January 17, 2020

By Email to OIRA_Submission@omb.eop.gov

RE: Collection of State Administrative Records Data,
    OMB Control Number 0607-0995

To Whom It May Concern:

Campaign Legal Center ("CLC") submits this comment on the Census Bureau's proposed collection of state administrative records in connection with the 2020 Census.[1] CLC is a nonpartisan, nonprofit organization dedicated to advancing democracy through law. As a champion of equal voting rights and a regular user of census data, CLC is committed to the success of the 2020 Census. CLC has previously advocated for an accurate and transparent census in multiple forums, including regulatory comments, and we appreciate the opportunity to do so again.

The Census Bureau collects certain administrative records for a variety of legitimate purposes related to the decennial census. CLC does not oppose the continuation of this routine data collection.

However, the Bureau should not collect additional state administrative records to help produce statistics on citizen voting-age population ("CVAP") as a tool for redistricting. There is little benefit in a targeted collection of state records on citizenship, because such records are too unreliable to form the basis of CVAP data fit for use as a redistricting population base. The most significant consequence of this data collection will probably be a negative one: the more citizenship data the Bureau attempts to collect from the states, the more fear and suspicion the Bureau will inspire among non-U.S. citizens and their communities, depressing participation in the 2020 Census. With the self-response period for the census about to begin, this damage to the Bureau's reputation could not come at a worse time.

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[1] *See* Submission for OMB Review; Comment Request, 84 Fed. Reg. 70146 (Dec. 20, 2019).

I.   Background

State and local governments throughout the United States rely on Census Bureau data products to comply with various legal requirements in redistricting.

One constitutional mandate is to draw equally populous districts. [2] Governments overwhelmingly use total-population data from the decennial census as the population base to be equalized, although some apply limited adjustments.[3] The Census Bureau facilitates this practice by publishing total-population figures at the granular level of census blocks following each decennial census.[4]

Another requirement is to comply with the Voting Rights Act ("VRA"), which bans racial discrimination in electoral systems. [5] For VRA compliance, governments use a variety of Census Bureau data, including race and ethnicity data from the decennial census and, occasionally, CVAP data from the American Community Survey, which uses statistical sampling to produce estimates for geographic areas larger than census blocks.[6]

In 2017, the Department of Commerce solicited other federal agencies to submit a formal request to add a question on citizenship status to the 2020 Census questionnaire. [7] In response, the Department of Justice ("DOJ") formally requested a citizenship question in December 2017, citing a purported need for more granular citizenship data to enforce the VRA. [8] Career professionals at the Census Bureau advised Secretary of Commerce Wilbur Ross that the best way to produce citizenship data suited to "DoJ's stated uses"—i.e., VRA enforcement—was to compile citizenship information from administrative records.[9] The Bureau did not opine on whether the resulting

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[2]   Evenwel v. Abbott, 136 S. Ct. 1120, 1124 (2016).

[3]   *Id.*

[4]   *See* Catherine McCully, *Designing P.L. 94-171 Redistricting Data for the Year 2020 Census* 7-9, U.S. CENSUS BUREAU (Dec. 2014),
https://www.census.gov/content/dam/Census/library/publications/2014/rdo/pl94-171.pdf.

[5]   52 U.S.C. § 10301.

[6]   *See Understanding and Using American Community Survey Data: What All Data Users Need To Know* 1-5, 8-9, U.S. CENSUS BUREAU (July 2018), https://www.census.gov/content/dam/Census/library/publications/2018/acs/acs_general_handbook_2018.pdf.

[7]   *See* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2574-75 (2019).

[8]   *Id.* at 2562-64.

[9]   Memorandum from John M. Abowd to Wilbur L. Ross, Jr., Technical Review of the Department of Justice Request to Add Citizenship Question to the 2020 Census 1 (Jan. 19, 2018),   available   at   http://www.osec.doc.gov/opog/FOIA/Documents/AR%20-

data would be fit for use as a redistricting population base, as DOJ's request did not raise that issue.

Secretary Ross overruled the Bureau in 2018 and sought to add a citizenship question to the census.[10] The U.S. Supreme Court later held Secretary Ross's action illegal, finding that the VRA rationale was "contrived."[11] The Commerce Department then abandoned its attempt to ask the citizenship question in the 2020 Census.

