1373.

<sup>43</sup> .At the time of trial and Supreme Court argument, the Census Bureau estimated that a citizenship question would cause an increase in non-response rate of noncitizen households by 5.8 percent. *See New York*, 351 F. Supp. 3d at 533 n.14. Yet, days before the Supreme Court issued its decision, the Census Bureau revised its estimate, finding that the question would reduce census responses in noncitizen households by 8 percent, June Brown memo <https://www2.census.gov/ces/wp/2019/CES-WP-19-18.pdf>—constituting about 9 million people.

<sup>44</sup> .*Dep’t of Commerce*, 139 S. Ct. at 2573 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-69 (1962)).

<sup>45</sup> .*Id.* at 2575.

<sup>46</sup> .*New York*, 351 F. Supp. 3d at 533-34.

decision to add a citizenship question. At deposition, Earl Comstock, the Department's then-Director of Policy and Ross's then-chief advisor on the census, testified that he never understood the Secretary's actual justification for the citizenship question, and that he always saw his task as helping him "find the best rationale"—whether or not it was "legally valid."<sup>48</sup>

Of course, Secretary Ross claimed that it was DOJ who requested the citizenship question's addition with VRA enforcement in mind. But the tortured history of the DOJ "request" proved even more telling. In May 2017—seven months *before* DOJ eventually reached out to Commerce—Secretary Ross wrote his senior staff that he was "mystified" that his "months old request" to add a citizenship question had gone nowhere.<sup>49</sup> In response, Comstock promised to "work with Justice to get them to request" the citizenship question,<sup>50</sup> and later testified that he set out to "find an [executive] agency that would have . . . reason to request a citizenship question,"<sup>51</sup> only to be rebuffed by multiple agencies. Notably, Comstock pitched the request to DOJ's Executive Office for Immigration Review and the Department of Homeland Security, neither of which had any responsibility to enforce the VRA.<sup>52</sup> Eventually "out of patience" with his staff's failed attempts to recruit another agency, Secretary Ross "contact[ed] [then-]Attorney General [Jeff] Sessions directly."<sup>53</sup> It was only then that DOJ communicated its newly-discovered need for additional citizenship information to discharge its VRA enforcement duties.

*B. Evidence that the real reason was to harm communities of color*

Something was obviously rotten in the Department of Commerce, and—in Chief Justice Roberts's words—nothing obliged the Court to "exhibit a naiveté from which ordinary citizens are free."<sup>54</sup> In his summation, the sheer "incongruence" between Secretary's Ross's

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<sup>47</sup> .Letter from Former Census Bureau Directors to Sec'y Wilbur L. Ross, Jr., Dep't of Commerce (Jan. 26, 2018), <https://perma.cc/9E3J-MAM4>.

<sup>48</sup> .*New York*, 351 F. Supp. 3d at 569.

<sup>49</sup> .*Id.* at 550.

<sup>50</sup> .*Id.* at 567-68.

<sup>51</sup> .*Id.* at 551 (internal quotations omitted).

<sup>52</sup> .*Id.* at 551-52.

<sup>53</sup> .*Id.* at 554.

<sup>54</sup> .*Dep't of Commerce*, 139 S. Ct. at 2575 (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1985)).

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explanation for agency action and the record confirmed that the stated VRA rationale for the citizenship question was “a distraction,” not a reasoned “explanation for agency action.”<sup>55</sup> But a distraction from what? As advocates, we can connect the many dots that the Court left untouched. And properly considered, there is no room for doubt that the Trump Administration acted to diminish the political power and influence of the diverse communities in which the plaintiffs we were privileged to represent reside and thrive. The citizenship question would clearly have done that by depressing the census response of members of those communities, ensuring that millions went uncounted and underrepresented. And, as discussed *infra*, it would have also served the parallel purpose of collecting the kind of granular information that many proponents of excluding noncitizens from states’ redistricting counts believe is needed to successfully do so.

The evidence is overwhelming and only briefly surveyed here. To start, in April 2018, in a meeting brokered by then-White House Chief Strategist Stephen Bannon,<sup>56</sup> Secretary Ross spoke about a citizenship question with then-Kansas Secretary of State Kris Kobach. Kobach—a self-proclaimed “advise[r] [to] the President”<sup>57</sup> who touted a citizenship question “so Congress [can] consider excluding illegal aliens from the apportionment process”<sup>58</sup>—wrote Secretary Ross three months later to say that the lack of a citizenship question “leads to the problem that aliens . . . are still counted for congressional apportionment purposes.”<sup>59</sup> Kobach did not mention the VRA, or any other reasons to add the question to the census.<sup>60</sup>

But it was Commerce’s connection to a less well-known figure that produced the most incriminating evidence of discriminatory animus, and it was only by chance that lawyers suing the Administration came upon it. In late May 2019—more than a month after Supreme Court oral argument—plaintiffs’ lawyers in an unrelated state court lawsuit challenging North Carolina’s state legislative map unearthed new,

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<sup>55</sup> .*Dep’t of Commerce*, 139 S. Ct. at 2575-76.

<sup>56</sup> .*New York*, 351 F. Supp. 3d at 549-50.

<sup>57</sup> .Pilar Pedraza (@PilarPedrazaTV), Twitter (Jul. 8, 2019, 2:21 PM), <https://twitter.com/PilarPedrazaTV/status/1148296028854112256>.

<sup>58</sup> .Kris W. Kobach, *Bring The Citizenship Question Back to the Census*, BREITBART (Jan. 30, 2018), <https://www.breitbart.com/politics/2018/01/30/exclusive-kobach-bring-citizenship-question-back-census/>.

<sup>59</sup> .351 F. Supp. 3d at 552.

<sup>60</sup> .*Id.*

stunning evidence that should have been disclosed in discovery in *Department of Commerce*.<sup>61</sup>

The evidence concerned Dr. Thomas Hofeller, the “Michelangelo of [Republican] gerrymandering.”<sup>62</sup> A giant behind-the-scenes figure in Republican politics, Hofeller was “good friends” for about 30 years with Mark Neuman, Secretary Ross’s “trusted” and “expert adviser” on census issues.<sup>63</sup> He also communicated regularly and directly with Christa Jones, a senior official at the Census Bureau who participated in the decision to add a citizenship question.

In fall 2015, a conservative news outlet commissioned Hofeller to perform a study on the political and demographic effects of using of CVAP instead of total population (“TPOP”) data for apportionment purposes. Hofeller’s study concluded the obvious: excising noncitizens from the redistricting population base “would be advantageous to Republicans and Non-Hispanic Whites,”<sup>64</sup> and would “clearly” disadvantage Democrats, because jurisdictions with large immigrant communities have historically favored Democratic candidates.<sup>65</sup> As a result, Hofeller surmised that the change would “provoke a high degree of resistance from Democrats and the major minority groups in the nation.”<sup>66</sup> Ultimately, however, he determined that it would be “functionally unworkable” to use citizen population, rather than total

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<sup>61</sup> .In September 2019, a three-judge panel of the Wake County Superior Court struck down North Carolina’s legislative map as a partisan gerrymander that violated the state’s constitution, and ordered that new maps be drawn for the 2020 election. See *Common Cause v. Lewis*, No. 18-CVS-14001 (N.C. Super. Sept. 3, 2019), <http://www.commoncause.org/north-carolina/wp-content/uploads/sites/22/2019/09/Common-Cause-v.-Lewis-trial-court-decision-9.3.19.pdf>.

<sup>62</sup> .Michael Wines, *Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html>.

<sup>63</sup> .See Letter Resp. to Pls.’ Oct. 28 Letter Mot., *State of New York v. Dep’t of Commerce*, No. 18-cv-2921, Dkt. No. 451 at 3 (S.D.N.Y. Oct. 30, 2018).

<sup>64</sup> .See Letter Mot. to Show Cause at 55-63, *State of New York v. Dep’t of Commerce*, No. 1:18-cv-2921-JMF, Dkt. No. 587-1 (S.D.N.Y. May 30, 2019), <https://www.documentcloud.org/documents/6077735-May-30-2019-Exhibit.html#document/p63/a504019>.

<sup>65</sup> .NYIC Pls.’ Mot. for Sanctions at 4-5, *State of New York v. Dep’t of Commerce*, No. 18-cv-02921, Dkt. No. 635 (S.D.N.Y. July 16, 2019).

