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TESTIMONY OF

THE CENTER FOR LAW AND SOCIAL JUSTICE

before the

**House Committee on Oversight and Reform, Subcommittee on Civil
Rights and Civil Liberties**

on

Black Community Participation on Census 2020

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Chairman Raskin, Ranking Member Roy, and members of the Subcommittee: My name is Lurie Daniel Favors and I serve as the General Counsel of the Center for Law and Social Justice. I am a civil rights attorney with 15 years of experience advocating for the protection of the racial justice and civil rights of Black New Yorkers. The Center for Law and Social Justice (CLSJ) is a unit of Medgar Evers College of The City University of New York. Founded in 1986 by means of a New York State legislative grant, the mission of CLSJ is to provide quality advocacy, and community services to New Yorkers of African descent and the disenfranchised. CLSJ seeks to accomplish its mission by conducting research, and initiating public policy advocacy projects and litigation on behalf of community organizations and groups of people of African descent and the disenfranchised which promote civil and human rights, and which further national and international understanding. Because of its unique combination of advocacy services from a community-based perspective, CLSJ is a focal point for progressive activity.

The Impact of Race and Racism on the Decennial Census

At its heart, the census is essentially a survey that counts the population and gathers information designed to tell the government: who lives where, how people live there, and what needs are present in their community. These questions are important because once census data is compiled, it is plugged into myriad formulae that determine two key functions of democracy: 1) how many political representatives each community will receive; and, 2) how the government will distribute nearly \$800 billion dollars of taxpayers' revenues annually for services. These services include infrastructure development, food, nurses, doctors, health benefits, affordable and emergency housing, teachers, bus and train lines, transportation infrastructure, senior services, infants and youth services, climate and environmental services, emergency care, and more. Indeed, the correct allocation of political power, voting rights protections and the annual distribution of hundreds of billions of dollars¹ in government

¹ Andrew Reamer, GW Institute of Public Policy, Counting for Dollars 2020: The Role of the Decennial Census in the Geographic Distribution of Federal Funds Report #2: *Estimating Fiscal Costs of a Census Undercount to States*, at 2, 5 (2018) (<https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/GWIPP%20Reamer%20Fiscal%20Impacts%20of%20Census%20Undercount%20on%20FMAP-based%20Programs%2003-19-18.pdf>) (“*Reamer Report*”)

resources, are dependent upon the vitally important numeric and geographic data that is generated by the decennial census.

Communities that are difficult to count and most under counted on the census (also known as “hard to count” or “HTC” communities) receive less than their fair share of political representation and their fair share of government resources. Conversely, communities that are over counted on the census, benefit by receiving an inequitably larger share of political representation and government resources, than that to which they are entitled. The decision to include a citizenship question on the 2020 census will trigger an undercount in census self-response rates, particularly in HTC communities, further exacerbating pre-existing challenges in counting the residents who live there. This undercount threatens to gravely disenfranchise constituents politically and economically for the next decade as it will erroneously skew the entire data set upon which each of the regulatory formulae that determine political power, civil rights, and resource allocation, rely. The negative impacts of a flawed census data set are myriad and they are particularly troublesome for New Yorkers of African descent.

New York City, which has the highest population of people of Pan African descent in the US, had one of the lowest response rates during the 2010 Census. Communities like Central Brooklyn, Bronx, Queens, and parts of Manhattan and Staten Island, along with portions of Long Island, and upstate areas like Rochester, Buffalo and Albany are just a few of the counties that are home to large percentages of “Hard-to-Count” Black populations. These populations, all of African descent, include: African Americans, Caribbean American and Caribbean immigrants, African immigrants, and Afro Latinx, and African descendent people from other areas of the globe, such as Asia, Europe, and Australia and New Zealand.

Significant History of Racial Disparity in US Census Enumeration

Racial disparity in census enumeration is not a recent development in the United States. Low census counts in Black communities are an outgrowth of continuing patterns of racial oppression that date back to the time when Africans were enslaved on these shores. When government or community groups engage in census outreach or education in African descendant communities without considering how race and racism have historically shaped

Black community census participation, we essentially undermine our efforts before they even begin.

One of the earliest references to counting people of African descent in the American census count is found in the “Three-fifths Clause” of the United States Constitution. Contrary to popular belief, the three-fifths clause was not about Black *humanity*. The “Three-fifths Clause” was merely the fraction used to *apportion additional political representation in Congress* to slave states.

The clause stated that congressional representation would be based on "the whole Number of free Persons" and “three fifths of all other Persons.” Those “other Persons” were enslaved African people. This was not a data point about race — which we know because free Africans were counted in the same way as Whites. Rather, this was a data point, a census data set if you will, about the allocation of *political power*.