However, in July 2019, President Trump issued an executive order, E.O. 13880, directing the production of citizenship data through alternative means. E.O. 13880 directs other federal agencies to provide the Commerce Department with administrative records on individuals' citizenship status; orders Secretary Ross to create an inter-agency working group on collecting citizenship data; and orders the Commerce Department to "strengthen its efforts, consistent with law, to obtain State administrative records concerning citizenship."[12]

The executive order does not mention the VRA—the original rationale provided for collecting more granular citizenship data—but it does suggest another rationale: the use of block-level citizenship data as a redistricting population base. The order notes that the Supreme Court has so far "left open the question whether 'States may draw districts to equalize voter-eligible population rather than total population.'"[13] According to the order, "more accurate and complete" citizenship data would allow states to "more effectively exercise [the] option" to redistrict based on eligible voters, setting up a legal test case.[14]

Around the same time as the President's executive order, Secretary Ross directed the Census Bureau to "produce [CVAP] information prior to April 1, 2021 that states may use in redistricting."[15]

After receiving these orders, the Census Bureau expanded its existing request for states to provide the Bureau with administrative records. In particular, the

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%20FINAL%20FILED%20-%20ALL%20DOCS%20%5bCERTIFICATION-INDEX-DOCUMENTS%5d%206.8.18.pdf#page=1289 ("Abowd Memo").

[10]   New York, 139 S. Ct. at 2562.
[11]   *Id.* at 2575.
[12]   Exec. Order No. 13880, Collecting Information About Citizenship Status in Connection With the Decennial Census, 84 Fed. Reg. 33821, 33822 (July 11, 2019).
[13]   *Id.* at 33823-24 (quoting Evenwel, 136 S. Ct. at 1133).
[14]   *Id.* at 33824.
[15]   *Paperwork Reduction Act Program, Information Collection Request 2020 Census - Enumeration Operations* 18, OMB Control No. 0607-1006, U.S. DEPARTMENT OF COMMERCE (July 3, 2019), available at https://www.documentcloud.org/documents/6192581-2020-Census-Supporting-Statement-ARevised-July.html#document/p18/a512146.

Bureau is now seeking administrative records connected to state driver licenses. [16] Additionally, the Bureau has entered an agreement to obtain immigration and citizenship records from the Department of Homeland Security ("DHS"). [17]

II. Discussion

A. Collecting citizenship records from states will not enable the Census Bureau to produce data suitable for drawing voting districts with equal CVAP.

As E.O. 13880 makes clear, the Census Bureau's effort to produce block-level CVAP statistics is at least partly in response to the President's desire to help states experiment with voting districts that equalize CVAP instead of total population. CLC agrees with other public commenters who have argued that, regardless of the data used to accomplish it, CVAP-based redistricting would unfairly deprive communities of representation based on their diversity of immigration status and age, likely violating the Constitution. [18] However, CLC wishes to emphasize that *even if* CVAP-based redistricting were acceptable in the abstract (which it is not), collecting state administrative records would not enable the Bureau to produce data fit for this purpose. [19]

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[16] *See* Mike Schneider, *Census confirms drivers' records request tied to citizenship*, ASSOCIATED PRESS (Oct. 16, 2019), https://apnews.com/584d26aa91fc4004ad147d0a3ba2231e.

[17] *Privacy Impact Statement for the Department of Homeland Security (DHS) Immigration-Related Data Sharing with U.S. Census Bureau* 1, U.S. DEP'T OF HOMELAND SEC. (Dec. 20, 2019), available at https://www.documentcloud.org/documents/6596155-Privacy-Impact-Assessment-for-the-Department-of.html ("DHS Memo").

[18] *See, e.g.*, Comment from National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund 4, OMB Control No. 0607-0995, available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201912-0607-003 ("Drawing district lines on the basis of the voter-eligible population would violate Latino voting rights, and prevent Latinos from achieving fair opportunities for representation during redistricting."); Comment from American Civil Liberties Union 2, OMB Control No. 0607-0995, available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201912-0607-003 ("The single, well-understood purpose of block-level CVAP data is to make this data available in the redistricting process for states to dilute Hispanic political power by excluding non-citizens," which is a "discriminatory and unlawful goal.").

[19] Nothing in this comment should be taken to suggest that a citizenship question on the census would have produced better citizenship data than administrative records. To the contrary, citizenship data taken directly from census responses would likely be of even *lower* quality than citizenship data derived from administrative records. *See* Abowd Memo, *supra* note 9, at 1 (stating that a data product derived from a citizenship question on the census "would use substantially less accurate citizenship status data than are available from administrative sources"). But if redistricting based on administrative-record-derived CVAP is the lesser of two evils, it is an evil nonetheless.

1. <u>Redistricting requires a consistently reliable measure of population at the block level.</u>

Creating a new data product fit for use as a redistricting population base is a herculean task. For reasons of both constitutional law and good policy, redistricting requires a measure of the population base that is consistently reliable at the block level across geographic areas.

