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Revisiting the Census Citizenship Question: A 2019 Amicus Brief and the Continuing Battle Over Who Counts

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**Revisiting the Census Citizenship Question:**  
**A 2019 Amicus Brief and the Continuing**  
**Battle Over Who Counts**

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We are grateful to the Asian Pacific American Law Journal for publishing the accompanying amicus brief the Korematsu Center filed in support of a challenge to the inclusion of a citizenship question on the Census, described *infra*. This Introduction contextualizes the 2019 amicus brief and highlights the continuing importance of this issue. This is part of a broader advocacy project on the Census, undertaken under the supervision of Professor Annie Lai and Korematsu Center Director Shaleen Shanbhag, and including an additional student team member, Kevin Valero.

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## I. INTRODUCTION: THE U.S. CENSUS, APPORTIONMENT, AND CONTEMPORARY EXCLUSION EFFORTS

In August 2025, President Trump announced that he had “instructed our Department of Commerce to immediately begin work on a new and highly accurate CENSUS based on modern day facts and figures and . . . [that] People who are in our Country illegally WILL NOT BE COUNTED IN THE CENSUS.”<sup>1</sup> This exclusionary directive is an attempt to defy the constitutional mandate that requires a decennial count of “the whole number of persons in each State.” Though the original Constitution counted “other Persons”—enslaved Black people—as only three-fifths of a person,<sup>2</sup> the Thirteenth Amendment abolished slavery, and Section 2 of the Fourteenth Amendment replaced the three-fifths formula with the requirement that Representatives be apportioned based on “the whole number of persons in each State,” excepting only “Indians not taxed.”<sup>3</sup> Together, these constitutional provisions mandate a single, nationwide enumeration conducted every ten years.<sup>4</sup> And although courts have confronted proposals for mid-decennial redistricting,<sup>5</sup> no administration has undertaken a mid-decade, nationwide count. Whether attempted mid-decade or during a decennial census, the Fourteenth Amendment does not permit excluding a whole group of people from the apportionment count based on immigration status.<sup>6</sup> A decennial or a mid-decade “exclusionary census” would depart from more than two centuries of practice and raise the very same questions about who counts—legally and politically—that animated earlier controversies.<sup>7</sup>

The Trump administration’s current effort carries forward and expands the initiative undertaken in 2018 when the Secretary of Commerce sought to add a citizenship question to the decennial census.<sup>8</sup> Although the Supreme Court ultimately

1. See Alejandra Jaramillo & Ethan Cohen, *Trump Calls for a New Census to Exclude Undocumented Immigrants*, CNN (Aug. 7, 2025), <https://www.cnn.com/2025/08/07/politics/trump-census-immigration> [https://perma.cc/D5XJ-5PDY].

2. U.S. CONST. art. I, § 2, cl. 3.

3. *Id.* amend. XIV, § 2.

4. See *Wisconsin v. City of New York*, 517 U.S. 1, 5 (1996) (citing U.S. CONST. art I, § 2, cl. 3 for the proposition that an “actual Enumeration” is required every ten years).

5. E.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 414 (2006) (challenge to mid-decade redistricting).

6. Janai S. Nelson, *Counting Change: Ensuring an Inclusive Census for Communities of Color*, 119 COLUM. L. REV. 1399, 1405 (2019).

7. Tye Rush, Samuel Hall & Matt A. Barreto, *The Importance of Counting All Immigrants for Apportionment and Redistricting*, 75 UC L.J. 1667, 1670–71 (2024) (noting that because “the framers of the Constitution were aware of and thinking about citizens and non-citizens” when they used the word “persons” rather than “citizens” in the Fourteenth Amendment’s apportionment clause, any exclusion of noncitizens “stands in contrast to more than 225 years of practice and to nearly all modern legal interpretations of representation”); *Trump v. New York*, 592 U.S. 125, 144–47 (Breyer, J., dissenting) (explaining, based on the history of all prior decennial censuses, that “from the founding era until now, enumeration in the decennial census has always been concerned with residency, not immigration status”); see *id.* at 130–33 (per curiam) (declining to adjudicate the legality of a presidential memorandum directing the exclusion of undocumented immigrants from apportionment totals on justiciability grounds).

8. Letter from Wilbur Ross, Sec’y of Com., U.S. Dep’t of Com., to Karen Dunn Kelley, Under Sec’y for Econ. Affs., U.S. Dep’t of Com. (Mar. 26, 2018) [hereinafter Ross Letter].

blocked that effort in *Department of Commerce v. New York*,<sup>9</sup> President Trump subsequently issued Executive Order 13,880 on July 11, 2019, instructing the Department of Commerce and other agencies to collect citizenship information “to the maximum extent permissible under law” using administrative records rather than questionnaire responses.<sup>10</sup> The following year, a July 2020 presidential memorandum went further, directing that undocumented immigrants be excluded from the apportionment base used to allocate seats in the House of Representatives.<sup>11</sup> Taken together, these actions leveraged executive authority—through orders, directives, and memoranda—to test the boundaries of how citizenship information could factor into census and apportionment decisions. In doing so, they also shifted how the federal government framed the census, recasting it from a neutral enumeration into an instrument of immigration and electoral policy. That reframing signaled that inclusion of some individuals in the count was conditional rather than guaranteed.<sup>12</sup>

Although the initiatives pursued in 2019 and 2020 ended when President Trump lost the 2020 election, the August 2025 directive revives and dramatically expands their underlying premise. Moving beyond previous attempts to change how citizenship data is collected or used, the directive declares that a particular group of residents should not be counted at all. For jurisdictions with large immigrant and mixed-status communities, such a mandate threatens both fair representation and the equitable allocation of federal resources.<sup>13</sup> Ultimately, the directive reflects a persistent strategy in which demographic change, immigration, or national security rhetoric is invoked to limit which groups are treated as full members of the national population for purposes of the census.

The Korematsu Center’s 2019 amicus brief in *Department of Commerce v. New York*, brought on behalf of Norman Y. Mineta, the Sakamoto sisters, and the Council on American-Islamic Relations (National and New York, Inc.),<sup>14</sup> anticipated many of the dangers that the 2025 announcement makes explicit. The brief offers a cautionary tale of how census-derived information collected under assurances of administrative neutrality can later be misused to facilitate surveillance, exclusion, and punishment, drawing on the wartime incarceration of Japanese Americans and the post-9/11 disclosures involving Arab, Muslim, and South Asian communities.<sup>15</sup> As the brief explains, the integrity of the census depends not only on constitutional

9. *Dep’t of Com. v. New York*, 588 U.S. 752 (2019).

10. Exec. Order No. 13,880, 84 FED. REG. 33,821 (July 16, 2019).

11. See *Memorandum of July 21, 2020: Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, 85 FED. REG. 44,679 (July 23, 2020); *Evenwel v. Abbott*, 578 U.S. 54, 74–75 (2016) (affirming total-population baseline for representational equality).

12. Christopher Rhodes, *Who Counts in America? Trump Wants to Decide*, AL JAZEERA (Aug. 8, 2025), <https://www.aljazeera.com/opinions/2025/8/8/who-counts-in-america-trump-wants-to-decide> [<https://perma.cc/YNK3-ZLKA>].

13. TAYLOR R. KNOEDL, CONG. RSCH. SERV., R47847, THE U.S. CENSUS BUREAU: AN OVERVIEW at 7 (2023).

14. Brief for Fred T. Korematsu Ctr. for Law & Equal. et al. as Amici Curiae Supporting Respondents at 10–14, *Dep’t of Com. v. New York*, 588 U.S. 752 (2019) (No. 18–966) [hereinafter Brief for Korematsu Ctr.] (one of forty-six amicus briefs filed at the Supreme Court).

15. See *Hirabayashi v. United States*, 828 F.2d 591, 592–93 (9th Cir. 1987); *Korematsu v. United States*, 584 F. Supp. 1406, 1408–09 (N.D. Cal. 1984).

and statutory safeguards but also on public trust that demographic data will not be weaponized against particular communities.

The Census Bureau, housed within the Department of Commerce, is statutorily responsible for designing and executing the decennial census.<sup>16</sup> Its operational independence, however, remains vulnerable to political influence. Even where the executive branch lacks direct control over Bureau methodology, presidential rhetoric and executive directives can compromise the conditions under which the Bureau collects responses by eroding public confidence that census data will remain confidential.<sup>17</sup> The Census Bureau has repeatedly recognized that accurate enumeration depends on individuals' willingness to participate, premised on the assurance that the information they share will not be turned against them.<sup>18</sup> A policy declaring that certain residents "will not be counted" directly threatens that understanding and risks suppressing participation years before the next decennial census begins. The census is a constitutionally mandated practice that gives concrete form to the nation's representational structure.<sup>19</sup> As the Supreme Court has emphasized, representation is grounded in the total population: representatives serve all residents, not only voters. Nonvoters also have a stake in policy debates and constituent services alike.<sup>20</sup> The constitutional choice to count all persons reflects the understanding that democratic legitimacy depends on including every resident, regardless of immigration status, in the apportionment base. Any effort to exclude certain "whole persons" therefore threatens that constitutional structure and risks turning the census into a tool that future administrations could use to drastically alter the political landscape.