This early instance of racially manipulating the census count was for the consolidation of political power in the hands of slave owners. Their desire to use census data to perpetuate the economic system of slavery is just the start of a legacy of racially motivated census manipulation.

In the seventy years that followed the passage of the three-fifths clause, anti-Black slave owning interests used their false census data sets to protect the institution of slavery. As a result, they passed racist laws in the US Congress like:

1. The Missouri Compromise of 1820 which admitted Missouri into the Union as a slave state;
2. The annexation in 1845 of Texas, which was intended to be an "empire for slavery";
3. The passage of the Fugitive Slave Act of 1850 (also known as the blood hound law) wherein once escaped African slaves were recaptured, they had to be returned to their masters and it required officials and citizens of free states to cooperate;
4. The law which allowed slavery in Utah and New Mexico; and
5. The passage of the Kansas-Nebraska Act in 1854 which ensured slavery could thrive in new territories like the Great Plains and the Rocky Mountain

Not a single one of these laws, which were designed to keep Black people enslaved, oppressed and locked into the bottom rungs of society, could have passed without the three-fifths clause's decades old manipulation of census data.

While one would hope that this racist past was relegated to the history books, that history is present with us today. The decades of racial oppression that followed the Civil War, the Reconstruction era, Jim Crow, the struggles of the Civil Rights Movement, and the rise of white nationalism in our current political environment, all contribute to the fears that drive a decrease in Black community census participation.

Concerns about the misuse of data, including memories of how Japanese Americans were rounded up in internment camps, and more recent stories of how Muslims in America were targeted in the days following 9/11 based in part on census data, are firmly embedded in the consciousness of many communities of African descent. Coupled with the increasingly explicitly racially hostile environment in which we now live, many Black communities remain fearful of engaging in the transfer of information from their households to the federal government.

Census Data Accuracy and the Wrongful Inclusion of a Citizenship Question

Despite political protestations to the contrary, accurate data, like accurate facts, are vitally important in order to arrive at the proper outcome. In the case of the constitutionally mandated census, the proper outcome is the correct and proportionate distribution of electoral power and fiscal resources, regardless of zip code, community or race. The inclusion of a citizenship question on the 2020 census threatens to negatively impact the nation's ability to reach that goal. Including a citizenship question will devastate the Census Bureau's ability to accurately count the nation's residents. The resulting inaccuracy will unnecessarily lock some of our country's most vulnerable communities into a political and economic underclass.

As elected public officials, you are well aware that the boundaries for your districts are drawn based on the total population data gathered by the decennial census.² That data

² Nat'l Conference of State Legislatures, *Redistricting Law 2010* ("NCSL Redistricting"), at 7 (2009).

determines the size of each of your districts and the number of residents you represent.³ When drawing congressional and legislative districts, districting bodies are required by law to design districts that are equally populated.⁴ Indeed, mathematical precision lies at the heart of the equal population requirements for congressional, legislative and local districts.⁵ Congressional districts are required to be as “nearly equal in population as practical.”⁶

The framers were so concerned with numerical accuracy in the distribution of electoral power and access to government resources, that they reached a compromise on not only which residents would be counted, but whether residents would be counted as whole or fractions of persons. As noted previously, this distinction was based on a racial classification that distinguished between free White residents and White indentured servants who were counted as whole persons, and enslaved African residents who were only assigned a three-fifths count.

Only after slavery was legally abolished did Congress adjust the mathematical formulation for the distribution of political representation and government resources. Once Congress formally recognized African descendants as full human beings, the formula for apportionment was revised to accommodate the new calculation. The Fourteenth Amendment modified the first sentence of Article I, Section 2, to provide: Representatives shall be apportioned among the several States *according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.*” U.S. CONST. amend, XIV, Section 2.

Accuracy of population data is one of the principal underpinnings of the Equal Protection Clause mandate that there be substantive equality in population among the various congressional, state and local legislative districts. As with any mathematical equation, the accuracy of the data determines the accuracy of the answer. The Constitution’s demand for population equity in the apportionment of electoral power lies at the heart of how and why

³ *Id.* at 25-26.

⁴ *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964)

⁵ NCSL Redistricting at 2.

⁶ *Id.* at 26; *Wesberry v. Sanders*

typically, the Census Bureau vigorously eschews data gathering policies that could skew census data or produce statistically questionable results.⁷

In order to maintain its commitment to numerical accuracy and independence from state and local politics, the Census Bureau has long employed objective, scientific methodologies to ensure accuracy. The Census Bureau's Statistical Quality Standards, with which all Census Bureau employees are required to comply, defines "information quality" as an "encompassing term comprising utility, objectivity and integrity."⁸ The agency's focus on objectivity is primarily concerned with "whether information is accurate, reliable, and unbiased," and ensuring that the information it produces is:

"...presented in an accurate, clear, complete, and unbiased manner. Objectivity involves both the *content of the information* and the presentation of the information. It requires complete, *accurate*, and easily understood documentation of the sources of the information, with a description of the sources of errors that may affect the quality of the data, when appropriate."⁹

The states are required to comply with the Constitution's mandates of equal protection under the law as expressed through the principle of "one person-one vote." The Census Bureau's longstanding commitment to producing accurate and useful data plays the quintessential role in empowering the states and local governments to meet these mandates.