The Constitution requires district-based voting schemes to provide equal representation for equal numbers of people. This basic requirement applies to congressional maps as well as maps for state and local legislatures. [20] In congressional redistricting, *any* practicably avoidable deviation from perfect population equality is unconstitutional unless it has an adequate justification. [21] For state and local legislatures, a map is presumed unconstitutional if its maximum population deviation is 10 percent or greater, [22] and smaller deviations can be struck down if arbitrary or discriminatory.[23]

Because the law recognizes bright-line mathematical thresholds for population deviations that trigger legal consequences, a voting map can live or die based on small inaccuracies in the population counts of census blocks. For example, one federal court struck down a Pennsylvania congressional redistricting plan because, according to census data, the most populated district had *nineteen* more residents than the least populated district.[24] If just a few census blocks in Pennsylvania had slightly different population counts in the 2000 Census, the same map could have been a model of perfect population equality. Similarly, small changes in block-level census counts can determine whether a state legislative map's maximum population deviation meets the 10 percent threshold for *prima facie* constitutionality, greatly affecting the probability that the map will survive. In one illustrative case, the voting map for the Maryland State Senate had a maximum population deviation of 9.84 percent.[25] Because this deviation fell slightly below 10 percent, the map's opponents had the burden to prove the inequality stemmed from "an unconstitutional or irrational state purpose"—a burden they could not carry.[26]

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[20]   Evenwel, 136 S. Ct. at 1124, 1124 n.1.
[21]   Karcher v. Daggett, 462 U.S. 725, 734 (1983).
[22]   Evenwel, 136 S. Ct. at 1124.
[23]   Larios v. Cox, 300 F. Supp. 2d 1320, 1339-42 (N.D. Ga. 2004) (three-judge court), aff'd mem., 542 U.S. 947 (2004).
[24]   Vieth v. Pennsylvania, 195 F. Supp. 2d 672, 675 (M.D. Pa. 2002) (three-judge court).
[25]   Marylanders for Fair Representation, Inc. v. Schaefer, 849 F. Supp. 1022, 1033 (D. Md. 1994) (three-judge court).
[26]   *Id.* at 1033-36.

Courts understand that no set of population data is perfect, and errors in the census count (or intentional distortions to avoid revealing personal information of census respondents) will inevitably affect the outcomes of some close cases.[27] Yet, the legal framework for these equal representation cases relies on the fact that the decennial census systematically gets close to capturing the true total populations of census blocks, even though it continually undercounts some communities more than others. As the Supreme Court has explained,

> [T]he census data provide the only reliable—albeit less than perfect—indication of the districts' "real" relative population levels. Even if one cannot say with certainty that one district is larger than another merely because it has a higher census count, one *can* say with certainty that the district with a larger census count is more likely to be larger than the other district than it is to be smaller or the same size. That certainty is sufficient for decisionmaking. Furthermore, because the census count represents the best population data available, it is the only basis for good-faith attempts to achieve population equality.[28]

This qualified praise of the census pertains to a specific census data product: total-population figures in the Bureau's decennial redistricting data file. Unlike many data products (including the proposed CVAP product), the decennial redistricting data derive from a massive effort to enumerate every U.S. resident individually—the single largest civilian operation the federal government undertakes. [29] Because the resulting block-level counts are "reliable" and reflect real differences in the probable populations of any two given districts, [30] courts can examine the apparent deviations in a total-population-based map without worrying that the real deviations are likely very different. That is why courts, in judging total-population-based maps, are comfortable drawing minute mathematical distinctions with enormous legal significance.

Maps based on a less consistently reliable set of population data would not inspire such confidence. Unable to determine the true population deviations to

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27   *See* Karcher, 462 U.S. at 738 ("The census may systematically undercount population, and the rate of undercounting may vary from place to place."); Gaffney v. Cummings, 412 U.S. 735, 745 (1973) (noting that census population counts "are inherently less than absolutely accurate").

28   Karcher, 462 U.S. at 738 (internal quotation marks and citations omitted).

29   Robert Bernstein, *Temporary Workers Are Recruited for Address Canvassing*, U.S. CENSUS BUREAU (March 12, 2019), https://www.census.gov/library/stories/2019/03/2020-census-hiring-thousands-of-workers-ramps-up.html ("The hiring of hundreds of thousands of temporary workers for the 2020 Census – often described as the nation's largest civilian mobilization — is now underway.").

30   Karcher, 462 U.S. at 738.

an acceptable degree of certainty, courts would likely invalidate those maps so they could be redrawn based on "the best population data available."[31] Indeed, the Supreme Court has issued only one opinion upholding a map not based on total census population, and in that case, the alternative population base was acceptable only because of "special population problems" that made the state's census figures an unusually unreliable reflection of the *bona fide* resident population.[32]

Even if a state or local government could legally get away with redistricting based on data that are not consistently reliable at the block level, it should not want to. Equal representation for equal numbers of people is a basic principle of fairness. Taking this principle seriously means choosing a reliable population base to minimize the risk of severely diluting particular communities' representation through faulty data.

As long as total-population census figures are the only consistently reliable data on block-level population, those figures will be the sole appropriate basis for redistricting.

> 2. The Census Bureau cannot produce administrative-record-based CVAP data fit for use as a redistricting population base.