## II. THE 2019 SUPREME COURT CASE: *DEPARTMENT OF COMMERCE V. NEW YORK*

In 2018, the Trump administration announced its plan to add a citizenship question to the 2020 Census.<sup>21</sup> The administration claimed that reinstating the citizenship question, which was last used in 1950, would aid enforcement of Section 2 of the Voting Rights Act (VRA) of 1965, asserting that block-level citizenship data was necessary to address minority vote dilution.<sup>22</sup> From the outset, however,

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16. 13 U.S.C. § 2.

17. See 13 U.S.C. §§ 8(b), 9(a) (codifying confidentiality guarantees); Exec. Order No. 13,880, 84 FED. REG. 33,821 (July 16, 2019) (directing agencies to maximize citizenship data collection following *Dep't of Commerce*).

18. Brief for Am. Stat. Ass'n et al. as Amici Curiae Supporting Respondents at 7–15, *Dep't of Com.*, 588 U.S. 752 (2019) (No. 18–966) (arguing that adding the citizenship question departed from standard statistical practices and would reduce data accuracy).

19. See U.S. CONST. art. I, § 2, cl. 3; *id.* amend. XIV, § 2.

20. *Evenwel*, 578 U.S. at 74–75.

21. Ross Letter, *supra* note 8, at 1.

22. *Id.* (announcing decision to include citizenship question and citing VRA § 2 enforcement rationale).

civil rights organizations,<sup>23</sup> former Census Bureau officials,<sup>24</sup> statisticians,<sup>25</sup> and state and local governments<sup>26</sup> identified this rationale as pretextual—“a shameful attempt to disempower already marginalized communities and terrorize immigrant families”<sup>27</sup>—and warned that the question would suppress immigrant participation, discourage responses in mixed-status households, and ultimately skew both congressional apportionment and the allocation of federal resources.<sup>28</sup>

Litigation over the citizenship question was brought in multiple jurisdictions<sup>29</sup> and culminated in the Supreme Court’s decision in *Department of Commerce v. New York*, where the Court held that the Secretary of Commerce’s stated justification was not merely unpersuasive but pretextual in a legally cognizable sense.<sup>30</sup> Under the Administrative Procedure Act (APA), agencies must provide “genuine justifications” for their actions, not post hoc rationalizations designed to obscure political motives.<sup>31</sup> Although the Enumeration Clause grants Congress broad discretion over census design, an agency exercising delegated authority remains bound by the APA’s prohibition on arbitrary and capricious action.<sup>32</sup> The administrative record revealed a “disconnect between the decision made and the explanation given,” thereby exposing the government’s asserted VRA rationale as pretextual.<sup>33</sup> That disconnect was reinforced by evidence that Secretary of Commerce Wilbur Ross had

23. Brief of The Leadership Conf. on Civ. and Hum. Rts. et al. as Amici Curiae Supporting Plaintiffs at 10, *California v. Ross*, No. 3:18-CV-01865 (N.D. Cal. July 24, 2018) (arguing that the administration’s “sudden interest in enforcement of the Voting Rights Act is not credible” and was likely “pretextual”).

24. Memorandum from John M. Abowd, Chief Scientist & Assoc. Dir. for Research & Methodology, U.S. Census Bureau, to Wilbur Ross, Sec’y, U.S. Dep’t of Commerce (Jan. 19, 2018) (concluding that adding the citizenship question would “harm[] the quality of the census count” and introduce “major potential quality and cost disruptions”).

25. Letter from Lisa LaVange, President, Am. Statistical Ass’n, to Wilbur Ross, Sec’y, U.S. Dep’t of Commerce (Jan. 19, 2018) (strongly cautioning against adding the question at “this late stage of the Census process” and warning that “the quality of the census will be undermined” without adequate scientific justification).

26. Letter from Eric T. Schneiderman, Att’y Gen., State of N.Y., et al., to Wilbur Ross, Sec’y, U.S. Dep’t of Commerce (Feb. 12, 2018) (arguing that the DOJ’s VRA rationale was unfounded and that the question would cause a population undercount “that would disproportionately harm states and cities with large immigrant communities”).

27. Press Release, ACLU of New Mexico, ACLU of New Mexico Comment on Supreme Court Census Citizenship Case Victory (June 27, 2019), <https://www.aclu-nm.org/press-releases/aclu-new-mexico-comment-supreme-court-census-citizenship-case-victory> [<https://perma.cc/D77N-J6Y2>].

28. See *Dep’t of Com.*, 588 U.S. at 784 (finding DOJ’s VRA rationale contrived and unsupported by record).

29. See *New York v. United States Dep’t of Com.*, 351 F. Supp. 3d 502, 517 (S.D.N.Y. 2019) (finding Secretary Ross’s VRA rationale pretextual and enjoining the question); *California v. Ross*, 358 F. Supp. 3d 965, 1008 (N.D. Cal. 2019) (same); *Kravitz v. United States Dep’t of Com.*, 366 F. Supp. 3d 681, 749 (D. Md. 2019) (same).

30. See *Dep’t of Com.*, 588 U.S. at 785 (holding courts need not accept “contrived” reasons under APA review).

31. See *id.* (citing 5 U.S.C. § 706(2)(A)).

32. U.S. CONST. art. I, § 2, cl. 3; 5 U.S.C. § 706(2)(A).

33. *Dep’t of Com.*, 588 U.S. at 785 (identifying disconnect between decision and explanation).

pushed for the citizenship question over the objections of Census Bureau experts warning against it,<sup>34</sup> and by the later revealed “Hofeller Files,” which showed that Thomas Hofeller’s 2015 study concluded that adding a citizenship question would be “advantageous to Republicans and non-Hispanic Whites” and “would clearly be a disadvantage to the Democrats.”<sup>35</sup> Subsequent filings further revealed that Hofeller helped ghostwrite a draft DOJ letter to the Department of Commerce requesting the citizenship question and supplying the Voting Rights Act enforcement rationale on which Secretary Ross ultimately relied.<sup>36</sup>

The Court, however, resolved the case on relatively narrow grounds. It declined to address the broader constitutional questions raised by the plaintiffs, including whether the Enumeration Clause forbids design choices that foreseeably chill participation, whether a decision undertaken with an intent to depress immigrant responses violates equal protection principles, and whether apportionment rules categorically bar citizen-only population measures. Instead, the Court confined its holding to the APA’s pretext analysis, vacating the Secretary’s action and remanding the case for further proceedings.<sup>37</sup> That limited approach was sufficient to forestall the citizenship question from appearing on the 2020 Census, given the compressed production schedule and the end of the administration, but it left unresolved deeper structural questions concerning apportionment, personhood, and the proper limits of executive influence over census administration. Those questions contributed to the attention paid to the case as it reached the Supreme Court, drawing engagement from institutions and communities across doctrinal, political, and institutional lines.

#### A. *Amicus Participation: Contrasting Coalitions and Arguments*

The *Department of Commerce v. New York* case attracted unusually broad amicus participation at the Supreme Court—nine amicus briefs supporting the government and thirty-six supporting the challengers—reflecting the census’s

34. Justin Elliott, *Wilbur Ross Overruled Career Officials at Census Bureau to Add Citizenship Question*, PROPUBLICA (Mar. 27, 2018, 1:33 PM), <https://www.propublica.org/article/wilbur-ross-overruled-career-officials-at-census-bureau-to-add-citizenship-question> [https://perma.cc/ZBS5-RGU4] (reporting that Secretary Ross pushed for a citizenship question despite career officials’ warnings about depressed response rates).

35. Thomas B. Hofeller, *The Use of Citizen Voting Age Population in Redistricting* at 7, 9 (2015) (unpublished memorandum), <https://www.commoncause.org/wp-content/uploads/2019/05/2015-Hofeller-Study.pdf> [https://perma.cc/AMV2-F7HH]; Notice of Filing of New Evidence at 1–2, *New York Immigration Coal. v. U.S. Dep’t of Com.*, No. 18-CV-2921 (JMF) (S.D.N.Y. May 30, 2019), <https://www.brennancenter.org/sites/default/files/legal-work/2019-05-30-NYIC%20Respondents%20Notice%20of%20Filing.pdf?inline=1> [https://perma.cc/76DN-B5QM].