<sup>66</sup> .*Id.*

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population, for redistricting purposes without a citizenship question on the 2020 census form.<sup>67</sup>

In August 2017, Hofeller prepared a document that outlined a VRA enforcement rationale for a citizenship question to be added to the 2020 census. A full paragraph from that document found its way *verbatim* into a draft of a letter that Secretary Ross’s Census advisor Mark Neuman gave DOJ in October 2017. This draft letter served as the basis for the final letter that DOJ sent Commerce just a month later requesting a citizenship question. These documents, in other words, suggested a clear link between Hofeller, DOJ, and Secretary Ross. *None* of them were produced, disclosed, or listed in a privilege log during the *Department of Commerce* litigation. And ultimately, in May 2020, the district court acknowledged that a “striking” similarity between Neuman’s draft and the paragraph found in Hofeller’s computer “suggested coordination” between the two, even if it did not rise to “clear and convincing” evidence that DOJ misled the Court.<sup>68</sup> The court sanctioned DOJ for its woefully deficient conduct in discovery, which resulted in DOJ attorneys “[a]t best . . . fail[ing] to produce more than ten percent of the documents that [they] were required to produce as part of th[e] litigation . . . .”<sup>69</sup>

And there was more. In November 2019, *more than a year after the close of discovery*, the House Oversight Committee made public a series of documents and communications that Mark Neuman produced to congressional investigators.<sup>70</sup> These communications fell squarely within the scope of documents that government defendants in the citizenship question cases should have disclosed, whether as part of the agency’s administrative record or in follow-up court-ordered

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<sup>67</sup> .*Id.* at 4.

<sup>68</sup> Op. & Order, *State of New York v. U.S. Dep’t of Commerce*, No. 18-cv-02921, ECF No. 694, at 13 (S.D.N.Y. May 21, 2020).

<sup>69</sup> *Id.* at 22. While the district court denied Plaintiffs’ request for sanctions on their “most serious allegations—*i.e.*, that Defendants concealed evidence and that two witnesses provided false testimony”—it stressed that it did not do so “on a finding that Plaintiffs’ troubling allegations are wrong,” but because “even if Plaintiffs’ allegations [were] accurate, that would not have changed the outcome of the litigation.” *Id.* at 2.

<sup>70</sup> .Memorandum from Acting Chairwoman Carolyn B. Maloney to Members of the Comm. on Oversight & Reform, *Update on Investigations of Census Citizenship Question Since House Held Attorney General Barr and Commerce Secretary Ross in Contempt of Congress*, (Nov. 12, 2019), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-11-12.Memo%20to%20COR%20Members%20re.%20Census.pdf>.

discovery. They revealed that Neuman, Secretary Ross's adviser, directly sought and received the blessing of Hofeller and a close associate before supplying DOJ with an opening draft of the letter that Commerce would eventually hold up as the genesis of the VRA rationale, and that Hofeller had been working to add a citizenship question to the census as early as 2014 in order to aid "the Republican redistricting effort."<sup>71</sup> For months, defendants in the *Department of Commerce* lawsuit had dismissed plaintiffs' raising of Hofeller's obvious role in Secretary Ross's decision as a "conspiracy theory."<sup>72</sup> Those claims always rang hollow but were now farcical.

In any event, by then, lawyers' claims in court had been overtaken by the Administration's public statements. As has become common practice, the President and his political allies themselves would ultimately say the quiet part out loud and in public. Days after the Supreme Court's decision, President Trump said that adding a citizenship question was "very important to find out if someone is a citizen as opposed to an illegal."<sup>73</sup> Similarly, top Trump campaign aides around this time said that the attempt to block a citizenship question shows that "Democrats are desperate to help as many illegals as possible get into our country,"<sup>74</sup> and that it would "give [Democrats] the electoral advantage when it comes to the distribution of congressmen and they want more of that."<sup>75</sup> And more recently, President Trump justified his new plan to exclude undocumented immigrants from apportionment on the grounds that "illegal aliens" were gaining power at the expense of American citizens.<sup>76</sup>

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<sup>71</sup> .*Id.*

<sup>72</sup> Def's Resp. to Mot. for Sanctions, *State of New York v. U.S. Dep't of Commerce*, No. 18-cv-02921, ECF No. 601, at 5 (S.D.N.Y. June 3, 2020).

<sup>73</sup> .Remarks by President Trump at Signing of H.R. 3401, (July 1, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-h-r-3401/>.

<sup>74</sup> .Matt Wolking (@MattWolking), Twitter (July 6, 2019, 8:10 AM), [https://twitter.com/MattWolking/status/1147478033651159040?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1147487674829365249&ref\\_url=http%3A%2F%2Felectionlawblog.org%2F](https://twitter.com/MattWolking/status/1147478033651159040?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1147487674829365249&ref_url=http%3A%2F%2Felectionlawblog.org%2F).

<sup>75</sup> .Fox News, (July 8, 2019) <https://www.mediamatters.org/embed/clips/2019:07:08:66943:fnc-revolution-20190707-pierson-census>.

<sup>76</sup> See, e.g., President Donald Trump, *Statement from the President Regarding Apportionment* (July 21, 2020), <https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment/>.

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Pick a door, any door: all signs point squarely at a desire to rig the rules to harm communities of color. But if we are to understand the still-present threat facing marginalized communities, it is vital to understand a second—but connected—reason why Secretary Ross, Hofeller, and central players in the Trump Administration thought that a citizenship question would help them achieve their goal.

### III. THE *EVENWEL* GAMBIT

As noted, a close read of the Administration's litigation conduct in the citizenship question case and all available evidence suggests that two related, but ultimately separate, goals were in play behind the citizenship question. The Administration's more straightforward goal—central to litigation and well-covered in the media—was to reduce self-response rates among noncitizens and people in immigrant communities because, as Secretary Ross himself stated, they “may not feel comfortable answering” the question.<sup>77</sup> Successful challenges by ACLU-represented plaintiffs and others kept a citizenship question off the 2020 census. And current litigation by ACLU-represented plaintiffs aims to block the latest effort to decrease and discourage census participation by undocumented people, their families, and members of their communities.

Still, there is no doubt that the abortive citizenship question stood in service of a second, less well-known or covered but perhaps more central goal: to achieve the use of *citizen voting age population* data (again, CVAP) as a redistricting population base. Put simply, the Administration sought to enable complicit states to erase noncitizens from the count used to draw legislative districts. This somewhat more inside-baseball rationale was certainly the focus of Dr. Thomas Hofeller's work—it was, after all, the purpose of his smoking gun 2015 study—and has been the Administration's fixation since its defeat at the Supreme Court. It is also discriminatory<sup>78</sup> and would do nothing less than “fundamentally rewrite the terms of American representation.”<sup>79</sup>

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<sup>77</sup> .Hearing to Review the FY2019 Budget Request for the U.S. Dep't of Commerce, Hr'g Before S. Subcomm. on Commerce, Justice, Sci. & Related Agencies, 115 Cong. (May 10, 2018) (testimony by Wilbur Ross, Sec. of Commerce).

<sup>78</sup> .Kravitz, 382 F. Supp. at 400.

<sup>79</sup> .Levitt, *supra* note 29, at 1390.

A. “One-person, one-vote” and the push to use CVAP as a redistricting base

*Evenwel* established, “States use total-population numbers from the census when designing congressional and state-legislative districts.”<sup>80</sup> *People*, not eligible voters, are what matters.<sup>81</sup> That norm derives from the post-Civil War Fourteenth Amendment’s directive that the total number of congressional representatives must be “apportioned among the several States” based on “the *whole number of persons* in each.”<sup>82</sup> But even at the founding, when only a fraction of people—chiefly adult white men—could vote,<sup>83</sup> Congress was still understood to represent all persons, including children, women, and even enslaved persons.<sup>84</sup> “Restrictions on the franchise left large groups of citizens . . . unable to cast ballots, yet the Framers understood that these citizens were nonetheless entitled to representation in government.”<sup>85</sup> Thus, by design, the number of people, not voters, has always been the relevant building block to American democracy.<sup>86</sup> (Indeed, the Fourteenth

<sup>80</sup> .*Evenwel*, 136 S. Ct. at 1124.