Administrative records will not enable the Census Bureau to produce CVAP statistics that are consistently reliable at the block level, no matter how many records the Bureau collects.

> a. *State administrative records are a poor source of individual citizenship information.*

Even if the Census Bureau collects a large volume of state administrative records, those records will be only minimally helpful in producing block-level CVAP statistics. State administrative data on individual citizenship status are notoriously riddled with errors and outdated information.

State departments of motor vehicles (DMVs)—which the Bureau is actively soliciting for administrative records, with mixed success[33]—illustrate the broader problems with state administrative recordkeeping on citizenship. Typically, DMV records reflect a person's citizenship status only as of the date the person applied for a driver license and was asked to provide proof of either

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[31]   *Id.* at 738.

[32]   Burns v. Richardson, 384 U.S. 73, 94-95 (1966).

[33]   *See* Hansi Lo Wang, *Nebraska Is 1st State To Share Driver's License Records With Census Bureau*, NPR (Nov. 20, 2019), https://www.npr.org/2019/11/20/781373128/nebraska-1st-to-say-it-will-share-drivers-license-records-with-census-bureau.

U.S. citizenship or lawful presence. If a non-U.S. citizen obtains a license and later naturalizes, the agency record is not updated until the person has reason to interact with the agency again—for example, when the license expires years later. In the long intervals between updates, these records misidentify naturalized U.S. citizens as non-U.S. citizens.

CLC identified this precise problem in Texas last year, when the state attempted to use stale driver license data to remove registered voters from its voter rolls on the theory that they were non-U.S. citizens. After Texas publicly announced that it had found nearly 100,000 non-U.S. citizens on its voter registration rolls, it quickly became clear that the vast majority of people Texas had identified were naturalized U.S. citizens who had obtained a driver license, later naturalized, and only then registered to vote. Because these individuals had not had any reason to interact with the Texas driver-license agency since becoming citizens, their driver-license records still indicated they were non-U.S. citizens. On behalf of clients including the League of United Latin American Citizens, CLC sued and obtained a preliminary injunction halting the voter purge on the basis that it discriminated against newly naturalized U.S. citizens.[34] Texas then agreed to settle the litigation.[35]

The Census Bureau appears to be aware that personal information in state administrative records is unreliable. Although the Bureau initially considered using state administrative records to enumerate certain households in the 2020 Census after a single failed nonresponse followup attempt, the Bureau later decided to use only "high-quality" *federal* records for that purpose.[36] As recently as September 2019, the Bureau indicated that it was considering foregoing any use of state administrative records as a source of citizenship data for the CVAP product.[37]

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[34]   *Victory! Court Saves Texas Voters from Purge*, CAMPAIGN LEGAL CTR. (Feb. 27, 2019), https://campaignlegal.org/press-releases/victory-court-saves-texas-voters-purge.

[35]   *CLC and Partners Settle with Texas to End Targeting of Naturalized Citizen Voters*, CAMPAIGN LEGAL CTR. (April 26, 2019), https://campaignlegal.org/press-releases/clc-and-partners-settle-texas-end-targeting-naturalized-citizen-voters.

[36]   Transcript of 2020 Census Program Management Review 52, U.S. CENSUS BUREAU (Aug. 3, 2018), https://www2.census.gov/programs-surveys/decennial/2020/program-management/pmr-materials/2018-08-03/pmr-transcript-2018-08-03.pdf; *see also* Supplemental Memorandum of Law in Further Support of Defendants' Motion to Dismiss at A-16, NAACP v. Bureau of the Census, No. 8:18-cv-00891-PWG (D. Md. Jan. 21, 2019), available at https://www.brennancenter.org/sites/default/files/legal-work/NAACPvCB_suppmemsupportMTD_%202019-01-21.pdf ("It is no longer the Census Bureau's plan to use state administrative records" to enumerate households.).

[37]   *See* John M. Abowd & Victoria Velkoff, *Update on Disclosure Avoidance and Administrative Data* 12, U.S. CENSUS BUREAU (Sept. 13, 2019), https://www2.census.gov/cac/sac/meetings/2019-09/update-disclosure-avoidance-administrative-data.pdf (CVAP "will be produced by combining administrative data from a number of federal, and *possibly* state, agencies") (emphasis added).

The Bureau now appears to be planning, at least tentatively, to use both state and federal administrative records in calculating each person's citizenship variable.[38] But using citizenship data from state administrative records will do little to enhance the reliability of the Bureau's CVAP statistics, because the quality of citizenship information held by state agencies is so low.

> b. *By using state and federal administrative records, the Census Bureau will produce only citizenship estimates with inconsistent reliability across geographic areas.*

Regardless of what combination of administrative records and other information it uses, the Census Bureau will not be able to produce a reliable CVAP count for each census block. Instead, the Bureau will *estimate* citizenship status for many U.S. residents, leading to inaccurate CVAP statistics for many blocks. Voting maps based on the Bureau's CVAP data will often result in districts with significantly *unequal* CVAP, adding an extra dimension of unfairness to the inherent injustice of CVAP-based redistricting.