36. Memorandum in Support of Plaintiffs’ Rule 60(b)(2) Motion at 6–9, *New York Immigration Coal. v. U.S. Dep’t of Com.*, No. 18-CV-2921 (JMF) (S.D.N.Y. June 3, 2019), [https://www.brennancenter.org/sites/default/files/legal-work/MemorandumSupport\\_Plaintiffs\\_Rule60b2\\_%202019-06-03.pdf](https://www.brennancenter.org/sites/default/files/legal-work/MemorandumSupport_Plaintiffs_Rule60b2_%202019-06-03.pdf) [https://perma.cc/YUP8-VYVL] (detailing Hofeller’s role in drafting a DOJ letter seeking a citizenship question on VRA grounds).

37. *Dep’t of Com.*, 588 U.S. at 782–85 (remanding for further agency explanation while refraining from addressing constitutional arguments).

significance across doctrinal, political, and institutional domains.<sup>38</sup> Supporting the government were coalitions of states led by Oklahoma; the Republican National Committee and the National Republican Congressional Committee; conservative legal organizations including the Public Interest Legal Foundation, Judicial Watch, the Allied Educational Foundation, the Immigration Reform Law Institute, Citizens United, the Eagle Forum, and the Project on Fair Representation; as well as scholars Ronald Cass and Christopher DeMuth.<sup>39</sup> Their briefs emphasized agency discretion, historical precedent for collecting citizenship data, and the purported necessity of such data for VRA enforcement.<sup>40</sup> They relied heavily on historical Census Bureau practices of gathering citizenship information through long-form questionnaires and sample surveys, arguing that the 2020 proposal merely formalized a longstanding practice of collecting demographic data for statistical and enforcement purposes.<sup>41</sup>

Amici supporting the plaintiffs and respondents represented an even wider array of institutional, professional, and community-based organizations.<sup>42</sup> The U.S. House of Representatives underscored Congress's constitutional responsibility of census oversight and warned that the Secretary's pretextual rationale threatened the integrity of an accurate count.<sup>43</sup> Former Census Bureau directors—including every prior Director not recused due to involvement in the litigation—stressed that adding the question risked suppressing participation and degrading data quality.<sup>44</sup>

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38. Kelly Percival & Brianna Cea, *Annotated Guide to the Amicus Briefs in the Supreme Court's Citizenship Question Case*, BRENNAN CTR. FOR JUST. (Apr. 11, 2019), <https://www.brennancenter.org/our-work/court-cases/annotated-guide-amicus-briefs-supreme-courts-citizenship-question-case> [<https://perma.cc/YA35-VWQP>] (reporting that thirty-six amicus briefs were filed in support of the challengers, nine in support of the Commerce Department, and one in support of neither party).

39. See *Dep't of Com. v. New York*, No. 18–966, (U.S. Jan. 25, 2019) <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18–966.html> [<https://perma.cc/E9LP-BCZJ>].

40. Brief for Project on Fair Representation as Amicus Curiae Supporting Petitioners at 4–10, *Dep't of Com.*, 588 U.S. 752 (2019) (No. 18–966) (arguing citizenship question would improve citizenship data for redistricting and Section 2 VRA enforcement); Brief for Pub. Interest Legal Found. as Amicus Curiae Supporting Petitioners at 4, *Dep't of Com.*, 588 U.S. 752 (2019) (No. 18–966) (arguing citizenship question would “enhance enforcement of civil rights laws” by providing “more precise citizen population data, particularly in small jurisdictions”).

41. Percival & Cea, *supra* note 38 (summarizing government-side amici as invoking historical census practices and the need for improved citizenship data for VRA and NVRA enforcement); see, e.g., Brief of Oklahoma et al. as Amici Curiae Supporting Petitioners at 6–8, *Dep't of Com.*, 588 U.S. 752 (2019) (No. 18–966) (“Between 1820 and 1950, almost every decennial census asked a question about citizenship in some form”); Brief for Project on Fair Representation as Amicus Curiae Supporting Petitioners at 12–14, *Dep't of Com.*, 588 U.S. 752 (2019) (No. 18–966) (emphasizing historical use of longform census questionnaires to collect citizenship data); Brief for Pub. Interest Legal Found. as Amicus Curiae Supporting Petitioners at 3–4, *Dep't of Com.*, 588 U.S. 752 (2019) (No. 18–966) (arguing that shifting from sample surveys to the decennial census would provide “more precise citizen population data”).

42. See Docket, No. 18–966, *supra* note 39.

43. Brief for the U.S. House of Representatives as Amicus Curiae Supporting Respondents at 3–5, *Dep't of Com.*, 588 U.S. 752 (2019) (No. 18–966) (warning of harm to count integrity).

44. See, e.g., Brief for Former Census Bureau Dirs. as Amici Curiae Supporting Respondents at 9–14, *Dep't of Com.*, 588 U.S. 752 (2019) (No. 18–966) (filed on behalf of five former Directors and noting that former Director John Thompson did not join due to his role as an expert witness).

Professional organizations, including the American Statistical Association and the Electronic Privacy Information Center, detailed the methodological and privacy concerns posed by the question.<sup>45</sup> Civil rights groups, cities, school districts, business associations, and community coalitions documented the predictable chilling effects on immigrant communities and the real-world consequences of undercounts for representation and resource distribution.<sup>46</sup> Together, these briefs underscored that the Enumeration Clause requires a count of “persons,” not citizens, and that attempts to manipulate census design undermine that constitutional mandate.<sup>47</sup>

B. *What Made the Korematsu Center Brief Distinct*

Amid this broader amicus landscape, the Korematsu Center’s brief offered a perspective largely absent from other filings: the constitutional and democratic risks of census data misuse. While many amici focused on statutory authority, administrative law, or methodological consequences, the Center concentrated on historical episodes in which the government used census-derived information to facilitate targeted surveillance or exclusion, particularly the wartime incarceration of Japanese Americans and post-9/11 disclosures relating to Arab and Muslim communities.<sup>48</sup> The brief used these examples to illustrate how departures from confidentiality norms harm both individuals and the institutional legitimacy on which accurate enumeration depends.<sup>49</sup>

The Center also elevated community narratives that rarely appear in census litigation, such as former Secretary of Commerce Norman Mineta’s account of wartime data disclosures and the Sakamoto sisters’ testimony about their family’s forced removal and incarceration during World War II.<sup>50</sup> These stories grounded the legal arguments in lived experience, reinforcing why census confidentiality protections require vigilance, not deference.

Crucially, the Center identified a threat absent from all other amicus filings: the retroactive use of census data. Even information collected under ostensibly neutral pretenses may later be repurposed for exclusionary or punitive policies,

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45. Brief for Am. Stat. Ass’n et al. as Amici Curiae Supporting Respondents at 7–15, *Dep’t of Com.*, 588 U.S. 752 (2019) (No. 18–966) (arguing that adding an untested citizenship question departed from standard statistical practices and would reduce data accuracy); Brief for Elec. Priv. Info. Ctr. (EPIC) et al. as Amici Curiae Supporting Respondents at 8–14, *Dep’t of Com.*, 588 U.S. 752 (2019) (No. 18–966) (explaining that the citizenship question would undermine data privacy and increase risks of misuse).

46. See, e.g., Brief for the Leadership Conf. on Civ. & Hum. Rts. et al. as Amici Curiae Supporting Respondents at 29–33, *Dep’t of Com.*, 588 U.S. 752 (2019) (No. 18–966) (describing anticipated undercount and associated harms to communities of color).

47. See, e.g., Brief for Former Census Bureau Dirs., *supra* note 44, at 9–14 (explaining that adding an untested citizenship question would materially harm data accuracy and undermine the integrity of the enumeration).

48. See *Hirabayashi*, 828 F.2d at 592–93 (detailing suppression of evidence and racial animus); *Korematsu*, 584 F. Supp. at 1409 (granting *coram nobis* petition based on government misconduct).

49. See Brief for Korematsu Ctr., *supra* note 14, at 14–17 (explaining confidentiality’s role in public trust).

50. Brief for Korematsu Ctr., *supra* note 14, at 1–3.

whether in apportionment, immigration enforcement, or national security contexts.<sup>51</sup> Administrations change, crises arise, and assurances made today cannot insulate against tomorrow's pressures. By situating the Court's pretext analysis within this historical trajectory, the Center's brief argued that robust scrutiny under the APA is not a mere procedural formality, but an essential safeguard against future misuse.<sup>52</sup> It demonstrated that the constitutional stakes extended well beyond the 2020 enumeration and implicated the long-term viability of the census as an instrument of democratic governance.