<sup>81</sup> .*See Wesberry v. Sanders*, 376 U.S. 1, 15 (1964) (“Numbers . . . ’are the only proper scale of representation.” (quoting the Federalist No. 54 (Madison))).

<sup>82</sup> .U.S. CONST. amend. XIV, § 2 (emphasis added).

<sup>83</sup> .*See Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States* 21 (2000) (“By 1790, according to most estimates, roughly 60 to 70 percent of adult white men (and very few others) could vote.”).

<sup>84</sup> .*See Garza v. Cty. of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990) (“The framers were aware that th[e] apportionment and representation base would include categories of persons who were ineligible to vote—women, children, bound servants, convicts, the insane, and, at later times, aliens.”); Joseph Fiskin, *Taking Virtual Representation Seriously*, 59 WM. & MARY L. REV. 1681, 1706 (2018) (noting “Americans in the eighteenth and nineteenth centuries” “[i]deologically . . . opposed virtual representation” but “[i]n reality, both before and after the Revolution, *most* of the representation in the United States was, in fact, virtual”).

<sup>85</sup> .*Evenwel*, 136 S. Ct. at 1127 n.8.

<sup>86</sup> .The Fourteenth Amendment’s legislative history is clear on the point, as the Court explained in *Evenwel*. *See id.* at 1128 (“no one will deny that population is the true basis of representation; for women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot”) (quoting Maine Rep. James G. Blaine); *id.* (“what becomes of that large class of non-voting taxpayers that are found in every section? Are they in no matter to be

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Amendment corrected the glaring and loathsome exception that counted enslaved persons as “three-fifths” of all others, perversely inflating slave states’ political power as a result.<sup>87</sup>)

At the same time, since the 1960s the Supreme Court has interpreted another provision of the Fourteenth Amendment—its Equal Protection Clause—to hold that *intrastate* redistricting must also “be apportioned on a population basis.”<sup>88</sup> At bottom, this “one person, one vote” rule means that districts must be “as nearly of equal population as is practicable.”<sup>89</sup> Anything less would give voters in smaller districts undue political weight,<sup>90</sup> so legislative districts must contain a roughly equal number of *people*.<sup>91</sup> And while the Court has been less clear on

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represented? They certainly should be enumerated in making up the whole number of those entitled to a representative”) (quoting New York Rep. Hamilton Ward); *id.* (“[n]umbers, not voters; numbers, not property; this is the theory of the Constitution”) (quoting Michigan Sen. Jacob Howard).

<sup>87</sup> .See *Evenwel*, 136 S. Ct. at 1145 (Thomas, J., concurring in the judgment) (“[T]he [three fifths] clause gave the slave States more power in the House and in the electoral college than they would have enjoyed if only free persons had been counted.”); *Wesberry v. Sanders*, 376 U.S. 1, 27 (1964) (Harlan, J. dissenting) (Since no slave voted, the inclusion of three-fifths of their number in the basis of apportionment gave the favored States representation far in excess of their voting population.”); see also Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 265 n.38 (2004) (“Fractionalization of African-Americans . . . helped . . . anti-slave interests; a two-fifths or lesser compromise would have been better because it would have further reduced the power of slave interests in Congress.”).

Of course, this arrangement was not just dehumanizing, it was also undemocratic to its core. Slave states’ representatives in Congress did not speak for enslaved persons’ interests *at all*. See, e.g., Sanford Levinson, *Who Counts? Sez Who?*, 58 ST. LOUIS U. L.J. 937, 939-40 (2014) (noting slaves “might [have] ‘count[ed]’ as part of the ‘apportionment census,’ but no one imagined that they would, in fact, ‘count’ as part of the community whose opinions or interests would ever be taken into account”); see also AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 92 (2005) (“[M]asters did not as a rule claim to virtually represent the best interests of their slaves.”).

<sup>88</sup> .*Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

<sup>89</sup> .*Id.* at 577.

<sup>90</sup> .See *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

<sup>91</sup> .*Id.* The Court has acknowledged that “some deviations from population equality may be necessary,” and has explained that “minor deviations” of

whether a different benchmark than total population could ever be used to draw state or municipal legislative districts,<sup>92</sup> it has repeatedly affirmed the “basic constitutional standard” contemplating “equal representation for equal numbers of *people*.”<sup>93</sup>

As a practical matter, this “basic constitutional standard” is not just consistent with constitutional tradition and historical practice, but sound. The use of total population as a basis for redistricting “promotes equitable and effective representation.”<sup>94</sup> It dovetails with the command to apportion congressional representatives based on the “whole number of persons in each state,” which Professor Levitt has explained:

[i]mply that congressional representatives have the authority (and perhaps obligation) to represent all of their constituents; that all individuals within a polity deserve to be represented . . . ; that the wishes of the minority of the governed should not prevail over the wishes of the majority; and that constituents’ various concerns have roughly equal claims on the representatives’ time and attention . . . such that 50,000 individuals aren’t jostling for one representative’s efforts in one state while 500,000 individuals seek face time from one representative . . . next door.<sup>95</sup>

Demographically, however, many on the right of the American political landscape increasingly view the use of total population as the basis for redistricting as a problem. From the 1960s onwards, “social conservatives migrated geographically and politically towards the Republican Party while African-American and Latino voters increasingly coalesced with liberal white Democrats.”<sup>96</sup> These two coalitions have only grown more polarized over time, “pitting a predominantly white

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up to ten percent are presumptively permissible. *Brown v. Thompson*, 462 U.S. 835, 842 (1983).

<sup>92</sup> .See *Burns v. Richardson*, 384 U.S. 73, 91 (1966) (“At several points in [*Reynolds*], we discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population.”).

<sup>93</sup> .*Reynolds*, 377 U.S. at 568, 560-61 (emphasis added); see also *Bd. of Estimate v. Morris*, 489 U.S. 688, 693-94 (1989); *Gaffney v. Cummings*, 412 U.S. 735, 748-49 (1973); *Avery v. Midland Cty.*, 390 U.S. 474, 478 (1968); *Burns*, 384 U.S. at 91.

<sup>94</sup> .*Evenwel*, 136 S. Ct. at 1132.

<sup>95</sup> .Levitt, *supra* note 29, at 1391.

<sup>96</sup> .Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L.J. 867, 868-69 (2016).

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Republican party against a racially diverse Democratic one.”<sup>97</sup> They are also acutely geographically concentrated, with polarization between rural, more homogeneously-white communities increasingly at one end of the political spectrum, with more diverse urban centers at the other end.<sup>98</sup>

Against this backdrop, conservative redistricting thought leaders have been increasingly alarmed by patterns of non-white immigration into the United States over the past half-century. “As Latinos—and to a lesser extent, Asians—entered the country, many ended up residing in cities, following jobs and available low income housing stock.”<sup>99</sup> The nationwide result is that urban, heavily Democratic districts now almost invariably have higher rates of noncitizen residents who are ineligible to vote than Republican-leaning ones. Conservative experts like the late Hofeller have increasingly pushed for the use of CVAP as a population basis to counter this trend’s effect on redistricting, because “[t]he transparent political stakes of counting only eligible voters would be to suppress the voting power of urban areas with large populations of noncitizens and . . . shift power from Democrats to Republicans.”<sup>100</sup> As commentators like Michael Li of the Brennan Center have explained, however, this shift would come at a terrible democratic cost: a switch to CVAP would “take representation away from the . . . areas where most Americans live” and doubtlessly “re-create the disparities that existed before the Supreme Court’s reapportionment revolution of the 1960s.”<sup>101</sup>

*B. Evenwel v. Abbott, the post-Evenwel landscape, and the 2020 census*

In 2014, a group of Texas plaintiffs who lived in rural counties with relatively high rates of eligible voters challenged the state’s 2010 redistricting plan. Their claim alleged that their votes were improperly diluted as compared to districts with greater numbers of nonvoters—

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<sup>97</sup> .*Id.* at 869.

<sup>98</sup> .See *id.* at 875-76; Wendy K. Tam Cho et al., *Voter Migration and the Geographic Sorting of the American Electorate*, 103 ANNALS ASS’N AM. GEOGRAPHERS 856, 857-60 (2012).

