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Interagency Technical Working Group on Race and Ethnicity Standards
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Re: Comment in Response to Office of Management and Budget (OMB) Initial Proposals for Updating OMB's Race and Ethnicity Statistical Standards

To the Interagency Technical Working Group on Race and Ethnicity Standards:

On behalf of Campaign Legal Center (“CLC”), we are pleased to offer this comment in response to the Federal Register notice published January 27, 2023, concerning the Office of Management and Budget’s plans for revising the 1997 Statistical Policy Directive No. 15: Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity (SPD 15).¹

CLC is a nonpartisan, nonprofit organization dedicated to advancing democracy through law. Through our extensive work on redistricting and the decennial census, CLC seeks to ensure that every United States resident receives fair legislative representation at the federal, state, and local levels. CLC supports the Working Group’s efforts to update and improve the quality of race and ethnicity data collected by the federal government based on rigorous evidence and broad public feedback. We write to highlight the importance of race and ethnicity data in the enforcement of laws barring racial discrimination in the electoral process, including the federal Voting Rights Act of 1965 and similar laws at the state and local level.

Our comments focus on two specific reforms proposed by the Working Group: (1) the proposal to add a minimum reporting category for people of “Middle Eastern or North African” (MENA) descent on census and other federal forms, and (2) the

¹ Initial Proposals for Updating OMB's Race and Ethnicity Statistical Standards, 88 Fed. Reg. 5375 (Jan. 27, 2023).

proposal to collect race and ethnicity data using one combined question. CLC fully supports the addition of MENA as a new distinct minimum reporting category. We are also optimistic that a combined race and ethnicity question can reduce confusion and more accurately capture racial or ethnic groups that face discrimination; however, before adopting such a proposal, we urge OMB and the Census Bureau to conduct further research on whether and under what circumstances a combined question may lead to undercounts of certain racial or ethnic subgroups.

I. Accurate Race and Ethnicity Data is Necessary to Ensure that All Americans Are Provided Fair Representation and Equal Access to the Democratic Process.

Accurate data on the racial and ethnic composition of the United States is essential for ensuring compliance with federal and state laws guaranteeing fair representation and equal voting rights. Data from the decennial Census and the American Community Survey (ACS), in particular, is frequently used for this purpose by all stakeholders in the electoral process, including redistricting authorities, election administrators, community organizations, voting rights advocates, and the courts.

As an initial matter, data from the decennial Census and the ACS is the starting point for the redistricting process at the state and local levels. Every decade, the Census Bureau sends to each state a set of detailed population counts known as the redistricting or P.L. 94-171 file, which includes, among other things, data on race and Hispanic origin at the census block level.² Estimates of citizen voting age population by race and Hispanic origin at the block level are provided in the ACS. Redistricting authorities in each state use these data sources to draw congressional and state legislative redistricting plans, as well as plans for county and city councils, school boards, and other governing bodies.

Race and ethnicity data from the Census and ACS is the principal dataset used to comply with Section 2 of the federal Voting Rights Act of 1965 (VRA), which prohibits any voting practice or procedure, including a redistricting plan, that results in a denial or abridgement of the right to vote based on race, color, or membership in a language minority group.³ Section 2 may require a state or locality to draw one or more districts that provide a particular racial or ethnic minority an opportunity to elect their preferred candidates—often, but not always, these are “majority-minority” districts where the protected racial or ethnic group comprises the voting majority.⁴ The VRA only requires such districts if three preconditions are met: (i) the minority

² See 13 U.S.C.A. § 141; U.S. Census Bureau, *Decennial Census P.L. 94-171 Redistricting Data* (Sept. 16, 2021), <https://www.census.gov/programs-surveys/decennial-census/about/rdo/summary-files.html>.

³ 52 U.S.C. § 10301.

⁴ *Cooper v. Harris*, 581 U.S. 285, 301 (2017).

group is sufficiently large and geographically compact to form a majority in a district, (ii) the minority group is politically cohesive, and (iii) the minority’s preferred candidates⁵. Plaintiffs challenging a failure to draw a district required by the VRA must also show that the challenged plan improperly dilutes the minority group’s voting power, based on the “totality of the circumstances,” including an assessment of whether there is a history of discrimination against the group and whether “past discrimination in the form of present-day socioeconomic disparities.”⁷

The factors used to determine VRA compliance rely on access to data that accurately captures each and every racial or ethnic group that may be entitled to protection under Section 2, including their voting-age and estimated citizen voting-age populations at the block or precinct level (as reported by the decennial Census and ACS) and their performance on various socioeconomic indicators (as reported by ACS).