### III. WHAT WAS AT STAKE IN 2019—AND WHY IT STILL MATTERS

The 2019 *Department of Commerce v. New York* case confronted a core constitutional commitment: representation in the federal system is apportioned based on a count of "persons," not citizens, and that count must be accurate, uniform, and apolitical.<sup>53</sup> The census operationalizes this commitment, allocating seats in the House of Representatives, directing billions in federal funding, and shaping how political power is distributed across communities based on that count.<sup>54</sup> A citizenship question adopted on a pretextual basis posed a direct threat to this framework.<sup>55</sup>

Three interrelated principles were at stake. First, the Enumeration Clause requires counting all persons residing in each state.<sup>56</sup> Any design choice likely to depress participation among immigrant communities risks distorting the population base upon which apportionment rests.<sup>57</sup> As the dissent emphasized, the evidence before the Court showed that the citizenship question would foreseeably reduce responses in precisely those communities whose accurate enumeration is constitutionally required.<sup>58</sup>

Second, the APA's role in policing pretext is central to maintaining the separation of powers constraints that govern the exercise of administrative authority.<sup>59</sup> *Department of Commerce v. New York* reaffirmed that agencies must provide real

51. Brief for Korematsu Ctr., *supra* note 14, at 14–18.

52. Brief for Korematsu Ctr., *supra* note 14, at 5–10, 14–19.

53. U.S. CONST. art. I, § 2, cl. 3; *id.* amend. XIV, § 2; *Evenwel*, 578 U.S. at 73–75 (upholding states' use of total population in redistricting).

54. *See Dep't of Com.*, 588 U.S. at 760 (noting use of census results for apportionment and allocation of federal funds).

55. *See id.*

56. *See Evenwel* 578 U.S. at 74–75 (affirming total-population baseline for representational equality; describing the Framers' decision to ground representation in "persons"); Ming Hsu Chen, *The Political (Mis)representation of Immigrants in the Census*, 96 N.Y.U. L. REV. 901, 905, 907 (2021) (noting that "[t]he Framers specified in the Constitution that the total population of the nation should be based on the number of persons residing in a state," and that the Supreme Court has interpreted this command to require equal representation of all persons).

57. *See, e.g.*, Chen, *supra* note 56, at 903–05 (arguing that census design choices, including the citizenship question, can skew the political representation of immigrant communities by affecting who is counted); Nelson, *supra* note 6, at 1411 (explaining how census undercounts of communities of color distort both representational equality and the allocation of public resources).

58. *See Dep't of Com.*, 588 U.S. at 814 (Breyer, J., dissenting).

59. Brief for Korematsu Ctr., *supra* note 14, at 14–18 (linking APA pretext review to broader separation-of-powers concerns).

explanations for their decisions and that courts are not required to accept rationales contradicted by the record.<sup>60</sup> The requirement that courts reject agency rationales contradicted by the record echoes the lessons of *Korematsu*, *Hirabayashi*, and *Yasui*, where courts confronted the government's reliance on pretext to mask impermissible motives—then racial animus.<sup>61</sup> Those cases underscore the catastrophic consequences of judicial deference in the face of contrary evidence.<sup>62</sup> The 2019 Supreme Court case placed this concern in a modern administrative setting, emphasizing that courts must examine—not simply accept—agency rationales when the record reveals inconsistencies.<sup>63</sup>

Third, the census depends on public trust. Communities participate because the government promises confidentiality, neutrality, and fidelity to constitutional principles.<sup>64</sup> When political actors attempt to inject exclusionary motives—through citizenship questions, executive orders, or rhetoric signaling that certain populations “do not belong”<sup>65</sup>—those assurances are threatened.<sup>66</sup> The Korematsu Center's brief documents how communities that have experienced surveillance, internment, profiling, or selective disclosure are acutely aware that data, once collected, can be repurposed beyond its original intent.<sup>67</sup> That history underscores why the Court's pretext analysis matters far beyond administrative law: a government that cannot

60. *Dep't of Com.*, 588 U.S. at 785.

61. See *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943). Cf. *Korematsu*, 584 F. Supp. at 1417 (“the government knowingly withheld information from the courts when they were considering the critical question of military necessity in this case”); *Hirabayashi*, 828 F.2d at 599 (noting that the district court in its *coram nobis* decision “found that the United States government doctored the documentary record . . . [and] that had the suppressed material been submitted to the Supreme Court, its decision probably would have been materially affected”).

62. See Brief for Korematsu Ctr., *supra* note 14, at 13–17 (discussing the consequences of judicial deference in the wartime cases).

63. See *Dep't of Com.*, 588 U.S. at 785.

64. 13 U.S.C. §§ 8(b), 9(a) (restricting census data to statistical uses and prohibiting disclosures that would identify individual respondents); *Baldrige v. Shapiro*, 455 U.S. 345, 354 (1982) (explaining that Congress provided strict confidentiality assurances in Title 13 “[t]o stimulate the public cooperation necessary for an accurate census”); U.S. Census Bureau, Title 13: Protection of Confidential Information, [https://www.census.gov/about/policies/privacy/data\\_stewardship/title\\_13\\_-\\_protection\\_of\\_confidential\\_information.html](https://www.census.gov/about/policies/privacy/data_stewardship/title_13_-_protection_of_confidential_information.html) [<https://perma.cc/MB27-2ACL>] (describing the Bureau's legal obligation to use responses only for statistical purposes and to conduct a neutral, constitutionally mandated count of the population).

65. Donald J. Trump, *Remarks at a Campaign Rally in Reading, Pennsylvania*, AM. PRESIDENCY PROJECT (Nov. 4, 2024), <https://www.presidency.ucsb.edu/documents/remarks-campaign-rally-reading-pennsylvania> [<https://perma.cc/8R7L-HAJG>] (asserting he would “send home all of those who do not belong in our country”).

66. See, e.g., Chen, *supra* note 57 (arguing that debates over the citizenship question and related census policies signal that immigrants and mixed-status families are less politically valued and reinforce their marginalization in the political community); Justin Levitt, *Citizenship and the Census*, 119 COLUM. L. REV. 1355 (2019) (explaining how proposals to add a citizenship question and related measures were designed to shift political power away from jurisdictions with substantial noncitizen populations).

67. See Brief for Korematsu Ctr., *supra* note 14, at 13–17.

articulate an honest reason for collecting sensitive demographic information cannot reasonably expect communities to entrust it with that information.<sup>68</sup>

As discussed above, these concerns did not end with the Supreme Court's 2019 decision. After *Department of Commerce v. New York*, the Trump administration pursued the same objectives through a 2019 executive order directing agencies to share citizenship and immigration data with the Census Bureau and a 2020 presidential memorandum seeking to exclude undocumented immigrants from the population base used for apportionment.<sup>69</sup> Those directives prompted emergency litigation in *Trump v. New York*<sup>70</sup> and related cases, and court orders ultimately delayed delivery of 2020 apportionment data until after the change in administrations, ensuring that the exclusion policy was never implemented in practice.<sup>71</sup> Days into the new administration, President Biden issued Executive Order 13,986, revoking both measures and reaffirming that apportionment counts include all residents, regardless of immigration status.<sup>72</sup>

Current proposals to conduct supplemental counts, exclude undocumented immigrants from population totals, or use citizenship data in apportionment replicate the same concerns that animated the 2019 litigation.<sup>73</sup> Although the Court declined to resolve the full constitutional questions then presented, recent efforts to redefine who counts in our political system demonstrate why those issues remain urgent.<sup>74</sup> Efforts to narrow the population base—sometimes under the guise of “efficiency,” “security,” or “citizen representation”—echo the longstanding patterns of exclusion and bureaucratic distortion that the Korematsu Center identified.<sup>75</sup>

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68. See *Dep't of Com.*, 588 U.S. at 785 (rejecting agency's “contrived” rationale and emphasizing need for genuine explanations).

69. See *supra* text accompanying notes 5 and 7.

70. See *Trump v. New York*, 592 U.S. 125, 131–34 (2020) (per curiam) (dismissing challenges to the July 2020 memorandum as unripe where the record did not yet show which noncitizens could be excluded or whether the memorandum could feasibly be implemented).

71. See Stipulation and Order Re Further Proceedings, Nat'l Urb. League v. Ross, No. 5:20-cv-05799-LHK (N.D. Cal. Jan. 15, 2021) (collectively delaying census field operations and apportionment reporting and providing that the Census Bureau would not finalize or release apportionment counts before Feb. 5, 2021); *Nat'l Urb. League v. Raimondo (was Ross)*, ALL ABOUT REDISTRICTING (Apr. 22, 2021), <https://redistricting.ils.edu/case/natl-urban-league-v-ross> [<https://perma.cc/HL2Z-GVXZ>] (summarizing the litigation and its effect on apportionment timing).