<sup>99</sup> .Cain & Zhang, *supra* note 96, at 876.

<sup>100</sup> .Daryl J. Levinson, *The Supreme Court 2015 Term, Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 33, 42 (2016).

<sup>101</sup> .Michael Li, Brennan Center for Justice, *America’s Historic Fight Over Who Deserves Representation* (July 18, 2019) <https://www.brennancenter.org/our-work/analysis-opinion/americas-historic-fight-over-who-deserves-representation>.

many of whom were noncitizens.<sup>102</sup> Accordingly, the plaintiffs asked the courts to hold that equal protection principles *required* local legislative redistricting to be keyed to the number of eligible voters, not residents, in a given district. The lower court rejected their argument.<sup>103</sup>

In *Evenwel v. Abbott*, the Supreme Court conclusively rejected the argument that states *must*, as a constitutional matter, equalize districts' voting population "for purposes of the one-person, one-vote rule."<sup>104</sup> The Court largely relied on the unbroken constitutional history—starting with the founding and reinforced by the Fourteenth Amendment—of using total population to apportion representation in the House of Representatives among the states.<sup>105</sup> Justice Ginsburg's opinion then surveyed past decisions to conclude that the Court's guiding theory in its "one-person, one-vote" cases was one of "equality of representation, not voter equality."<sup>106</sup> And finally, the *Evenwel* Court cited the longstanding "settled practice" of all fifty states in using total population as a basis for redistricting, which only confirmed its validity.<sup>107</sup>

The Court in *Evenwel* stopped short of deciding whether states "may draw districts to equalize voter-eligible population rather than total population."<sup>108</sup> Indeed, doing so "would have been a substantial expansion of the question presented."<sup>109</sup> But it doubtlessly came close to endorsing the "singular propriety of an equal representation theory for state legislative redistricting,"<sup>110</sup> for example, by affirming the foundational norm that "representatives serve *all* residents, not just those eligible or registered to vote."<sup>111</sup>

Another likely obstacle to CVAP-based redistricting emerged in the *Evenwel* litigation: both proponents and detractors alike considered

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<sup>102</sup> .See 136 S. Ct. at 1129.

<sup>103</sup> .See *Evenwel v. Perry*, No. 14-cv-335, 2014 WL 5780507, at \*4 (W.D. Tex. Nov. 5, 2014).

<sup>104</sup> .Brief for Appellants at 26, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2015) (No. 14-940) 2015 WL 4624625.

<sup>105</sup> .See *Evenwel*, 136 S. Ct. at 1127.

<sup>106</sup> .*Id.* at 1130-31.

<sup>107</sup> .See *id.* at 1132-33 ("Adopting voter-eligible apportionment as constitutional command would upset a well-functioning approach to districting that all 50 States and countless local jurisdictions have followed for decades, even centuries.").

<sup>108</sup> .*Id.* at 1133.

<sup>109</sup> .Levitt, *supra* note 29 at 1395.

<sup>110</sup> .*Id.*

<sup>111</sup> .*Evenwel*, at 1132.

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available citizenship data—usually collected through the ACS —“insufficient for equalizing the number of voters in each district.”<sup>112</sup> Most redistricting is done using data at the “census-block” level, the smallest unit of geography that the decennial census count measures.<sup>113</sup> However, in part because the ACS only offers a five-year rolling “sample” of approximately 2.5 percent of the U.S. population, the Census Bureau does not produce or release estimates with census-block granularity.<sup>114</sup> As a result, *amici* argued that the “constitutional requirement mandating that states draw legislative districts” using CVAP that the plaintiffs sought was “impossible to accurately implement using currently available data.”<sup>115</sup> And Texas only tepidly defended the use of total population to redistrict by claiming that its “choice to rely upon census data”<sup>116</sup>—“the most reliable population data currently available”<sup>117</sup>—was “permissible.”<sup>118</sup>

Even if these arguments were likely correct as a practical matter, they might be gratuitous following the Court’s opinion in *Evenwel*. As noted *supra*, a central rationale of *Evenwel* is the principle that representatives serve *all* constituents, not just those who vote.<sup>119</sup> If that is true, then the level of granularity of the citizenship information

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<sup>112</sup> .Levitt, *supra* note 29 at 1394.

<sup>113</sup> .See Brief of Nathaniel Persily et al. as Amici Curiae in Support of Appellees at 23-24, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2015) (No. 14-940), 2015 WL 5719746; see also *id.* at 21 (“Census blocks ‘nest’ in all other levels of census geography, such as block groups, tracts, county subdivisions, and counties. . . . [t]hey are the atoms, in other words, out of which all other data aggregations are produced.”).

<sup>114</sup> .See Levitt, *supra* note 29 at 1378.

<sup>115</sup> .Brief of Former Directors of the U.S. Census Bureau as Amici Curiae in Support of Appellees at 13, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2015) (No. 14-940) 2015 WL 5675832. Although it had not been made public at the time, the 2015 Hofeller study that was later revealed in litigation endorsed this view, stating: “ACS data are simply not available for [census voting districts] and any estimates of CVAP populations for [those districts] would be even more inaccurate than the ACS estimates for Census Tracts or Block Groups.”). Letter Motion to Show Cause at 55-63, *State of New York v. Dep’t of Commerce*, No. 1:18-cv-2921-JMF, Dkt. No. 587-1 (S.D.N.Y. May 30, 2019), <https://www.documentcloud.org/documents/6077735-May-30-2019-Exhibit.html#document/p63/a504019>.

<sup>116</sup> .Brief for Appellees 50, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2015) (No. 14-940) 2015 WL 5562189.

<sup>117</sup> .*Id.* at 51.

<sup>118</sup> .*Id.* at 50.

available should be immaterial: all residents of a given district—even nonvoting immigrants—should count for redistricting purposes.

Still, Hofeller believed that states' use of CVAP as a redistricting basis—which he acknowledged was a “radical departure from the federal ‘one person, one vote’ rule”<sup>120</sup>—was possible, but only if the census could be used to collect more granular data on citizenship.<sup>121</sup> The gambit's spoils were too alluring: an entrenched redistricting “advantage[] to Republicans and Non-Hispanic Whites.”<sup>122</sup> Accordingly, and notwithstanding the dim prospects of CVAP-based redistricting after *Evenwel*,<sup>123</sup> he and senior Trump Administration officials deployed the VRA as a smokescreen. And at each step of the way in litigation, the Secretary of Commerce and other government defendants vehemently denied that they sought to undermine the political weight of districts home to large immigrant communities, or that the citizenship question had anything to do *at all* with redistricting.<sup>124</sup>

Even those flimsy denials, however, fell away in the wake of the Supreme Court's June 27, 2019 decision in *Department of Commerce*. Abruptly changing course, the Trump Administration and its advisers enthusiastically leaned into the redistricting rationale they fiercely disavowed for close to two years. On July 5, 2019, President Trump, asked why he was still trying to put a citizenship question on the census, stated: “Number one, you need it for Congress. You need it for Congress, for districting. You need it for appropriations. Where are the

<sup>119</sup> .See *Evenwel*, 136 S. Ct. at 1132 (“Nonvoters have an important stake in many policy debates . . . and in receiving constituent services, such as help navigating public-benefits bureaucracies.”).

<sup>120</sup> .Letter Motion to Show Cause at 55-63, *State of New York v. Dep't of Commerce*, No. 1:18-cv-2921-JMF, Dkt. No. 587-1, at 9 (S.D.N.Y. May 30, 2019), <https://www.commoncause.org/wp-content/uploads/2019/05/2015-Hofeller-Study.pdf>.

<sup>121</sup> .See *id.*

<sup>122</sup> .*Id.*

<sup>123</sup> .See *id.* at 4.

<sup>124</sup> .See, e.g., Pets.' Opp. to MYIC Resps' Mot. for Limited Remand, *Dep't of Commerce v. New York*, No. 18-966 (dismissing assertion that Thomas Hofeller played key role in developing citizenship question and VRA rationale as a “conspiracy theory [that] is implausible on its face”); see also, e.g., Michael Wines, *Charges of Politics in Census Debate Are 'Smoke and Mirrors,' Justice Dept. Says*, N.Y. TIMES (June 3, 2019), <https://www.nytimes.com/2019/06/03/us/census-citizenship-question-hofeller.html>.