Census race and ethnicity data is also needed to comply with state redistricting laws mandating racial equity and respect for communities of interest. Several states have statutes and constitutional provisions that protect voters from racial vote dilution independent from the federal VRA.⁸ And at least 20 states require redistricting authorities to draw electoral districts in a manner that preserves communities of interest (COIs).⁹ COIs are groups that would benefit from cohesive representation in the legislature because of shared legislative concerns and include ethnic communities with shared traditions, cultures, languages, and religions.¹⁰ Detailed race and ethnicity subgroup data are especially useful for identifying COIs and their precise geographic boundaries.

Apart from the redistricting process, Census race and ethnicity data is also vital for assessing whether election rules and procedures comply with laws barring vote suppression and denial, such as the Fourteenth Amendment to the U.S. Constitution, the federal VRA, and similar state and local laws. These laws require

⁵ *Thornburg v. Gingles*, 478 U.S. 30 (1986).

⁷ *Id.* at 48-49.

⁸ See, e.g., Colo. Const. art. IV, § 44.3(4)(b) and art. V, § 44.3(4)(b) (prohibiting racial vote dilution separate from the federal VRA); Mo. Const. art. III, § 3(b)(2) (same). Five states have also established state-level voting rights acts prohibiting racial vote dilution in local governments and school districts: California, Washington, Oregon, Virginia, and New York. See Cal. Elec. Code § 14025; Wash. Rev. Code § 29A.92.005; Or. Rev. Stat. Ann. § 255.400; Va. Code Ann. § 24.2-125; N.Y. Elec. Law § 17-200.

⁹ See *Redistricting Criteria*, Nat’l Conf. State Legislatures (July 16, 2021), <https://www.ncsl.org/research/redistricting/redistricting-criteria.aspx>. See also *Carstens v. Lamm*, 543 F. Supp. 68, 91 (D. Colo. 1982) (“[A] plan which provides fair and effective representation . . . must identify and respect the most important communities of interest in the state.”).

¹⁰ Brennan Center for Justice, *Communities of Interest* (Nov. 2010), <https://www.brennancenter.org/sites/default/files/analysis/6%20Communities%20of%20Interest.pdf>.

policymakers and election administrators to consider, among other things, whether their voting rules or procedures place disparate burdens on any racial or ethnic group's ability to cast a ballot. For example, election administrators weighing the closure, relocation, or consolidation of polling places or ballot drop boxes should examine whether their actions would disproportionately hinder a racial or ethnic group's ballot access. This analysis often depends on accurate Census and ACS data showing the geographic distribution of all potentially impacted racial and ethnic groups in the area, and the socioeconomic realities affecting their respective opportunities to vote. When election administrators fail to regulate themselves, communities depend on this data to advocate for more equitable election rules in courts¹¹ and legislatures.¹²

Finally, race and ethnicity data from the ACS is also important for identifying jurisdictions that must provide election-related language assistance under Section 203 of the federal VRA. The federal VRA defines "language minority groups" as persons who are American Indian, Asian American, Alaska Native, or of Hispanic origin.¹³ If eligible voters from these language minority groups with limited English proficiency meet a certain population threshold in a state, county, or county subdivision, then that jurisdiction must provide language assistance during elections to those groups.¹⁴ The Census Bureau must make these calculations every five years based on ACS language ability and race/ethnicity data.¹⁵ Given the need to calculate population thresholds for ethnic groups with significant language diversity, accurate subgroup data is important, especially for Asian American subgroups and Latino/Hispanic ethnic subgroups that may speak languages other than Spanish (e.g., Latinos of indigenous origin).

In short, the health and protection of American democracy depends on race and ethnicity data that accounts for all of the racial and ethnic groups that may be entitled to legal remedies for violations of federal and state voting rights laws. This data is necessary to uncover and remedy unlawful racial disparities in political representation and voting access.

When a racial or ethnic group is severely undercounted, it can be difficult or impossible for that group to understand its share of the electorate, identify socioeconomic factors bearing on its members' ability to participate in the democratic

¹¹ *E.g.*, Campaign Legal Center, *Victory! Early Voting Site Will Be Established on Arizona Tribe's Reservation* (Aug. 16, 2021), <https://campaignlegal.org/update/victory-early-voting-site-will-be-established-arizona-tribes-reservation>.