72. Exec. Order No. 13,986, 86 FED. REG. 7,015 (Jan. 25, 2021) (revoking EO 13,880 and the July 21, 2020, memorandum and directing that apportionment counts include all residents regardless of immigration status).

73. See, e.g., Dan Merica & David Nakamura, *Trump Calls for Major Changes to Census Amid GOP Redistricting Effort*, WASH. POST (Aug. 7, 2025), <https://www.washingtonpost.com/politics/2025/08/07/trump-calls-major-changes-census-amid-gop-redistricting-effort> [<https://perma.cc/NWE4-4YRK>] (reporting former President Trump's proposal to conduct a new census that would exclude undocumented immigrants from the count used for apportionment); Justin Levitt, *Nonsensus: Pretext and the Decennial Enumeration*, 3 AM. CONST. SOC'Y SUP. CT. REV. 59 (2019) (explaining how attempts to manipulate the decennial census through selective exclusions or contrived rationales threaten the constitutional commitment to counting all persons).

74. See, e.g., *Trump*, 592 U.S. at 129–30 (2020) (per curiam) (describing presidential memorandum directing exclusion of undocumented immigrants from the apportionment base).

75. See Brief for Korematsu Ctr., *supra* note 14, at 16–18 (tracing how census and other governmental data have historically been used to facilitate exclusionary policies); see also Chen,

That continuity is precisely what makes the present moment legible and what makes forgetting so costly.

#### IV. LESSONS FOR THE PRESENT MOMENT: THE DANGERS OF FORGETTING

Viewed from the vantage point of 2026, the 2019 dispute was neither unique nor surprising. It reflected a recurring pattern in which census design serves as a proxy for broader ideological conflicts over belonging and political power. The unresolved questions left by *Department of Commerce v. New York* have resurfaced with greater force, illustrating how fragile the enumeration process becomes when political actors treat it not as a constitutional obligation but as a tool for exclusion.<sup>76</sup> The constitutional commitment to count all persons—rooted in the Reconstruction Amendments, reinforced through decades of practice, and defended by courts, Congress, and communities alike—remains susceptible to renewed attempts to narrow the political community. That fragility makes the historical lessons surfaced by the Korematsu Center’s brief—and the dangers of forgetting them—all the more pressing. The struggle over who is counted continues to define the struggle over democratic governance itself.

The historical episodes the brief details—the wartime incarceration of Japanese Americans and the post-9/11 disclosures involving Arab, Muslim, and South Asian communities—underscore how census-derived information, once gathered under assurances of neutrality and confidentiality, can be redeployed for exclusionary or punitive ends.<sup>77</sup> The danger in the present moment lies not in the invention of new mechanisms, but in forgetting this history and treating census administration as a merely technical exercise rather than a site of constitutional risk. As the brief emphasizes, assurances offered in one political era cannot guarantee that future administrations, facing different political agendas or ideologies of demographic threat, will resist the temptation to repurpose census-derived data.<sup>78</sup>

Proposals to conduct supplemental or exclusionary counts aimed at removing undocumented immigrants from the apportionment base thus raise not only serious constitutional concerns but also the risk of chilling participation in communities that already face barriers to being counted. Testimony from former Census

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*supra* note 56 (situating contemporary efforts to narrow the census population base within a longer history of bureaucratic practices that undercount and politically misrepresent immigrant communities).

76. Brendan A. Shanahan, *A Century-Long Battle Over the Census Is Brewing*, TIME (Apr. 2, 2025), <https://time.com/7265213/battle-over-the-census-brewing> [<https://perma.cc/M9QK-XH3U>] (linking contemporary “citizen-only” apportionment proposals to earlier nativist reapportionment bills and warning lawmakers to reject similar measures before they can “metastasize into a full-blown constitutional crisis”).

77. See *Hirabayashi*, 828 F.2d at 592–93 (describing suppression of evidence and racially motivated decision-making in *Hirabayashi v. United States*, 320 U.S. 81 (1943) and *Korematsu v. United States*, 323 U.S. 214 (1944)); *Korematsu*, 584 F. Supp. at 1408–09 (same; vacating conviction on coram nobis grounds); see also Margo Anderson & William Seltzer, *Use and Misuse of the United States Census: The Role of Data in the Incarceration of Japanese Americans During World War II* (2023) (detailing the Census Bureau’s provision of demographic data to military authorities to carry out the exclusion and incarceration).

78. See Brief for Korematsu Ctr., *supra* note 14, at 14–19.

Bureau directors and empirical studies alike confirm that public trust—particularly in the government’s willingness to keep data confidential—is essential to securing an accurate count.<sup>79</sup>

The Trump administration’s August 2025 announcement is more than a policy proposal. By declaring that people “in our Country illegally will not be counted,” it signals to immigrant communities and mixed-status households that their inclusion in the national count is now uncertain.<sup>80</sup> The Supreme Court recognized in *Department of Commerce v. New York* that even the prospect of a citizenship question could reduce participation among noncitizen households; proposals to create alternative population measures explicitly aimed at exclusion will produce similar effects.<sup>81</sup> Statutory confidentiality protections cannot fully counteract the message that the government may seek to use census-related data to redraw the lines of political belonging.

Compounding these risks, the Court’s growing reliance on its emergency, or “shadow,” docket further destabilizes the census landscape.<sup>82</sup> Disputes over administrative rulemaking, immigration policy, and census-related actions increasingly reach the Court through emergency applications that bypass full factual development, appellate review, and oral argument.<sup>83</sup> When courts are asked to evaluate administrative actions without a complete record, the risk of unchecked pretext, rushed decision-making, and inadequate scrutiny grows. The Center’s 2019 brief warned against precisely this dynamic. In the context of the census, the harms from chilled participation, diminished trust, and distorted apportionment may become entrenched long before judicial review can fully address them.

By documenting episodes in which census information facilitated exclusion, the brief provides a framework for recognizing when contemporary policies threaten to repeat those harms and how historical memory can operate as a constitutional safeguard. The brief also serves as a model of how amicus practice can integrate legal analysis, public education, and collective accountability, ensuring that historical warnings remain visible to courts and policymakers alike.<sup>84</sup> In moments of renewed pressure to narrow the represented community, memory is not merely descriptive; it is an instrument of resistance against repetition.

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79. See Brief for Former Census Bureau Directors, *supra* note 44, at 8–16.

80. Jaramillo & Cohen, *supra* note 1.

81. *Dep’t of Com.*, 588 U.S. at 766–68.

82. Taraleigh Davis, *Introducing the Interim Relief Docket Stat Pack*, SCOTUSBLOG (Jan. 28, 2026), <https://www.scotusblog.com/2026/01/introducing-the-interim-relief-docket-stat-pack> [<https://perma.cc/JAN4-NZ9D>] (documenting increased emergency activity and grant rates in the 2024–25 Term).

83. James Romoser, *Symposium: Shining a Light on the Shadow Docket*, SCOTUSBLOG (Oct. 22, 2020), <https://www.scotusblog.com/2020/10/symposium-shining-a-light-on-the-shadow-docket> [<https://perma.cc/5UC6-BSFZ>] (explaining that emergency stay applications are decided on a truncated record, without full briefing or oral argument).

84. See Robert S. Chang, Alice Hsu, Elizabeth C. Rosen & Sofie Syed, *Stop Repeating History: The Story of an Amicus Brief and Its Lessons for Engaging in Strategic Advocacy, Coalition Building, and Education*, 68 CASE W. RES. L. REV. 1223 (2018).

## V. CONCLUSION: COUNTING IN CONSTITUTIONAL PRAXIS

The 2019 citizenship question litigation and the Korematsu Center's amicus advocacy reveals how census administration serves as a forum in which constitutional principles, administrative law, and historical memory converge. Recent efforts to exclude undocumented immigrants from population totals, conduct supplemental counts, or reinterpret demographic data reflect a renewed attempt to narrow the boundaries of political belonging and defy the constitutional mandate to count all persons.

The Korematsu Center's brief illustrates how census data can be misused when political actors seek to weaponize demographic information against particular communities. By grounding its legal analysis in historical episodes and community testimony, the brief underscores the risks of forgetting what happens when policymakers attempt to resurrect exclusionary census practices under new guises. Census data, once collected, may be retroactively repurposed in ways that exceed its original scope, underscoring the need to remain vigilant against efforts to distort or manipulate the population base. Administrative pretext, political rhetoric, and emergency judicial procedures can fracture public trust and erode the accuracy of the count. Understanding those dynamics requires centering the experiences of communities that have already lived through the promise of confidentiality and its subsequent breach. The lessons of the 2019 Supreme Court case and the historical memory preserved in the Korematsu Center's amicus brief point toward a single conclusion: to remember, to warn, and to stop repeating history.