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funds going? How many people are there?”<sup>125</sup> Days later, the President stated that gathering citizenship information is “relevant to administering our elections. Some states may want to draw state and local legislative districts based upon the voter-eligible population.”<sup>126</sup> And Attorney General William Barr acknowledged that citizenship data “may be relevant to [] considerations” pending resolution of disputes over “whether illegal aliens can be included for apportionment purposes.”<sup>127</sup> On July 11, 2019, President Trump issued an order that expressly stated that the Administration sought to allow “States to design . . . legislative districts based on the population of vote-eligible citizens.”<sup>128</sup>

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<sup>125</sup> Remarks by President Trump Before Marine One Departure, White House (July 5, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trumpmarine-one-departure-51/>.

<sup>126</sup> Remarks by President Trump on Citizenship and the Census, White House (July 11, 2019) <https://www.whitehouse.gov/briefings-statements/remarks-president-trumpcitizenship-census/>. As the *Department of Commerce* trial court later noted in a May 2020 sanctions order, this “decision . . . recognized what Plaintiffs had been arguing all along over Defendants’ strenuous objection: that collecting citizenship data [from other agencies] would be ‘far more accurate’ than adding a citizenship question to the census questionnaire and would yield ‘an even more complete count of citizens than through asking the single question alone.’” Opinion and Order, *New York v. Dep’t of Commerce*, No. 18-cv-02921, ECF No. 694, at 4 (S.D.N.Y. May 21, 2020) (quoting <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census/>).

<sup>127</sup> .Macagnone & Ruger, *supra* note 119. Executive Order 13880, captioned “Collecting Information about Citizenship Status in Connection with the Decennial census decennial census decennial census” (“EO 13880”), is currently the subject of a pending lawsuit brought by civil rights organizations, including the Mexican American Legal Defense and Educational Fund (MALDEF). See *La Unión del Pueblo Entero v. Ross*, No. 19-cv-02710 (D. Md.) (“*LUPE v. Ross*”). The *LUPE* plaintiffs claim EO 13880 aims to “enable states to subtract purported non-U.S. citizens from the population used to draw new political boundaries, thereby drastically reducing the political strength and representation of Latinos and others.” Pls.’ Opp. to Defs.’ Mot. to Dismiss, *LUPE v. Ross*, No. 19-cv-02710, ECF No. 64, at 1 (D. Md. Jan. 9, 2020). And that the order “is a direct response to [defendants’] being thwarted in . . . ask[ing] a citizenship question of all people responding to the 2020 Census.” *Id.*

<sup>128</sup> .Executive Order on Collecting Information about Citizenship Status in Connection with the Decennial census decennial census decennial census, The White House (July 11, 2019), <https://www.whitehouse.gov/presidential-actions/executive-order-collecting-information-citizenship-status-connection-decennial-census/>.

Post-judgment, in other words, the Administration embraced its *Evenwel*-inspired rationale as often as it could and to anyone who would listen. While *Department of Commerce* has foreclosed a citizenship question appearing on the 2020 census, the decision has not at all hindered the effort to use CVAP as a redistricting base. And proponents of using CVAP to decimate representation of resident noncitizens and other non-voters in this redistricting cycle are emboldened. In the days before President Trump issued his executive order on citizenship data, 19 Republican members of the House of Representatives wrote Attorney General Barr, in part, to affirm their belief that “citizenship is [] germane to carrying out our duty to apportion representatives.”<sup>129</sup> The State of Alabama has sued the Administration claiming that including noncitizens in the final census numbers used for apportionment is itself unlawful;<sup>130</sup> legislators in Missouri and Nebraska have pushed legislation to exclude noncitizens from the redistricting process; and lawmakers in Arizona and Texas have indicated willingness to use citizenship data to do the same.<sup>131</sup> And now, most notably, President Trump’s executive order aims to exclude altogether undocumented immigrants from the census count used to apportion congressional representatives. A year after its rebuke at the Supreme Court, the Administration persists, unabashed—with advocates in state legislatures vowing to continue the battle regardless of the results of the 2020 election.

In sum, despite the administration’s defeats in court, significant threats persist to the rights to representation of communities of color. It persists because the Trump Administration and various states’ elected

<sup>129</sup> .Letter from 19 Republican Members of the House of Representatives to William P. Barr, Att’y Gen. of the United States (July 10, 2019), [https://roy.house.gov/sites/roy.house.gov/files/wysiwyg\\_uploaded/Barr%20Letter%20With%20Signatures%20Two.pdf](https://roy.house.gov/sites/roy.house.gov/files/wysiwyg_uploaded/Barr%20Letter%20With%20Signatures%20Two.pdf).

<sup>130</sup> .In July 2018, various civil rights organizations, led by the Mexican American Legal Defense Fund (MALDEF), intervened as defendants, citing, in part, that “the current administration cannot be trusted to defend” against Alabama’s lawsuit. See Rafael Bernal, *Latino groups intervene in Alabama census lawsuit*, THE HILL (July 12, 2018), <https://thehill.com/latino/396678-latino-groups-intervene-in-alabama-census-lawsuit>.

<sup>131</sup> .See Nick Brown, *Republicans want census data on citizenship for redistricting*, REUTERS (Apr. 8, 2019), <https://www.reuters.com/article/us-usa-census-redistricting-insight/republicans-want-census-data-on-citizenship-for-redistricting-idUSKCN1RK18D>; see also David Daley, *How to Get Away With Gerrymandering*, SLATE (Oct. 2, 2019), <https://slate.com/news-and-politics/2019/10/alec-meeting-gerrymandering-audio-recording.html>.

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officials have made it clear they will continue their efforts to halt or diminish minority communities' growing political influence at a time when the census, "[i]f administered correctly," should instead "etch a portrait of a new America whose future population is irreversibly racially and ethnically diverse."<sup>132</sup>

### IV. MOVING FORWARD: WHAT THE CITIZENSHIP QUESTION AND *EVENWEL* BATTLES MEAN FOR LITIGATORS, ACTIVISTS, AND THE FUTURE OF AMERICAN DEMOCRACY

Though the Supreme Court's decision blocking a citizenship question from appearing on the 2020 census was worthy of immediate celebration, the civil rights community knew better than to declare total victory—something that proved prescient when the Administration announced its new apportionment policy a year later. The Supreme Court's decision on the citizenship question was a vitally important, and perhaps improbable, victory for communities of color in an area of administrative law where the federal government is typically owed a tremendous amount of deference. And yet, the Administration's push to get states to apportion based on CVAP data or outright exclude undocumented immigrants from the apportionment count, poses an active and serious threat to communities of color. Civil rights advocates and litigators must play a key role in preventing the census enumeration from being hijacked to prevent our democracy from reflecting our diversity.

Accordingly, this section reflects on lessons the civil rights legal community can take from recent litigation on the citizenship question and argues that impact litigation was perhaps the only viable route to ensure that a citizenship question was removed from the 2020 decennial form. Then, we suggest a few things that activists and policymakers can do to combat the continued threat of exclusionary redistricting.

#### A. *The citizenship question case as a case study for the utility of civil rights impact litigation*

Speaking at a July 11, 2019 press conference in the Rose Garden, Attorney General Bill Barr seemed annoyed. It was two weeks after the Supreme Court's decision in *Department of Commerce* and the Administration had not taken its defeat well, "vacillat[ing] over whether to persist in [its] efforts to include a citizenship question on the 2020

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<sup>132</sup> .Nelson, *supra* note 10.

census questionnaire.”<sup>133</sup> Initially, a few days after the decision, DOJ confirmed—to a federal judge, plaintiffs’ attorneys, and the national media—that the citizenship question was dead.<sup>134</sup> In no uncertain terms, Secretary Ross declared that “[t]he Census Bureau [would] start[] the process of printing the decennial questionnaires without the [citizenship] question.”<sup>135</sup> But a day later, President Trump then did a whiplash-inducing about-face, tweeting on July 3 that “News Reports about the Department of Commerce dropping . . . the Citizenship Question [are] FAKE!”<sup>136</sup> He added: “We are absolutely moving forward, as we must” with a citizenship question.