¹² Campaign Legal Center, *Community Preclearance: Advocacy Tools for In-Person Voting*, <https://campaignlegal.org/document/community-preclearance-advocacy-tools-person-voting>.

¹³ 52 U.S.C. § 10503(e).

¹⁴ 52 U.S.C. § 10503(b)(1)-(2); *see also* Census Bureau, *Section 203 Language Provisions of the Voting Rights Act* (Dec. 28, 2022),

¹⁵ 52 U.S.C. § 10503(b)(2)(A).

process, and ultimately determine whether its members have been deprived of fair representation or equal access to the ballot in violation of federal or state law. Undercounts, in other words, tend to make voting rights less effectively enforceable.

II. OMB Should Add “Middle Eastern or North African” (MENA) as a Minimum Reporting Category to Enable MENA Americans Obscured by Current Race and Ethnicity Questions to Protect Their Voting Rights.

The Working Group has proposed adding a minimum reporting category for Americans of “Middle Eastern or North African” (MENA) descent. CLC supports this proposal. Existing Census race and ethnicity questions have failed to provide MENA Americans a standard way to report their shared identity distinct from white Americans. As a result, MENA Americans have faced substantial challenges advocating for MENA representation in state and local legislatures, equal ballot access, and election-related language assistance.

The current Census race and ethnicity questions instruct respondents to mark “White” if they have origins among any of the original peoples of the Middle East or North Africa.¹⁶ But large-scale research conducted by the Census Bureau shortly after the 2010 Census suggests that many MENA respondents view their identity as distinct from “White” and mark “Some Other Race” (SOR) on federal forms, sometimes specifying their identity in the free response field and sometimes not.¹⁷ As a result, the MENA population in the United States has been severely undercounted. For example, while the Census Bureau estimates the number of Arab Americans in the United States at 2.1 million, the Arab American Institute finds the total is likely closer to 3.7 million.¹⁸ The Arab American Institute and other organizations have been advocating for more than 30 years to add MENA as a minimum response category on the Census and federal forms.¹⁹

The undercount of MENA populations has limited MENA communities’ ability to advocate for themselves in redistricting processes, particularly in Michigan,

¹⁶ Initial Proposals for Updating OMB’s Race and Ethnicity Statistical Standards, 88 Fed. Reg. 5375 (Jan. 27, 2023).

¹⁷ See, e.g., Elizabeth Compton, et al., *2010 Census Race and Hispanic Origin Alternative Questionnaire Experiment*, at 126 (Feb. 28, 2013), https://www.census.gov/content/dam/Census/library/publications/2013/dec/2010_cpex_211.pdf.

¹⁸ Arab American Institute, *Ensuring a Fair and Accurate Count in the 2020 Census*, https://static1.squarespace.com/static/5c96c17de5f7d145081a1f94/t/5d5f0a721aabda00017d6163/1566509682639/2019LD_Census_Issue_Brief.pdf; Sarah Jonny, *The Erasure of Middle Eastern and North African Immigrants from the American Narrative: A Case for Adding a MENA Category to the U.S. Census*, 35 Geo. Immgr. L. J. 1009, 1012 (2021),

¹⁹ Hephzibah V. Strmic-Pawl, Brandon A. Jackson & Steve Garner, *Race Counts: Racial and Ethnic Data on the U.S. Census and the Implications for Tracking Inequality*, 4(1) *Sociology of Race and Ethnicity* 1, 5 (2018); Jonny, *supra* note 18 at 1011-12.

California and New York where they have a large demographic presence.²⁰ For example, in Michigan, the state constitution required the state's independent redistricting commission to consider "the state's diverse population and communities of interest" in drawing legislative and congressional districts in addition to complying with the federal VRA.²¹ The state's constitution defines communities of interest as "populations that share cultural or historical characteristics or economic interests,"²² which should include Michigan's substantial MENA population. However, the lack of accurate data on where exactly MENA individuals live made it needlessly difficult for the Commission and advocates to identify and keep MENA neighborhoods intact in legislative and congressional districts. To fill holes in Census race and national origin data, the Commission had to rely on public testimony and "hand-drawn" COI maps submitted to an online comment portal to try to ascertain where MENA voters live in the state.²³

CLC supports the Working Group's proposal to add MENA as a minimum reporting category. This change would allow MENA Americans to identify and address forces that have population-level impacts on their communities, including redistricting and other decisions that impact their ability to participate collectively in the democratic process. Accurate counts of MENA voters will facilitate advocacy for voting districts that respect MENA communities of interest, accessible voting procedures, and language assistance for limited English proficiency Arabic speakers.