No. 18–966

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**In The  
Supreme Court of the United States**

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DEPARTMENT OF COMMERCE, ET AL.,  
*Petitioners,*

v.

STATE OF NEW YORK, ET AL.,  
*Respondents.*

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*On Writ of Certiorari Before Judgment to the  
United States Court of Appeals for the Second Circuit*

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**BRIEF OF NORMAN Y. MINETA,  
THE SAKAMOTO SISTERS, THE COUNCIL ON  
AMERICAN-ISLAMIC RELATIONS (NATIONAL  
AND NEW YORK, INC.), AND THE FRED T.  
KOREMATSU CENTER FOR LAW AND  
EQUALITY AS AMICI CURIAE  
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### INTERESTS OF AMICI CURIAE<sup>1</sup>

Norman Y. Mineta, Sharon Sakamoto, Eileen Yoshiko Sakamoto Okada, and Joy Sakamoto Barker come forward as *amici curiae* because they know first-hand about the dangers—particularly for immigrant and minority communities—from government exploitation of census data. The government weaponized confidential census data during World War II to facilitate the mass removal and incarceration of their families and communities. The unlawful and pretextual manner in which the federal government has endeavored to add a citizenship question to the 2020 decennial census compels *amici* to offer that profoundly troubling historical context to inform the Court’s consideration of the questions presented.

Norman Y. Mineta served as Secretary of Transportation under President George W. Bush, as Secretary of Commerce under President Clinton, as a member of the U.S. House of Representatives from 1975 to 1995, and as mayor of San Jose, California, from 1971 to 1975. Norm’s parents had to respond as non-citizens to the 1920, 1930, and 1940 decennial censuses because this Court made clear in *Ozawa v. United States*, 260 U.S. 178 (1922), that his parents—who emigrated from Japan—were not eligible for naturalized citizenship due to their Japanese ethnicity. In 1942, when Norm was 10 years old, the federal government removed him and his family from their home, and incarcerated them with thousands of other Japanese Americans—first at the Santa Anita racetrack in southern California and then at the Heart Mountain camp in Wyoming. Even though he was a young boy at the time, Norm clearly recalls being surprised that the federal government was able to so quickly round up many Japanese Americans from his community on the day of the Pearl Harbor bombing and in the months that followed. Years later, he learned that the U.S. Census Bureau had provided critical information that facilitated the surveillance of Japanese American communities, as well as their eventual exclusion and incarceration.

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1. This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution intended to fund the brief’s preparation or submission.

Sharon Sakamoto, Eileen Yoshiko Sakamoto Okada, and Joy Sakamoto Barker are three sisters who spent World War II incarcerated at the Minidoka concentration camp in Idaho. Their parents were American citizens born and raised in Washington State. Eileen was five years old and Joy was six months old when the federal government removed them, their parents, and two brothers from their Seattle home and sent them all to live in a converted horse stall at the Puyallup Fairgrounds south of Seattle. The federal government then moved them to Minidoka, where Sharon was born. Like Norm and his family, the Sakamoto family was unaware that the Census Bureau cooperated with military authorities by identifying where Japanese Americans lived. Sharon, Eileen, and Joy join as *amici* because they are deeply concerned that the proposed citizenship question on the 2020 decennial census will cause immigrants and other persons of color to avoid responding for fear that the information will be used to harm them, just as the federal government harmed Japanese Americans during World War II.

The Council on American-Islamic Relations (CAIR) is the Nation's largest Muslim American civil rights and advocacy organization, and the Council on American-Islamic Relations, New York, Inc. (CAIR-NY) is an independent New York affiliate. Following the tragic attacks of 9/11, CAIR and CAIR-NY aided Muslim New Yorkers impacted by the perceived misuse of census data. Shortly after 9/11, at the request of what is now U.S. Customs and Border Protection, the Census Bureau provided a list of U.S. cities that had more than 1,000 Arab American residents. Over a year later, it provided a zip-code-level breakdown of Arab American populations by country of origin. Government officials subsequently insisted that the Bureau disclosed this data to help notify travelers about currency reporting requirements and to improve airport signage. Muslim Americans, however, viewed these post-9/11 disclosures as pretextual and infected with animus, thereby reducing their trust and participation in the 2010 decennial census. CAIR and CAIR-NY join as *amici* out of concern that the inclusion of a citizenship question in the 2020 decennial census will further erode Muslim Americans' trust and participation.

The Fred T. Korematsu Center for Law and Equality is a non-profit organization based at the Seattle University School of Law. It works to advance justice through research, advocacy, and education. Inspired by the legacy of Fred Korematsu—who defied military orders during World War II that resulted in the unlawful incarceration of 120,000 Japanese Americans—the Korematsu Center works to advance social justice for all. It has a special interest in addressing government action that harms classes of persons based on race or nationality.<sup>2</sup>

#### INTRODUCTION AND SUMMARY OF ARGUMENT

The decennial census depends on self-reporting and can achieve its mandate under the Enumeration Clause only when the public trusts that the federal government will not misuse collected information. In recognition of that fact, every U.S. President since 1910 has issued a proclamation reassuring individuals and their communities that no harm could result from participating in the decennial census.

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2. The Korematsu Center does not represent the official views of Seattle University.

Toward that end, the modern Census Act requires the Secretary of Commerce to treat census data as confidential.

Despite those assurances, the government has breached the public's trust on several occasions throughout the Nation's history—particularly during World Wars I and II. The most notable breach is the Census Bureau's 1942 disclosure of data on the whereabouts of Japanese Americans. The evidence is clear—and, indeed, the Bureau now admits—that it provided the data that powered the machinery of mass removal and incarceration of Japanese Americans during World War II.

The Census Bureau disclosed confidential data to wartime authorities out of supposed "military urgency," but the *coram nobis* cases 40 years later demonstrated any such urgency was a lie. The real reason for the government's deplorable treatment of Japanese Americans was a baseless perception of disloyalty grounded in racial stereotypes.

As that history demonstrates, the fear that census data could be used to harm individuals and communities is anything but abstract. Immigrant communities and other communities of color, in particular, thus have good reason to be suspicious of the government's decision to include a citizenship question on the 2020 decennial census. The district court's exhaustive post-trial findings confirm that suspicion here: the citizenship question was added through a process that the court found to be arbitrary, and it was based on a justification that the court found to be pretextual.

The federal judiciary plays a vital role in ensuring that improper motives do not infect government decisionmaking. Heeding the lessons of the government's historical exploitation of census data, including its misuse of such data to facilitate the mass incarceration of Japanese Americans on the pretext of national security, this Court should firmly reject the government's attempt once again to escape meaningful judicial scrutiny.

## ARGUMENT

### I. PUBLIC TRUST IN THE CENSUS DERIVES FROM THE FEDERAL GOVERNMENT'S ASSURANCE THAT IT WILL NOT MISUSE DATA.

The promise of data confidentiality is integral to the modern Census Bureau's ability to achieve the "actual Enumeration" required by the U.S. Constitution. U.S. CONST. art. I, § 2, cl. 3; *see, e.g.*, Vincent P. Barabba & D.L. Kaplan, *U.S. Census Bureau Statistical Techniques To Prevent Disclosure—The Right of Privacy vs. the Need To Know* (1975) ("Should the public's confidence in the Bureau's pledge of confidentiality for their census returns erode, goodwill and cooperation will erode."), *quoted in* U.S. DEP'T OF COMMERCE, REPORT ON STATISTICAL DISCLOSURE AND DISCLOSURE-AVOIDANCE TECHNIQUES 32 (1978). In recognition of the need for public trust, the modern Census Act restricts the Secretary's ability to (i) "use the information furnished" by census respondents "for any purpose other than the statistical purposes for which it is supplied"; (ii) "make any publication whereby the data furnished by any particular establishment or individual \*\*\* can be identified"; or (iii) "permit anyone other than the sworn officers and employees of the

Department or bureau or agency thereof to examine the individual reports.” 13 U.S.C. § 9(a)(1)-(3).

The federal government, however, did not always seek to protect census data. For example, to facilitate an accurate enumeration in the 1790 decennial census, the government posted draft census data in public places to shame noncompliant persons and levy community pressure on them. *See* JASON G. GAUTHIER, *MEASURING AMERICA: THE DECENNIAL CENSUS FROM 1790 TO 2000*, at 129 (2002).

It was not until the early twentieth century that the Census Bureau (created in 1902) adopted a more sensible approach of incentivizing participation in the decennial census through “guarantees \*\*\* designed to assure the public that they can respond candidly to government statistical inquiries.” Margo Anderson & William Seltzer, *Challenges to the Confidentiality of U.S. Federal Statistics, 1910–1965*, 23 J. OFFICIAL STATS. 1, 1 (2007) (hereinafter “*Challenges*”). President William Howard Taft sought to remove politics from the census process by ordering the Secretary of Commerce and Labor to promulgate regulations to ensure that “the census shall not be made to serve the political purposes of any one.” *The Census and Politics*, N.Y. TIMES, at 8 (Aug. 18, 1909) (quoting President Taft’s letter).