What followed was an absolute frenzy. Forced to explain to multiple courts why they could not close the book on litigation, government lawyers told the courts that the Administration had ordered a review of “all available options” for a “new decision” to put a citizenship question on the decennial census.<sup>137</sup> After vehemently asserting for close to two years that the VRA and the VRA alone motivated its decision on the citizenship question, the Administration publicly said it was going back to the drawing board. And it was doing so in the face of the fact that it had steadfastly asserted to the Supreme Court, three federal district courts, and two circuit courts of appeal that the Census Bureau had no choice but to finalize the decennial census questionnaire by June 2019.<sup>138</sup> After flirting with the idea of adding the citizenship question by executive order<sup>139</sup>—a clearly unlawful and likely unconstitutional act<sup>140</sup>—

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<sup>133</sup> Opinion and Order, *New York v. Dep’t of Commerce*, No. 18-cv-02921, ECF No. 694, at 4 (S.D.N.Y. May 21, 2020).

<sup>134</sup> .See Pls.’ Letter to Hon. Jesse Furman, *State of New York v. Dep’t of Commerce*, No. 19-cv-2921 (July 3, 2019), [https://www.brennancenter.org/sites/default/files/legal-work/Requeststatusconference\\_7.03.19.pdf](https://www.brennancenter.org/sites/default/files/legal-work/Requeststatusconference_7.03.19.pdf); Hallie Jackson & Dartunorro Clark, *Trump administration will print 2020 census without citizenship question*, NBC NEWS (July 2, 2019), <https://www.nbcnews.com/politics/politics-news/trump-administration-will-print-2020-census-without-citizenship-question-n1025971>.

<sup>135</sup> .Mike Schneider & Mark Sherman, *2020 Census to be printed without citizenship question*, AP (July 3, 2019), <https://apnews.com/9193a30c38c345a88997020b6b958d9f>.

<sup>136</sup> .President Donald J. Trump, @realDonaldTrump, TWITTER (July 3, 2019, 8:06AM), <https://twitter.com/realDonaldTrump/status/1146435093491277824>.

<sup>137</sup> .Defs.’ Letter to Hon. Jesse Furman, *State of New York v. Dep’t of Commerce*, No. 19-cv-2921 (July 3, 2019), [https://www.brennancenter.org/sites/default/files/legal-work/LetterResponse\\_7.3.19.pdf](https://www.brennancenter.org/sites/default/files/legal-work/LetterResponse_7.3.19.pdf).

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President Trump on July 11, 2019 held a speech in the Rose Garden to—actually, finally, really—concede.

President Trump, flanked by Secretary Ross and Attorney General Barr, spoke first. “The problem,” Attorney General Barr said, is not only that “there are injunctions currently in place that forbid adding the question,” but that “any new decision would be subject to immediate challenge as a new claim in the three ongoing district court cases.”<sup>141</sup> “There is simply no way to litigate these issues and obtain relief from the current injunctions in time to implement any new decision without jeopardizing our ability to carry out the census,” Barr concluded.<sup>142</sup>

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<sup>138</sup> .See Pls.’ Motion to Amend Judgment on Remand Pursuant to Rule 59(e), or For Injunctive Relief Pursuant to the All Writs Act 12, 13 n.5 (listing the large number of representations Defendants made regarding the June 2019 deadline) (July 5, 2019) [https://www.aclu.org/sites/default/files/field\\_document/motion\\_to\\_amend.pdf](https://www.aclu.org/sites/default/files/field_document/motion_to_amend.pdf).

<sup>139</sup> .See Michael Wines & Adam Liptak, *Trump Considering an Executive Order to Allow Citizenship Question on Census*, N.Y. TIMES (July 5, 2019), <https://www.nytimes.com/2019/07/05/us/census-question.html>.

<sup>140</sup> .Adding a citizenship question by executive order would violate federal law for at least two clear reasons. First, it would violate the Census Act, which “delegate[s] to the Secretary of Commerce the task of conducting the decennial census decennial census decennial census ‘in such form and content as he may determine’”—not the President. *Dep’t of Commerce*, 139 S. Ct. at 2561 (emphasis added) (quoting 13 U.S.C. § 141(a)); see also *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 321 (1999) (describing respective roles that Census Act assigns to President, Congress, and Secretary)decennial census decennial census decennial census.

Second, an executive order adding a citizenship question to the census would likely encroach on Congress’s authority, in violation of the separation of powers. Here, “Justice Jackson’s familiar tripartite scheme [in the “*Steel Seizure*” case] provides the [relevant] framework.” *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)). Because Congress, through the Census Act, delegated its constitutional authority to administer the census to the Commerce Secretary, not the President, presidential authority to directly alter its content by executive order is likely at its “lowest ebb.” *Youngstown Sheet & Tube*, 343 U.S. at 638. Courts could only uphold such “exclusive Presidential control . . . by disabling the Congress from acting upon the subject.” *Id.* at 637-38. . As such, the President lacks authority to modify the content of the decennial census decennial census decennial census form through executive order

<sup>141</sup> .*Id.*

In other words: *we would have gotten away with it if not for those pesky lawyers.*

He was probably right. Consider the situation in March 2018, when Secretary Ross wrote his decisional memo authorizing a citizenship question. State legislatures or governors had no authority to prevent the Trump Administration from going through with it. There was no chance that Congress would pass legislation prohibiting a citizenship question and muster enough votes to override a presidential veto—why, after all, would Republican members challenge President Trump when it came to a move that was explicitly designed to help the “Republican redistricting effort”?<sup>143</sup> For this particular problem, the legislative process offered no real solution.

The citizenship question fight is, in many ways, just one facet of one of the most important issues facing the United States. As political interests that have historically depended on a declining white majority face the prospect of a rapidly diversifying electorate, conservative activists have repeatedly opted to change the rules in their favor over including people of color in their vision for America. Ten states now have “strict” voter ID laws on the books, meaning that voters without proper identification must return with appropriate ID within a short period of time after Election Day for their provisional ballots to be counted.<sup>144</sup> These laws excessively and disparately burden minority voters, who are generally less likely to possess qualifying forms of identification.<sup>145</sup> According to a Leadership Conference on Civil and Human Rights report,<sup>146</sup> at least 1,688 polling places have closed in places formerly covered by Section 5 of the Voting Rights Act—a crucial safeguard against discriminatory voting practices that required certain jurisdictions to submit changes to election laws to federal “preclearance”—since the Supreme Court invalidated it under *Shelby*

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<sup>142</sup> .*Id.*

<sup>143</sup> .*Supra* note 63, at 12.

<sup>144</sup> .Wendy Underhill, Nat. Conference of State Legislatures, *Voter Identification Requirements* (Feb. 24, 2020), <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

<sup>145</sup> .*See, e.g., Veasey v. Abbott*, 830 F.3d 216, 265 (5th Cir. 2016) (en banc) (holding Texas’s strict ID law violated VRA Section 2 for its discriminatory effect, where “Hispanic registered voters and Black registered voters were respectively 195% and 305% more likely than their Anglo peers to lack [a qualifying] ID”).

<sup>146</sup> .THE LEADERSHIP CONFERENCE EDUC. FUND, *DEMOCRACY DIVERTED* 12 (Sept. 2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf>.

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*County v. Holder* in 2013.<sup>147</sup> At the same time, more states now routinely purge massive numbers of voters from the registration rolls, most frequently in jurisdictions formerly covered by Section 5.<sup>148</sup>

The Trump Administration has not just embraced this trend; it has taken it to distressing and unprecedented heights. In addition to encouraging voter suppression through false claims about widespread voter fraud, President Trump has floated the (patently unconstitutional) idea of ending birthright citizenship in America<sup>149</sup>—a naked attempt to exclude the children of undocumented immigrants from the polity and prevent them from ever voting in the only country they have ever known. Kris Kobach, who advised Secretary Ross on adding a citizenship question, had his own documentary proof-of-citizenship law in Kansas struck down.<sup>150</sup> These endeavors—as well as countless other

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<sup>147</sup> .570 U.S. 529 (2013). Under Section 5 of the VRA, certain “covered jurisdictions” with a history of voter suppression on racial grounds had to get federal approval—either from the Attorney General or the U.S. District Court for the District of Columbia—before enacting “voting qualification[s] or prerequisite[s] to voting, or standard[s], practice[s], or procedure[s] with respect to voting.” 52 U.S.C. § 10304(a). The Supreme Court in *Shelby County* effectively invalidated this preclearance process, because it found that the “coverage formula” that determined which jurisdictions were subject to Section 5 was unconstitutional. *Shelby County*, 570 U.S. at 557. 39% of the 757 counties in formerly covered jurisdictions that the Leadership Conference studied closed polling places during this time. *Id.*

<sup>148</sup> .Kevin Morris, Brennan Ctr. For Justice, *Voter Purge Rates Remain High, Analysis Finds* (Aug. 1, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds>.