We are not aware of any potential adverse consequences to including MENA as a minimum reporting category. Nor can we foresee negative impacts on other racial or ethnic communities. Indeed, in the Census Bureau's 2015 National Content Test, researchers testing a separate MENA category found that its inclusion significantly decreased the overall percentage of respondents reporting as SOR or White, did not affect the item nonresponse rate, and helped MENA respondents to find and report their identities more accurately.²⁴

CLC takes no position on the precise form, wording, or placement of the MENA response category in the race and ethnicity question set. We encourage the Working

²⁰ Arab American Institute, *National Arab American Demographics*, <https://www.aaiusa.org/demographics> (stating that one-third of the U.S. MENA population lives in the metropolitan areas of Detroit, Los Angeles, and New York City).

²¹ Mich. Const. art. IV, § 6(13).

²² *Id.* § 6(13)(c).

²³ See Mich. Indep. Citizens Redistricting Comm'n, *MI Redistricting Public Comment Portal*, <https://www.michigan-mapping.org/>.

²⁴ U.S. Census Bureau, *2015 National Content Test Race and Ethnicity Analysis Report: A New Design for the 21st Century*, at xiii (Feb. 28, 2017), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2015nct-race-ethnicity-analysis.pdf> ("2015 National Content Test Report").

Group and OMB to continue engaging with a diverse cross-section of the MENA community to vet and test different options.

III. The Use of a Combined Race and Ethnicity Question Holds Promise, But OMB and the Census Bureau Should Study Whether and Under What Circumstances a Combined Question May Undercount Certain Racial or Ethnic Subgroups.

The Working Group has also proposed collecting race and ethnicity data using one combined question. Existing policy requires federal agencies to a two-question format: first asking whether someone is of “Hispanic, Latino, or Spanish origin” and then asking respondents to select one or more of five race categories, (i) White; (ii) Black or African American; (iii) American Indian or Alaskan Native; (iv) Asian; or (v) Native Hawaiian or Other Pacific Islander. The Census and ACS are required by law to also include a “Some Other Race” (SOR) category.

CLC recognizes that a combined race and ethnicity question presents many benefits over the current two-question policy. Research shows that Latinos²⁵ find it much easier to find themselves among race and ethnicity categories in a combined question format.²⁶ When the Census Bureau tested combined question formats in 2015, “Hispanic respondents identified Hispanic alone at significantly higher rates when responding to the combined question formats compared to the Separate Question format.”²⁷

Evidence also suggests that many Hispanic and other respondents may find the distinction between race and ethnicity confusing and may not think of their race and ethnicity as distinct.²⁸ Indeed, in 2010 and 2020, SOR was the third largest race category largely because Hispanics who did not identify with any OMB race categories instead marked SOR.²⁹ The combined question format has been shown to significantly reduce the number and proportion of SOR responses. According to the Census Bureau’s 2015 National Content Test, 10% of respondents marked SOR in the separate question format while only 1-1.3% of respondents marked SOR in the tested

²⁵ This comment uses the terms Hispanic and Latino interchangeably, and both are intended to include “Hispanic, Latino, or Spanish origin” respondents.

²⁶ 2015 National Content Test Report, *supra* note 24 at 82-83.

²⁷ *Id.* at 83.

²⁸ Kim Parker, et al., *Multiracial in America, Chapter 7: The Many Dimensions of Hispanic Racial Identity* (June 11, 2015), <https://www.pewresearch.org/social-trends/2015/06/11/chapter-7-the-many-dimensions-of-hispanic-racial-identity/#fn-20730-55>.

²⁹ 2015 National Content Test Report, *supra* note 24 at ix.

combined question formats.³⁰ Nonresponse to the combined question was also lower than nonresponse to the separate race question.³¹

Given these findings, CLC is optimistic that merging the race and ethnicity questions and encouraging people to select as many categories as applicable can lead to more detailed self-identification, fewer people selecting SOR, and fewer people skipping the question altogether. This will lead to a more accurate count of racial and ethnic communities that face discrimination and help them enforce their voting rights and achieve other civil rights goals. CLC recognizes that improved accuracy also depends on other aspects of question design, like the available response categories, instruction wording, question terminology, and the medium used to elicit responses (paper, electronic, etc.). Thus, we encourage the Working Group to continue exploring how these factors and the choice of free response versus check boxes for subgroups interacts with SOR identification and nonresponse rates.