> i. The Census Bureau cannot reliably determine each person's citizenship status.

To its credit, the Bureau has been candid about its inability to match each U.S. resident with a reliable record of her current citizenship status. The Bureau aims only to calculate a "citizenship probability" for every person counted in the 2020 Census, knowing that for many individuals, the probability of U.S. citizenship will be nowhere near zero or 100 percent.[39]

Under what appears to be the Bureau's current plan, the Bureau will attempt to attach a Protected Identification Key (PIK) to each person record in the 2020 Census by matching those census records with "reference files" of federal administrative data.[40] If—and only if—the Bureau is able to assign a PIK to an individual, it will link that individual's census record to state and federal administrative records that appear to relate to the same person. Following this linkage, the Bureau will mathematically model the person's citizenship probability, taking into account "the most current citizenship status from each

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[38]   *See Memorandum of Understanding Through Which the U.S. Census Bureau Is Acquiring Administrative Data from the Nebraska Department of Motor Vehicles* 11-12 (Nov. 7, 2019), available at https://www.documentcloud.org/documents/6555710-Nov-7-2019-Memo-of-Understanding-Between.html ("Nebraska MOU").

[39]   *See id.* at 11.

[40]   *Id.* The federal administrative records used to create references files apparently will include records from the Social Security Administration (SSA), the Internal Revenue Service (IRS), and the Department of Homeland Security (DHS). *See id.*; DHS Memo, *supra* note 17, at 4.

available citizenship source for the person, as well as the person's other demographic, household, and location information as explanatory variables."[41]

Meanwhile, the Bureau admits it will fail to assign PIKs to some U.S. residents who are counted in the 2020 Census.[42] In those cases, "the person's citizenship probability will be estimated without the benefit of information about his/her citizenship status," instead using "local area information and the person's demographic characteristics" as rough predictors of citizenship status.[43]

Once the Bureau has settled on a citizenship probability for each person in the 2020 Census, those probabilities will "be combined with age, race, ethnicity, and location information from the 2020 Census to produce the [CVAP] statistics."[44]

This plan is a recipe for unreliable CVAP data. Almost inevitably, the Census Bureau will impute the wrong citizenship status to so many individuals that its block-level CVAP figures will be vastly less accurate than its block-level total-population counts.

For individuals who are assigned PIKs, the Bureau will make an educated guess based on administrative data linked to the individual. As the Bureau recognizes, "no one source [of citizenship data] is complete and up-to-date."[45] Using more administrative data may marginally increase the probability of inferring an individual's correct citizenship, but uncertainty will remain—especially if the data being added are of low quality, like DMV records on citizenship.

The likelihood of error will be even greater for individuals without PIKs. By the Bureau's own admission, its proposed methodology will be "much less accurate" for individuals who are not assigned PIKs and therefore cannot be linked to any administrative records about their citizenship status.[46] The Bureau assumes that some significant proportion of individuals without PIKs are undocumented non-citizens, but admits that any attempt to determine how

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[41]   Nebraska MOU, *supra* note 38, at 11.
[42]   *Id.*
[43]   *Id.*
[44]   *Id.* It is not currently clear whether the Bureau will estimate CVAP at the block level by (1) multiplying the total population of the census block by the average of citizenship probabilities for all voting age citizens, or (2) simply tallying the number of voting age citizens who have U.S. citizenship probabilities greater than or equal to 50 percent. The Bureau should clarify this point publicly.
[45]   *Id.*
[46]   *Id.*

much of the non-PIK-assigned population fits this description will be "inherently inexact."[47]

> ii. The Census Bureau's errors in calculating citizenship probability will systematically disempower particular census blocks in CVAP-based redistricting.

If the Census Bureau's errors in calculating citizenship probability were randomly distributed across all census blocks, and if false positives for U.S. citizenship were as common as false negatives, then the errors might have little practical effect on redistricting. But that result is not what the Bureau's methodology will produce. The problem of U.S. citizens being erroneously treated as likely non-U.S. citizens will fall unequally on different census blocks, for at least three major reasons.

First, some geographic areas will have a higher percentage of individuals assigned PIKs than others. For example, some blocks will be populated disproportionately by individuals who currently pay federal income taxes. These blocks will probably have high rates of individuals being assigned PIKs, because the Census Bureau is relatively likely to be able to link these recent federal taxpayers to their Social Security Number (SSN) or Individual Taxpayer Identification Number (ITIN).