In a similar vein, President Taft issued a proclamation in 1910 to assure the public that participation in the census would not lead to harm:

The sole purpose of the census is to secure general statistical information \*\*\* , and replies are required from individuals only in order to permit the compilation of such general statistics. The census has nothing to do with \*\*\* army \*\*\* service \*\*\* , with the regulation of immigration, or with the enforcement of any national, state, or local law or ordinance, nor can any person be harmed in any way by furnishing the information required. There need be no fear that any disclosure will be made regarding any individual person or his affairs.

*1910 Census Proclamation*, U.S. CENSUS BUREAU. The sitting U.S. President has delivered a virtually identical proclamation for every decennial census since then. *Challenges*, *supra*, at 5.

Yet the Census Bureau almost immediately failed to live up to its promise of confidentiality. In 1917, the Bureau disclosed “to courts, draft boards, and the Justice Department” the names of thousands of draft-age men who failed to register for the Selective Service during World War I. *Challenges*, *supra*, at 7. In doing so, the Bureau’s Director concluded that “statistical confidentiality should be conditioned and compromised by more apparently pressing government needs.” *Id.*

Unsurprisingly, the floodgates opened: “[O]nce census officials supported the initial release of information to draft boards in 1917, officials in other agencies, for example in the Justice Department, asked for further releases.” *Challenges*, *supra*, at 10. “[I]n early 1920, while the enumerators were in the field, the Justice Department, on behalf of the Department of Labor, asked if the local enumerators in Toledo, Ohio, could provide information about individuals’ citizenship from the 1920 Census of Population \*\*\* for use in deportation cases.” *Id.* at 8 (ellipsis in original) (citation and internal quotation marks omitted).

After World War I, Census Bureau Directors William Mott Steuart (1921–1933) and William Lane Austin (1933–1941) viewed regaining public trust through

data confidentiality as paramount. *See Challenges, supra*, at 9–10, 16. But by 1941, as the United States faced the prospect of World War II, President Franklin Roosevelt “sought a mechanism to permit the administrative and intelligence agencies access to individual level information collected by the U.S. Census Bureau.” *Id.* at 16. President Roosevelt “involuntarily retired” Director Austin and nominated a more compliant director, who immediately “authorized the Commerce Secretary to provide officials in other government agencies access to confidential census data for the ‘national defense program.’” *Id.* at 17. Within a year, Congress passed the Second War Powers Act of 1942, which stated “[t]hat notwithstanding any other provision of law, \*\*\* data \*\*\* in the possession of the Department of Commerce or any bureau or division thereof, may be made available \*\*\* to any branch or agency of the Government \*\*\* for use in connection with the conduct of the war.” Pub. L. No. 77–507, § 1402, 56 Stat. 176, 186–187. That Act temporarily suspended the existing statutory confidentiality protection for census data. 13 U.S.C. §§ 8–9 (1940).

Requests for the Census Bureau to share census data continued during the postwar period. For instance, a few years after the end of World War II, “the Attorney General’s Office sought information from census records about certain individuals for use by the FBI in the context of rising concern about possible Communist infiltration and sabotage.” *Challenges, supra*, at 25 (citation and internal quotation marks omitted). To be sure, for a period beginning in 1962, the “Bureau effectively resisted any federal agency requests for access to individual reports for the purpose of taxation, investigation or regulation.” *Id.* at 28. But in 2001, the Bureau facilitated the U.S. Department of Homeland Security’s post-9/11 access to data from the 2000 decennial census concerning the 5-digit postal codes of Arab Americans. *Id.* And “[a]s during the world wars, there is much discussion today in the United States about coordination of government information and efficiency.” *Id.* at 30.

The upshot of these examples is that many Americans—particularly those from immigrant and minority communities—have reason to distrust how the government might use responses to a citizenship question, which could suppress response rates and degrade the quality of the data gathered. Past experience has also eroded confidence in the effectiveness of “ethical safeguards \*\*\* to deter the most likely and persistent ‘intruders,’ that is, other agencies of government with investigative, intelligence, or prosecutorial agendas.” *Challenges, supra*, at 29. In today’s age, where national security and other exigencies have brought the issue of census data confidentiality back to the fore, it is imperative that the decennial census be administered in a manner that eliminates any concern that data will be wielded against those who provide responses.

II. THE MASS INCARCERATION OF JAPANESE AMERICANS, FACILITATED BY CENSUS DATA AND PRETEXT, SERVES AS A CAUTIONARY TALE.

A. *The Government Used Census Data To Incarcerate Japanese Americans During World War II.*

One of the most glaring and heinous examples of the Census Bureau's violation of the public trust occurred during World War II: the Bureau played a central role in the mass removal and incarceration of over 120,000 Japanese Americans during the spring of 1942. "The historical record is clear that senior Census Bureau staff proactively cooperated with the internment, and that census tabulations were directly implicated[.]" U.S. CENSUS BUREAU POLICY OFFICE, A MONOGRAPH OF CONFIDENTIALITY AND PRIVACY IN THE U.S. CENSUS 16 (July 2001) (hereinafter "CENSUS BUREAU MONOGRAPH").

Most directly, the Census Bureau now admits to "providing 1940 census data on Japanese Americans" to the War Department, specifically the Western Defense Command, "for small geographic areas down to the census tract and block levels." CENSUS BUREAU MONOGRAPH, *supra*, at 15. In February 1942, the Bureau deployed the head of its statistical research division, Calvert Dedrick, "to the Western Defense Command to assist in the implementation of the evacuations." Margo Anderson, *Public Management of Big Data: Historical Lessons from the 1940s*, FED. HIST. 17, 22 (2015) (hereinafter "*Public Management*"). Dedrick later testified that the Western Defense Command asked him for "a detailed cross-tabulation for even the most minute areas," such as "cities by blocks." William Seltzer & Margo Anderson, *After Pearl Harbor: The Proper Role of Population Data Systems in Time of War* 7 (Mar. 28, 2000) (unpublished draft). Dedrick agreed and provided unpublished data that allowed the Western Defense Command "to find where the citizens of Japanese descent lived" and to identify "exactly the city blocks where the people of Japanese descent lived." *Public Management*, *supra*, at 29–30 (citation and quotation marks omitted).

Contemporaneous evidence confirms the Census Bureau's admission. In 1943, U.S. General John L. DeWitt, Commander of the Western Defense, authored what the government offered as the military's official account of the wartime removal and incarceration. J.L. DeWitt, *Final Report: Japanese Evacuation from the West Coast, 1942* (June 5, 1943) (hereinafter "*Final Report*"). General DeWitt detailed how the Bureau performed a "special tabulation" of 1940 decennial census data for the Western Defense Command, which "plotted on maps" the "total number of Japanese individuals and families \*\*\* for each census tract." *Id.* at 86. Specifically, the Bureau provided "tables" showing "various city blocks where the Japanese lived and \*\*\* how many were living in each block." REPORT OF THE CWRIC, PERSONAL JUSTICE DENIED 105 n.\* (The Civil Liberties Public Education Fund & University of Washington Press, 1997).

That information allowed the Western Defense Command to round up Japanese Americans—what General DeWitt referred to as the "logistics of evacuation"—with swift and surgical precision. *Final Report*, *supra*, at 356. Indeed, General DeWitt concluded that "[t]he most important single source of information

prior to the evacuation was the 1940 Census of Population,” which “became the basis for the general evacuation and relocation plan.” *Id.* at 352; *see also id.* at 79 (census data was “[o]f prime importance in shaping the evacuation procedure”).

Beyond sharing data with the Western Defense Command, the Census Bureau disclosed information about individual Japanese Americans to federal agencies. William Seltzer & Margo Anderson, *Census Confidentiality Under the Second War Powers Act (1942–1947)*, at 5 (Mar. 12, 2007) (unpublished draft). In 1943, pursuant to the Second War Powers Act, the U.S. Treasury Department requested from the Commerce Department “a list of the Japanese residing in the Metropolitan Area of Washington, D.C., as reported in the 1940 Census, including information as to addresses.” *Id.* at 16 & fig. 1. The Commerce Department complied within seven days, creating a spreadsheet that listed the “name, address, sex, age, marital status, citizenship status, status in employment, and occupation and industry” of 79 Japanese Americans. *Id.* at 21–22 & figs. 5a-b. The rapidity of the disclosure demonstrates that “the Bureau not only provided identifiable micro-data on Japanese Americans to other federal agencies but also had well-developed procedures to do so expeditiously.” *Id.* at 24. Thus, at the very least, the 1943 Washington, D.C. disclosure is strong evidence that “lists of Japanese Americans from the 1940 Census were provided to assist in the mopping up stages of the round-up of Japanese Americans on the West Coast.” *Id.* at 40.