<sup>149</sup> .Julie Hirschfeld Davis, *President Wants to Use Executive Order to End Birthright Citizenship*, N.Y. TIMES (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/us/politics/trump-birthright-citizenship.html>.

<sup>150</sup> .*Fish v. Kobach*, 189 F. Supp. 3d 1107 (D. Kan. 2016), *aff'd*, 840 F.3d 710 (10th Cir. 2016). Kobach, a close ally to President Trump, served as vice chair to the President’s now-defunct Presidential Advisory Commission on Election Integrity. President Trump founded the commission after alleging, without evidence, that millions of people voted illegally for Hillary Clinton in the 2016 election such that she did not properly win the popular vote. Michael Tackett & Michael Wines, *Trump Disbands Commission on voter Fraud*, N.Y. TIMES (Jan. 3, 2018), <https://www.nytimes.com/2018/01/03/us/politics/trump-voter-fraud-commission.html>. The commission, which produced no evidence of voter fraud and was the subject of multiple lawsuits, including one brought by the ACLU, abruptly disbanded in 2018.

voter suppression attempts in states across the country—disproportionately harm voters of color.

Litigation can be a sub-optimal way to bring about change. It is costly; it often fails to generate mass political action; courts are typically reluctant or ill-equipped to deliver expansive remedies; and it largely depends on opponents playing fairly and by the rules. In the case of the citizenship question, litigation was also less than ideal because it did little to generate trust in government. It remains to be seen, for example, how significant of a problem census non-response in immigrant communities will be *even without* a citizenship question, because immigrant communities had heard about the push to add a question and may still feel intimidated, targeted, or scared.<sup>151</sup>

Yet, the sorts of attacks on democracy embodied by the attempt to add a citizenship question constitute “discrimination . . . unlikely to be soon rectified by legislative means.”<sup>152</sup> This is both because marginalized communities lack political power and because these attacks target their political power or franchise in the first place.<sup>153</sup> When local, state, or federal governments take away political power, it makes it harder for communities to remedy those harms through political means. Civil rights litigation, then, continues to have a vital role to play in combating attacks on our democracy and most vulnerable communities.

Further, litigation provides an important investigative check on government malfeasance, and the information that legal battles bring to light plays a meaningful role in educating the public. In March 2018, no one, including the press, knew the full (and scandalous) story that undergirded the decision to add a citizenship question to the 2020 census was. Indeed, even lawyers challenging the decision—who firmly believed that the question’s purpose was to harm immigrant communities—had no reason to grasp the scope of the Trump Administration’s cover-up, or to know that Hofeller played a key role in developing its strategy. Much of the information that eventually came to light between Secretary Ross’s decision and the Administration’s loss at the Supreme Court was the result of litigation discovery. On that score, even a loss in court would have delivered government transparency and public education benefits.

It is clear that the evidence produced during this litigation *did* have a crucial impact on the outcome. While Chief Justice Roberts stated that

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<sup>151</sup> .See *infra* Section IV.B.

<sup>152</sup> .City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

<sup>153</sup> .See, e.g., United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

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“the District Court should not have ordered extra-record discovery” as early as it did, the ultimately incomplete state of the administrative record “largely justified such extra-record discovery,” which Roberts relied on heavily in his ruling on pretext.<sup>154</sup> After “review[ing] a record as extensive as the one before us,” Chief Justice Roberts stated, the Court simply could not “ignore the disconnect between the decision made and the explanation given.”<sup>155</sup> To disregard all the evidence directly before the Court, the Chief said, would demonstrate unacceptable “naiveté” and render judicial review “an empty ritual.”<sup>156</sup>

The Hofeller documents also may have played a role in the Court’s decision. The Supreme Court was well aware of the bombshell evidence that came out after oral argument—in part because DOJ told the Court about it in a fit of panic. While all three plaintiff groups won at the district courts, both New York and Maryland plaintiffs (initially) lost on their constitutional claim that the decision to add a citizenship question was unconstitutional and discriminatory. But the Hofeller documents shed new light on those claims. They showed that Hofeller authored part of the initial request asking the Commerce Department to add a citizenship question, in part because he considered the question would be “advantageous for Republicans and non-Hispanic Whites.”<sup>157</sup> Documents in hand, the Maryland plaintiffs asked the district court to reconsider its judgment or reopen the case for further fact-finding on their intentional discrimination claim.<sup>158</sup> The Maryland court agreed,<sup>159</sup> and two days before the Supreme Court ruled in *Department of Commerce*, the Fourth Circuit allowed the district court to conduct additional factfinding.<sup>160</sup> Crucially, that meant that even if the Supreme Court ruled against the plaintiffs in the New York case, vindication

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<sup>154</sup> .*Dep’t of Commerce*, 139 S. Ct. at 2574.

<sup>155</sup> .*Id.* at 2575.

<sup>156</sup> .*Id.* at 2575-76.

<sup>157</sup> .*See supra* Part II.B.

<sup>158</sup> .*See* Mem. in Supp. of Pls’ Rule 60(b)(2) Mot. for Relief from Final Judgment, *Kravitz v. Dep’t of Commerce*, No. 18-cv-01041, Dkt. No. 162-1 (D. Md. June 3, 2019).

<sup>159</sup> .*See* Mem. Op., *Kravitz v. Dep’t of Commerce*, No. 18-cv-01041, Dkt. No. 175, at 13 (D. Md. June 24, 2019) (“The question of whether the Secretary’s true reasoning was driven by discriminatory animus is . . . weighty. But . . . it is becoming difficult to avoid seeing that which is increasingly clear. As more puzzle pieces are placed on the mat, a disturbing picture of the decisionmakers’ motives takes shape.”).

<sup>160</sup> .*Unión del Pueblo Entero v. Ross*, No. 19-1382, Dkt. No. 45 (4th Cir. June 25, 2019).

would elude the Trump Administration as new proceedings and discovery continued in Maryland federal court.

Later that evening, the Solicitor General of the United States asked the Court to “address the equal-protection claim and the immateriality of the Hofeller files . . . so that the lawfulness of the Secretary’s decision can be fully and finally resolved.”<sup>161</sup> To be clear: the Trump Administration asked the Supreme Court to decide an issue which was not before it, on which it had received no briefing, and which was not the subject of oral argument at the Court. The Court did not comply.

Almost a year after the Supreme Court’s *Department of Commerce* decision, the trial court entered sanctions against DOJ for significant failures in producing the citizenship question administrative record and other discovery materials.<sup>162</sup> The district court’s ruling cited the July 2019 unearthing of the Hofeller materials as well as other post-trial developments that caused the “plot to thicken[] twice”<sup>163</sup>: in November 2019, the House Oversight Reform Committee released stunning documents and communications—some, mentioned in Section II.B—in connection with its investigation into “the Trump Administration’s false rationale for adding a citizenship question to the 2020 census.”<sup>164</sup> Defendants should have, but failed to, release these documents during discovery or as part of the administrative record. Later that month, Defendants began producing documents they claimed “were inadvertently not produced in discovery,”<sup>165</sup>—documents that addressed directly the sham VRA enforcement rationale the Trump Administration put forth for the citizenship question. Ultimately, the court concluded that DOJ “failed to produce at least 900 documents . . . totaling 3,700 pages” or “ten percent of the documents [it] was required to produce as

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<sup>161</sup> .Letter of Noel J. Francisco, Solicitor Gen., re: Department of Commerce, et al. v. New York, et al., No. 18-966, at 1 (June 25, 2019), [https://www.supremecourt.gov/DocketPDF/18/18-966/104091/20190625161322614\\_DEPT%20OF%20COMMERCE%20ET%20AL%2018-966%20LETTER.pdf](https://www.supremecourt.gov/DocketPDF/18/18-966/104091/20190625161322614_DEPT%20OF%20COMMERCE%20ET%20AL%2018-966%20LETTER.pdf).