By contrast, other blocks will have concentrations of residents who cannot easily be linked to the Census Bureau's reference files—for example, U.S. citizens from birth who have no SSN or U.S. passport[48]; certain undocumented immigrants [49]; and individuals of any citizenship status who have used multiple names or otherwise changed their personally identifying information.[50] These blocks will have fewer PIKs per capita, which means their CVAP statistics will be disproportionately based on statistical averages and assumptions, rather than direct evidence of citizenship status. When the Bureau significantly underestimates the U.S. citizen proportion of the non-PIK-assigned population—as it inevitably sometimes will—the block will be stuck with an unrealistically low CVAP statistic.

Second, blocks with higher concentrations of foreign-born residents will tend to have more U.S. citizens who, despite being assigned PIKs, are vulnerable to being mischaracterized as likely non-U.S. citizens based on outdated

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[47] J. David Brown et al., *Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census* 19-20, U.S. CENSUS BUREAU (August 2018), https://www2.census.gov/ces/wp/2018/CES-WP-18-38.pdf.

[48] *Id.* at 19.

[49] *Id.*

[50] *See id.*; Nebraska MOU, *supra* note 38, at 11.

administrative records. A significant number of naturalized U.S. citizens do not have their current citizenship reflected in the SSA records that form the core of the Census Bureau's reference files.[51] Adding naturalization records from DHS is only a partial solution to the problem of outdated federal citizenship records, as those naturalization records are incomplete.[52] The Bureau will therefore turn to state administrative records to supplement the incomplete federal data on individuals' citizenship status. As discussed above, administrative records from DMVs and other state agencies are systematically out-of-date and characterize many naturalized U.S. citizens as non-U.S. citizens. To the extent the Bureau factors these records into its citizenship probability calculations, it will underestimate the number of naturalized U.S. citizens, deflating the CVAP statistics for blocks with disproportionately foreign-born populations.

Third, the Bureau's plan to use "explanatory variables" other than direct evidence of citizenship status may add troubling biases to the CVAP statistics. As already noted, the Bureau intends to model citizenship probability for PIK-assigned individuals by combining indications of citizenship status from administrative records with "the person's other demographic, household, and location information as explanatory variables."[53] For individuals not assigned PIKs, the Bureau will rely even more heavily on "local area information and the person's demographic characteristics" to impute citizenship probability.[54]

The Bureau has published little information about how it plans to weigh different "explanatory variables" against one another in calculating citizenship probability. However, this much is clear: whenever the Bureau uses factors such as race, Hispanic origin, sex, age, geographic location, or living arrangement to help determine a person's likely citizenship status, it risks subjecting that person to a quasi-scientific form of demographic profiling. Especially in the case of race or ethnicity, using group-level averages to infer individual citizenship probability raises profound ethical and constitutional concerns, even if the Bureau does so based on a good-faith belief that the averages have predictive value.[55] More to the point, this practice of assuming

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[51]   *See* DHS Memo, *supra* note 17, at 11-12 ("The SSA Numident contains citizenship status for most of the population but the information is not always up to date for foreign-born persons. Prior to the 1970s people were not required to provide evidence of citizenship status when applying for an SSN. Thus, the citizenship status is blank for many older people in the Numident.").

[52]   *See id.* at 12 ("Individuals who derive citizenship when their parent(s) naturalize also may choose to not obtain a citizenship certificate from [U.S. Citizenship and Immigration Services] but rather apply for an SSN or a passport to establish proof of citizenship.").

[53]   Nebraska MOU, *supra* note 38, at 11.

[54]   *Id.*

[55]   As a constitutional matter, government action that treats individuals differently based on race or ethnicity is subject to strict judicial scrutiny, even when the purpose is to use race or ethnicity as a statistical predictor of some other relevant trait. *See Cooper v. Harris*, 137 S.

that individual citizenship status tracks broad demographic trends will lead to many false negatives for U.S. citizenship, and those false negatives will be concentrated in certain census blocks because of the demographics of the local community.

Overall, the Bureau's plans will result in CVAP statistics that significantly underestimate the CVAP of some census blocks, while roughly approximating or overestimating the CVAP of other blocks. For this reason, redistricting plans based on these CVAP data would result in districts with unequal CVAP as well as unequal total population. The Bureau's proposed use of unreliable state administrative records on citizenship status is part of the problem, not a potential solution.

> 3. <u>Disclosure avoidance imposes an additional limit on the reliability of the CVAP data the Bureau can report.</u>

In addition to the data-quality problems discussed above, another factor will prevent the Census Bureau from publishing CVAP data reliable enough for use as a redistricting population base: the Bureau's need to add statistical noise to control the risk of census data being used to reconstruct individuals' private information.

Federal law strictly prohibits the Census Bureau from disclosing personally identifiable information that the Bureau has acquired for statistical purposes. [56] However, publishing aggregated statistics about a population always creates some risk that actors outside the Bureau will use those statistics to infer information about individual members of the population. This risk increases with the level of publicly known detail about the population's traits.