CLC also encourages OMB to conduct further study of the impact of a combined question format on potential undercounts of racial and ethnic subgroups before landing on a final proposal. Legal scholars and demographers have raised credible concerns that a combined question format may lead to undercounts of Afro-Latinos and other Americans with African ancestry.³² According to the Pew Research Center, there were about 6 million Afro-Latinos adults in the United States in 2020, accounting for 12% of Hispanic adults.³³ A prior 2014 Pew survey using a different question format found Afro-Latinos accounted for 24% of Hispanic adults. Both Pew surveys asked Latinos directly about Afro Latino identity, yielding a higher share of respondents who identified as Afro-Latino than as Hispanic and Black in the Census Bureau's two-question format.³⁴ Many American Latinos with Caribbean roots are likely to identify as Afro-Latino or Afro-Caribbean when prompted,³⁵ and it is unclear what effect a combined question format will have on this community.

³⁰ *Id.* at 285.

³¹ *Id.*

³² Tanya Kateri Hernández, *The new census proposal may likely undercount Black people by ignoring Afro-Latinos. We can't let that happen.*, The Grio (Mar. 16, 2023), <https://thegrio.com/2023/03/16/the-new-census-proposal-may-likely-undercount-black-people-by-ignoring-afro-latinos-we-cant-let-that-happen>. See generally Howard Hogan, *Do Race and Color Still Matter? – Considerations on the Combined Question* (Dec. 20, 2022), <https://static1.squarespace.com/static/63e409a2024c2f1c2e88c04f/t/63f7aeed0d79fc1cf0f7758c/1677176558274/Memo+Final+Hogan+December+2022.pdf>.

³³ Ana Gonzalez-Barrera, *About 6 million U.S. adults identify as Afro-Latino*, Pew Research Center (May 2, 2022), <https://www.pewresearch.org/fact-tank/2022/05/02/about-6-million-u-s-adults-identify-as-afro-latino/>.

³⁴ *Id.*

³⁵ Gustavo Lopez & Ana Gonzalez-Barrera, *Afro-Latino: A deeply rooted identity among U.S. Hispanics*, Pew Research Center (Mar. 1, 2016), <https://www.pewresearch.org/fact-tank/2016/03/01/afro-latino-a-deeply-rooted-identity-among-u-s-hispanics>. See also C. Alison Newby & Dowling, *Black and*

Given that undercounts can undermine effective enforcement of voting and civil rights, CLC encourages the Working Group to investigate whether and under what circumstances a combined question format may lead to undercounts of Afro-Latinos and other subgroups that may not consistently identify with the same minimum reporting category. The Working Group and relevant agencies should also look into how other question design variables may interact with the combined question format to mitigate potential subgroup undercounts, including the possibility of adding more minimum reporting categories. More specifically, we suggest the Working Group investigate whether adding “Afro-Latino” as a new checkbox or subgroup suggestion would help Afro-Latino Americans more easily find and report their identity(ies). This research should be conducted without delay in regions with significant Afro-Latino populations, such as California, Florida, and New York,³⁶ and in close collaboration with scholars and organizations who work with and in these communities.

Finally, CLC requests that the Working Group consider the impact of a combined question format on how responses are coded and presented in the P.L. 94-171 Summary File provided to redistricting authorities after the decennial census. The P.L. 94-171 file should enable users of that data to count racial or ethnic subgroups that may fit within more than one minimum reporting category (e.g., Afro-Latinos) in the category(ies) of their choice. Furthermore, if a combined question is adopted, OMB and the Census Bureau should provide users with crosswalks and guidance on comparing data collected under the new and old question formats.

IV. Conclusion

The proposed updates to SPD 15, and by extension the U.S. Census and American Community Survey, present an opportunity to improve the quality of race and ethnicity data collected by the federal government. This data is crucial to ensuring access to our democratic process. CLC fully supports the addition of MENA as a new distinct minimum reporting category and encourages continued research on the use of a combined race and ethnicity question.

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Hispanic: The Racial Identification of Afro-Cuban Immigrants in the Southwest, 50(3) Sociological Perspectives 343 (2007).

³⁶ Unidos US, *Fact Sheet: Afro-Latinos in 2017: A Demographic and Socio-Economic Snapshot* (Feb. 2019), https://unidosus.org/wp-content/uploads/2021/07/AfroLatino_22219_v2.pdf.

Respectfully submitted,

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