The foregoing lays bare how the federal government used the 1940 decennial census for the purpose of finding and incarcerating Japanese Americans, *despite* President Roosevelt’s 1940 proclamation that “[t]here need be no fear that any disclosure will be made regarding any individual person or his affairs” and that “[n]o person can be harmed in any way by furnishing the information required.” *Proclamation 2385: Sixteenth Decennial Census* (Feb. 9, 1940), in 1940 SUPPLEMENT TO THE CODE OF FEDERAL REGULATIONS 26–27 (1941). This shameful episode from our Nation’s history provides real-world context for Respondents’ concern that the Census Bureau will use citizenship data for improper purposes or in ways that will harm them or their communities.

B. *The Japanese American Incarceration Cases Are Powerful Reminders That This Court Must Be Vigilant In Policing Pretext.*

In addition to asking the Court to remember the use of census data during World War II, *amici* ask the Court to uphold the district court’s searching inquiry into the government’s stated reason for adding the citizenship question to the 2020 decennial census and to ensure that the reason is not pretextual. In the Japanese American incarceration cases, the Court failed to scrutinize the government’s claim that its actions were necessary, and 40 years later, it was discovered that the government’s reasons were a pretext for discrimination. The Court should remember the lesson of those cases. It should scrutinize the government’s proffered justification here (including by subjecting decisionmakers to discovery), and it should affirm the district court’s conclusion—based on scores of post-trial factual findings—that the Secretary of Commerce concealed his true motivation for adding the citizenship question.

The district court held that “the sole rationale” the government “articulated for [its] decision—that a citizenship question is needed to enhance [the Department of Justice’s (DOJ) Voting Rights Act (VRA)] enforcement efforts—was pretextual.” Pet. App. 320a.<sup>3</sup> In particular, the district court found several facts demonstrating that the government made its decision “well before” the DOJ’s request for a citizenship question “and for reasons unrelated to the VRA.” *Id.* at 313a. Worse still, “the record also includes evidence of the many ways in which Secretary Ross and his aides sought to conceal” the decision to add the citizenship question. *Id.* at 314a.

The Administrative Procedure Act (APA) exists precisely so that Article III courts can ferret out and invalidate such agency action. It confers upon courts the essential responsibility to “set aside agency action” that is “not in accordance with law” or “in excess of statutory jurisdiction, authority, or limitations.” 5 U.S.C. § 706(2)(A), (C). And it is a core tenet of APA review that an agency decision-maker must “disclose the basis of” decision. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *see also Securities & Exch. Comm’n v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (“[T]he process of review requires that the grounds upon which the administrative agency acted be clearly disclosed[.]”). Pretextual decisionmaking is anathema to those principles.

The Solicitor General nonetheless invites this Court to insulate the Secretary’s action from APA review altogether. Gov’t Br. 21–28. As a fallback, the Solicitor General argues that the district court’s pretext finding “defies fundamental principles governing APA review of agency action” because it puts the focus on an unstated justification not in the administrative record. *Id.* at 40–45. Relatedly, the Solicitor General seeks to shield decisionmakers from having to reveal their true intentions in discovery. *Id.* at 55.

As the Japanese American incarceration cases poignantly demonstrate, the costs of allowing the actual justifications for government action to go undetected—or even unchecked—are unmeasurably high. There, the government argued that the wartime orders resulting in the incarceration of 120,000 persons of Japanese ancestry—two-thirds of whom were American citizens—were justified by military necessity because those persons posed a threat of espionage and sabotage. *See Hirabayashi v. United States*, 320 U.S. 81 (1943), *conviction vacated* 828 F.2d 591 (9th Cir. 1987); *Yasui v. United States*, 320 U.S. 115 (1943), *conviction vacated* 772 F.2d 1496, 1498 (9th Cir. 1985); *Korematsu v. United States*, 323 U.S. 214 (1944), *conviction vacated* 584 F. Supp. 1406, 1413 (N.D. Cal. 1984). This Court infamously deferred, reasoning that “it is not for any court to sit in review of the wisdom of the[] action or [to] substitute its judgment for [the decisionmakers’].” *Hirabayashi*, 320 U.S. at 93; *see also Korematsu*, 323 U.S. at 218 (same).

Forty years later, *coram nobis* petitions revealed that the government had engaged in “the suppression of evidence which established \*\*\* the real reason for

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3. Significantly, the only other court to consider this question also found that the Secretary’s rationale was pretextual. *See State v. Ross*, No. 18-CV-01865-RS, 2019 WL 1052434, at \*48 (N.D. Cal. Mar. 6, 2019) (“Together, this evidence establishes that Defendants intended to use the VRA enforcement as a pretext for adding the citizenship question when VRA enforcement was not, in fact, their true purpose.”).

the exclusion order,” and instead had provided this Court a false and pretextual record to support the mass exclusion of Japanese Americans. *Hirabayashi*, 828 F.2d at 604. Although the government had represented that the immediate round-up of Japanese Americans was necessary because there was insufficient time to separate the loyal from the disloyal, General DeWitt’s Final Report originally said no such thing. *Id.* at 596, 598. Instead, it took the racist and revealing position that one could *never* separate the “sheep from the goats” because Japanese Americans were inherently disloyal on account of their “ties of race, intense feeling of filial piety and \*\*\* strong bonds of common tradition, culture and customs.” *Hirabayashi v. United States*, 627 F. Supp. 1445, 1449 (W.D. Wash. 1986). When it was discovered that the Report contradicted the government’s argument, the government ordered the Report revised and destroyed the original versions. *Hirabayashi*, 828 F.2d at 598–599.

The government also failed to apprise this Court of intelligence reports from the Federal Bureau of Investigation (FBI), the Federal Communications Commission (FCC), and the Office of Naval Intelligence (ONI) that refuted the government’s claim of military necessity. Justice Department attorney John L. Burling attempted to insert a footnote into the government’s brief in *Korematsu*, stating that General DeWitt’s “recital” with respect to “the use of illegal radio transmitters and shore-to-ship signaling by persons of Japanese ancestry” were “in conflict with information in the possession of the Department of Justice.” *Korematsu*, 584 F. Supp. at 1417 (emphasis and internal citation omitted). His memorandum to Assistant Attorney General Herbert Wechsler stated: “General DeWitt’s report makes flat statements concerning radio transmitters and ship-to-shore signaling which are categorically denied by the FBI and by the [FCC]. There is no doubt that these statements were intentional falsehoods.” *Id.* at 1424. The footnote as filed, however, did the opposite of what Burling recommended in “ask[ing] the Court to take judicial notice” of “the justification for the evacuation.” Br. of U.S. 11 n.2, *Korematsu v. United States*, No. 22 (U.S. Oct. 5, 1944).

Similarly, the ONI’s Kenneth Ringle wrote a report concluding that there was no basis for mass incarceration. See Lt. Comm. Kenneth D. Ringle to Chief of Naval Operations, *Report on Japanese Question* (Jan. 26, 1942), in File ASW 014.311, RG 107, U.S. National Archives, Washington, D.C. Justice Department attorney Edward Ennis urged the Solicitor General to disclose the report to this Court, but “[n]otwithstanding [his] plea, the \*\*\* brief in *Hirabayashi* made no mention of Ringle’s analysis.” *Hirabayashi*, 828 F.2d at 602 n.11. The Solicitor General finally confessed error for this conduct in 2011. U.S. Dep’t of Justice, *Confession of Error: The Solicitor General’s Mistakes During the Japanese American Internment Cases* (May 20, 2011).

These well-chronicled events make all-too-concrete the concern that the government’s stated rationale for pursuing a particular end may be cut from whole cloth. The APA empowers courts to evaluate the government’s justification in real time, rather than discover 40 years later that it was pretextual.

*Korematsu*, *Hirabayashi*, and *Yasui* are painful yet powerful reminders not only of the need for constant vigilance in protecting our fundamental values, but also of the essential role of Article III courts as guardians against pretextual government action. Rather than repeat the failures of the past, this Court should repudiate them and affirm the greater legacy of those cases: Blind deference to the Executive Branch's stated rationale is incompatible with the protection of fundamental freedoms. Accordingly, this Court should reject the government's invitation to abdicate its critical role to root out pretext under the APA; subject the government's reason for adding a citizenship question to the 2020 decennial census to searching judicial scrutiny; and stand as a bulwark against government action that threatens immigrant and other communities of color.

#### CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Respectfully submitted.

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