To reduce the probability that individuals will be reconnected with their personal information based on published census data, the Bureau follows procedures known as "disclosure avoidance." Specifically, the Bureau infuses many data products with extra statistical uncertainty, or "noise," before publishing them.[57] For the 2020 Census, the Bureau will adopt a "privacy-loss budget" limiting the total risk to personal privacy associated with all 2020

Ct. 1455, 1473 n.7 (2017) ("[T]he sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics.").

[56]   *See* 13 U.S.C. § 9(a).

[57]   *See* John M. Abowd, *Protecting the Confidentiality of America's Statistics: Ensuring Confidentiality and Fitness-for-Use*, U.S. CENSUS BUREAU (Sept. 4, 2018), https://www.census.gov/newsroom/blogs/research-matters/2018/08/protecting_the_confi0.html.

Census data products.[58] Because the total privacy-loss budget will be finite, every additional 2020 Census data product that the Bureau publishes will negatively affect the accuracy of other data that the Bureau can afford to publish.

Although the Bureau has not announced a final privacy-loss budget for the 2020 Census, it has long acknowledged that the budget will be sufficiently scarce to force some meaningful tradeoffs between protecting personal privacy and publishing data precise enough to serve the needs of data users.[59] The Bureau recently illustrated these tradeoffs by publishing a set of demonstration products, consisting of 2010 Census data with the Bureau's current "differential privacy" techniques applied. [60] The demonstration products do not include CVAP or any other citizenship data. Yet, even without expending any privacy-loss budget on CVAP, the demonstration products revealed points of tension between accuracy and privacy. Notably, the demonstration products showed that even if no CVAP data were published, disclosure avoidance might compromise the fitness of census data for use in some aspects of redistricting and voting rights litigation.[61]

Given the scarcity of privacy-loss budget it would face *without* publishing block-level CVAP, the Bureau will need to impose a tight cap on the amount of privacy risk associated with the CVAP product, or else severely damage the usefulness of more important census data products. The Bureau's only responsible choice will be to infuse a high level of noise into the published CVAP data (or cancel the publication of CVAP altogether). By intentionally adding extra error to the CVAP data, the Bureau will render those data even less suitable for use as a redistricting population base than they otherwise would be.

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[58]   *See* Memorandum from Albert E. Fontenot, Jr. for the Record, 2010 Demonstration Data Products - Design Parameters and Global Privacy-Loss Budget 1, U.S. CENSUS BUREAU (Oct. 31, 2019), https://www2.census.gov/programs-surveys/decennial/2020/program-management/memo-series/2020-memo-2019_25.pdf.

[59]   *See* Abowd, *Protecting the Confidentiality of America's Statistics*, *supra* note 57.

[60]   *See 2010 Demonstration Data Products*, U.S. CENSUS BUREAU (last revised Dec. 19, 2019), https://www.census.gov/programs-surveys/decennial-census/2020-census/planning-management/2020-census-data-products/2010-demonstration-data-products.html.

[61]   *See* Justin Levitt, Presentation at Workshop on 2020 Census Data Products: Data Needs and Privacy Considerations at 11:55-14:20, NAT'L ACADEMIES OF SCIENCES, ENGINEERING & MEDICINE, COMM. ON NAT'L STATISTICS (Dec. 11, 2019), available at https://sites.nationalacademies.org/DBASSE/CNSTAT/DBASSE_196518 (describing potential adverse impact of differential privacy on census data's fitness for use in detecting racially polarized voting to assess compliance with the VRA).

B. The Bureau's effort to collect individual citizenship information from the states contributes to fear of the 2020 Census.

While the expanded collection of state administrative records to facilitate production of CVAP data will have little benefit, it will likely come at a steep cost. As public awareness of this data collection spreads, it will heighten fear of the Census Bureau among non-U.S. citizens and their communities, interfering with the government's constitutional duty to conduct an "actual enumeration" of the population.[62]

Fear that the Census Bureau might share personal information with other entities, including law enforcement agencies, makes many U.S. residents reluctant to respond to census questionnaires. In a Bureau-commissioned survey conducted in 2018, 22 percent of all respondents, and 34 percent of those born outside the U.S., said they were "extremely concerned" or "very concerned" that their responses to the 2020 Census would be used against them.[63] A related focus-group study identified "confidentiality and privacy concerns" as one of the five primary barriers to participation in the 2020 Census, noting that participants "expressed concern that the government would share their information with other agencies."[64]

The Commerce Department's failed attempt to add a citizenship question to the 2020 Census has heightened this fear. More than six months after the government conceded that the citizenship question would not be on the questionnaire, rumors about the use of 2020 Census responses for immigration enforcement still linger, making it difficult for the Bureau and its partners to persuade non-U.S. citizens and members of mixed-status households to self-respond to the census.[65]

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[62]   U.S. CONST. art. I, § 2, cl. 3.