<sup>162</sup> Opinion and Order, *New York v. Dep’t of Commerce*, No. 18-cv-02921, ECF No. 694, at 21-22 (S.D.N.Y. May 21, 2020).

<sup>163</sup> *Id.* at 6.

<sup>164</sup> .Memorandum to Members of the Committee on Oversight and Reform from Acting Chairwoman Carolyn B. Maloney, at 1 (Nov. 12, 2019), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-11-12.Memo%20to%20COR%20Members%20re.%20Census.pdf>.

<sup>165</sup> .Letter of James J. Gilligan, Special Litigation Counsel, to Matthew Colangelo, *State of New York v. Dep’t of Commerce*, No. 18-cv-02921, Dkt. No. 669-1, at 1 (S.D.N.Y. Nov. 25, 2019).

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part of th[e] litigation.”<sup>166</sup> “To be sure,” the court remarked, “this was not DOJ’s finest hour.”<sup>167</sup>

This case makes clear that litigators may have a special role to play where elected officials try to shut marginalized communities from the political process. And it has shown that civil rights litigators must be dogged in discovery, particularly when suspicious that government officials are acting in bad faith. The continued assault on democracy unfortunately demands nothing less.

*B. Where activists and policymakers go from here*

Even though a citizenship question will not be on the 2020 census, two imminent threats remain. First, the threat of a citizenship question—and the misinformation, distrust, fear, and chaos it caused—may still deter individuals in noncitizen households and communities from responding to the census. Speaking before the House Oversight and Reform Committee in January 2020, Arturo Vargas, the CEO of the nonprofit National Association of Latino Elected and Appointed Officials, testified:

There has been damage done by the citizenship question debacle . . . . The citizenship question debacle has created and continues to foster fear and doubt. Many Latinos are resistant to participate in the census because they believe there will be a citizenship question on the form, despite its absence, and many fear how the data would be used. This is exacerbated by a hostile environment toward immigrants propagated by this Administration.”<sup>168</sup>

Further, House Oversight Chair Carolyn Maloney stated that she was “gravely concerned” that the 2020 census was “underfunded,”<sup>169</sup>

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<sup>166</sup> Opinion and Order, *New York v. Dep’t of Commerce*, No. 18-cv-02921, ECF No. 694, at 22-23 (S.D.N.Y. May 21, 2020).

<sup>167</sup> *Id.* at 22.

<sup>168</sup> .Reaching Hard-to-Count Communities in the 2020 Census Before the H. Comm. on Oversight & Reform, 116th Cong. [REDACTED] (2019) (Statement of Arturo Vargas, CEO, Nat’l Ass’n of Latino Elected & Appointed Officials), <https://www.c-span.org/video/?467977-1/house-oversight-reform-hearing-2020-census&start=1947> at 33:26-34:05.

<sup>169</sup> .Reaching Hard-to-Count Communities in the 2020 Census Before the H. Comm. on Oversight & Reform, 116th Cong. [REDACTED] (2019) (Statement of Rep. Maloney, Chairwoman, H. Comm. on Oversight & Reform), <https://www.c-span.org/video/?467977-1/house-oversight-reform-hearing->

while groups in New York filed suit in late 2019 demanding “immediate relief” for what it alleges as impermissibly low spending on the census.<sup>170</sup>

Grassroots organizations—including the immigrants’ rights groups the authors and other advocates had the privilege of representing in the citizenship question cases—are working tirelessly to ensure that communities of color are counted in 2020. At a rally held on the Supreme Court steps after the *Department of Commerce* argument, an undocumented woman told the assembled crowd that she risked deportation that day to be inside the courtroom. And she warned about the dangers of letting the census be perversely coopted to distort democracy and harm communities of color. Supporting the 2020 census Counts coalition and other groups doing the vital grassroots work to turn people out for the census honors her remarkable courage and the courage of countless other noncitizens advocating for their communities.<sup>171</sup>

Second, there is the aforementioned threat that states—using data shared with them by the Trump Administration—will try to redistrict based on CVAP data rather than total population. Efforts have been made at the state and federal level to prohibit the use of CVAP data for apportionment issues—for example, through introduced federal legislation that would bar the Census Bureau from including citizenship information in the “redistricting file” that it shares with states.<sup>172</sup> And many states have laws or constitutional provisions requiring that the state use actual census results for determining the population for redistricting purposes—a way to ensure that states use full count data rather than CVAP data.<sup>173</sup> Lawmakers should continue to pursue similar efforts in other states, and activists can and should demand legislation to ensure that states are not using CVAP data for districting in the next round starting in 2021.

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2020-census&start=1947 at 2:25-38.

<sup>170</sup> .Jonathan Stempel, *U.S. Starves 2020 Census of Funding, Threatens Undercount: NY Lawsuit*, REUTERS (Nov. 26, 2019), <https://www.reuters.com/article/us-usa-census-lawsuit/u-s-starves-2020-census-of-funding-threatens-undercount-ny-lawsuit-idUSKBN1Y01RJ>.

<sup>171</sup> .Census Counts, *About Us* (2020), <https://censuscounts.org/about>.

<sup>172</sup> .Sen. Cory Booker, *Sen. Booker Introduces Bill to Prohibit Use of Citizenship Data for Redistricting* (July 10, 2019), <https://www.scribd.com/document/416314267/Sen-Booker-Introduces-Bill-to-Prohibit-Use-of-Citizenship-Data-for-Redistricting>.

<sup>173</sup> .See, e.g., ALASKA CONST. art. VI, §§ 1-3; MICH. CONST. art. IV, § 2.

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Most broadly, activists, policymakers, lawyers, and the broader American public ought to stay alert—particularly on “procedural” and even clerical-sounding changes to law or policy. Turning away from the complex and often dry busywork of democratic oversight would prove disastrous. Complacency could lead to communities and their residents losing schools, health care, and representation. As they were to Hofeller, the stakes are clear to many who would change the rules at the expense of communities of color. They must be equally clear to anyone who would have America’s democracy reflect its diversity and changing demography.

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The citizenship question case was a technically and procedurally complex litigation. At bottom, however, the dispute centered on a very simple question that the Trump Administration refused to answer: *why does the census need a citizenship question?* Even in March 2018, before any litigation discovery had been taken, the notion that the Administration added the question to help enforce the VRA made no sense. Nor did Secretary Ross’s decisional memo, which outlined the VRA rationale. Given that “all of the relevant evidence before Secretary Ross—all of it—demonstrated that” a citizenship question would produce *worse* data than the federal government currently can access,<sup>174</sup> the decisional memorandum gave no *believable* reason for the decision to add the question to the 2020 census. As a result, most of the litigation that culminated in the Supreme Court’s *Department of Commerce* decision revolved around forcing the Administration to answer that simple question. It never did.

Despite the Trump Administration’s best efforts to stonewall, we know the real answer. The citizenship question was a two-pronged attack on the political power of communities of color and, by extension, our democracy. Litigation frustrated a first, more straightforward approach—to dramatically reduce response rates to the census in immigrant communities of color by weaponizing those individuals’ fears of the federal government and the Trump Administration in particular. But a second approach—the lesser-understood plan to use a citizenship question to get granular-enough data to allow states to apportion based on citizen voting-age population, rather than total population—lives on. And the Administration’s recent brute force attempt to manipulate House apportionment by excluding undocumented immigrants from the apportionment count is, beyond any doubt, likewise part and parcel of this attack.<sup>175</sup>

The endgame here is the same that drives voter suppression efforts across the country: a furious attempt to prevent the political

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<sup>174</sup> .*New York*, 351 F. Supp. 3d at 650.

consequences of the country's changing demographics by rigging the rules against communities of color. This undemocratic endeavor will only fail if advocates, activists, and organizers zealously defend the rights of marginalized communities and hold public officials accountable. Challenges to the citizenship question were part of that effort. They succeeded, but the fight goes on.

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<sup>175</sup> See White House, Statement from the President Regarding Apportionment (July 21, 2020), <https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment/> ("Last summer in the Rose Garden, I told the American people that I would not back down in my effort to determine the citizenship status of the United States population.").