[63]   *2020 Census Barriers, Attitudes, and Motivators Study Survey Report* 46, U.S. CENSUS BUREAU (Jan. 24, 2019), https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2020-report-cbams-study-survey.pdf.

[64]   *2020 Census Barriers, Attitudes, and Motivators Study (CBAMS) Focus Group Final Report* ix, U.S. CENSUS BUREAU (Jan. 24, 2019), https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2020-report-cbams-focus-group.pdf.

[65]   *See* House Committee on Oversight and Reform, *Reaching Hard-to-Count Communities in the 2020 Census* at 37:50-38:40, YOUTUBE (Jan. 9, 2020), https://www.youtube.com/watch?v=gyzDR9J_Kr8&feature=emb_title (John C. Yang, President and Executive Director of Asian Americans Advancing Justice, testifying that, despite the citizenship question not appearing on the census, "we know that damage has been done" including "significant confusion and distrust about the Administration's intent"); Suzie Wiley, *The 2020 census is happening: What you need to know*, KING 5 NEWS (Jan. 7, 2020), https://www.king5.com/article/entertainment/television/programs/new-day-northwest/census-2020-count-bureau-constitution-immigration-federal-funding/281-62324113-44b1-487c-8574-

These rumors persist in part because the Census Bureau continues to garner news coverage of its efforts to collect information on individuals' citizenship status. The Bureau's recent agreement to acquire DMV records from Nebraska attracted extensive publicity,[66] as did DHS's announcement that it would share data with the Bureau.[67] If the Bureau continues to collect citizenship data from more sources, more news stories will follow.

Every headline that directly or indirectly suggests a connection between the 2020 Census and immigration enforcement can only make it harder and more expensive for the Bureau to count every U.S. resident. As the first enumerations of 2020 begin, the Bureau should be able to focus on the unavoidable challenges it faces, such as fighting cybersecurity threats, hiring hundreds of thousands of field workers, and deploying new mobile questionnaire assistance centers. The Bureau should not make the task of encouraging self-response any more difficult than it needs to be, especially when the benefit of collecting citizenship data from the states is minimal.

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b4482c67c414 ("Despite earlier reports, the census will not include questions about citizenship status. There is still the concern among some civil rights groups that the rumor could keep some from avoiding the census altogether, leading to an inaccurate count in some communities.").

[66] *See, e.g.*, Alex Whitney, *Nebraska only state to share DMV info with Census Bureau*, NTV NEWS (Nov. 26, 2019), https://nebraska.tv/news/local/nebraska-only-state-to-share-dmv-info-with-census-bureau; Mike Schneider & Grant Schulte, *Nebraska is 1st to share drivers' records with Census Bureau*, ASSOCIATED PRESS (Nov. 20, 2019), https://apnews.com/c28edda27c514bbf874de0508e076ad0; Elliott Hannon, *Nebraska's the First State to Hand Over DMV Data for Trump's Citizenship Status Effort*, SLATE (Nov. 21, 2019), https://slate.com/news-and-politics/2019/11/nebraska-first-state-drivers-license-dmv-personal-data-citizenship-census.html; Jake Wasikowski, *Some Nebraskans concerned over Neb. DMV giving info to U.S. Census*, KMTV NEWS NOW OMAHA (Dec. 3, 2019), https://www.3newsnow.com/news/local-news/some-nebraskans-concerned-over-neb-dmv-giving-info-to-u-s-census; Hansi Lo Wang, *Nebraska Is 1st State To Share Driver's License Records With Census Bureau*, NPR (Nov. 20, 2019), https://www.npr.org/2019/11/20/781373128/nebraska-1st-to-say-it-will-share-drivers-license-records-with-census-bureau.

[67] *See, e.g.*, Gregory Wallace, *Homeland Security department to provide individual citizenship data to census*, CNN (Jan. 7, 2020), https://www.cnn.com/2020/01/07/politics/census-homeland-security/index.html; Hansi Lo Wang, *To Produce Citizenship Data, Homeland Security To Share Records With Census*, NPR (Jan. 4, 2020), https://www.npr.org/2020/01/04/793325772/to-produce-citizenship-data-homeland-security-to-share-records-with-census; Rebecca Klar, *DHS to share citizenship data with Census Bureau in wake of court decision*, THE HILL (Jan. 6, 2020), https://thehill.com/homenews/administration/476950-dhs-sharing-citizenship-data-with-census-in-wake-of-court-decision.

III.   <u>Conclusion</u>

The Census Bureau's expansion of its request for state administrative records to facilitate the production of CVAP data is ill advised. To the extent that the Bureau is trying to create CVAP statistics fit for use as a redistricting population base, that effort is futile, regardless of how many state administrative records the Bureau obtains. In collecting these records, the Bureau will likely hinder the overall success of the 2020 Census by stoking fears of a connection between the census and immigration enforcement.

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Respectfully submitted,

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