The inclusion of a citizenship question on the census will impede the ability to draw district lines that are in compliance with their constitutional obligations and it will harm the very communities that you were elected to represent, particularly communities of color and

⁷ "As the largest statistical agency of the federal government, the Census Bureau strives to serve as the leading source of quality data about the nation's people and economy. The Census Bureau has developed these standards to promote quality in its information products and the processes that generate them. These standards provide a means to ensure consistency in the processes of all the Census Bureau's program areas, from planning through dissemination. By following these standards, the Census Bureau's employees and contractors will ensure the utility, *objectivity*, and *integrity* of the statistical information provided by the Census Bureau to Congress, to federal policy makers, to sponsors, and to the public." (emphasis added) U.S. Census Bureau, *U.S. Census Bureau Statistical Quality Standards*, (Jul. 2013) (https://www.census.gov/content/dam/Census/about/about-the-bureau/policies_and_notices/quality/statistical-quality-standards/Quality_Standards.pdf).

⁸ U.S. Census Bureau, *Statistical Quality Standards*, I (July 2013) https://www.census.gov/content/dam/Census/about/about-the-bureau/policies_and_notices/quality/statistical-quality-standards/Quality_Standards.pdf.

⁹ *Id.* at ii.

immigrant communities. Including a citizenship question on the census undermines one of the primary purposes of the census enumeration — the distribution of equal representative power. As noted *supra*, inserting the highly politicized citizenship question is predicted to trigger a reduced census self-response rate and generate a severe undercount in total population data. This undercount will produce a flawed set of data that will skew the results of the regulatory formulae that employ census data to determine the appropriate distribution of resources.

The Census Bureau's decades long held position is explicitly and unambiguously opposed to questions related to citizenship being included on the decennial census. This precisely due to the Census Bureau's acknowledgement that a citizenship question on the census would produce faulty census data.¹⁰ According to the Bureau in 1980,

“any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count. Obtaining the cooperation of a suspicious and fearful population would be impossible if the group being counted perceived any possibility of the information being used against them. Questions as to citizenship are particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate.”¹¹

The recent decision to include the citizenship question on the census was made in contravention of that policy.

In 1985, when discussing the possible impact of questions related to citizenship being included on the Decennial census, the Census Bureau Director testified that such a line of questioning would:

“...run the risk of [the Census Bureau] being perceived as an enforcement agency... among those residents who could suffer injury as a result of being identified as undocumented aliens. This, in turn, could have a major effect on the cooperation we receive, not only from segments of this population, *but from the population at large*. In a free society, we are *entirely dependent upon respondent cooperation*. *The Census Bureau goes to great lengths to avoid misperceptions that could adversely affect that cooperation.*”¹²

¹⁰ *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980).

¹¹ *Id.* at 568

¹² *Enumeration of Undocumented Aliens in the Decennial Census: Hearing Before the Subcomm, on Energy, Nuclear Proliferation and Gov't Processes of the S. Comm on Governmental Affairs, 99th Cong. 23 (1985) (statement of John Keane, Dir. Bureau of the Census) (emphasis added).*

Notably, the agency's concerns about the negative impact of including a citizenship question on the census existed prior to the creation of the current anti-immigrant, anti-Black and anti-Latino sentiment, statements and policies emanating from the president's own statements and supported by those in his administration.¹³ Now that the political atmosphere has been poisoned with bigoted, xenophobic rhetoric and policies aimed squarely and antagonistically at these communities, the Census Bureau's long held reservations about the impact of including a citizenship question on the census are being realized.

More recently, Census Bureau personnel have been sounding the alarm about the negative impact that a citizenship question on the 2020 census will have on the overall response rate. The agency's data gathered by its Center for Survey Management (CSM) indicates that when a citizenship question is added, even residents who were at one time willing to participate in their questions, are no longer willing to do so.¹⁴ After extensive testing, which incorporated multiple response methods and field representative outreach efforts, the CSM recorded an unprecedented number of respondents who reported concerns about immigration status and confidentiality.¹⁵ The reported concerns were so significant that Census Bureau Field Representatives ("Field Representatives") noted that they were "facing a 'new phenomenon' in the field and that respondents' fears, particularly among immigrant respondents, have increased markedly."¹⁶ The CSM Memo noted that across the board,

¹³ See, Josh Dawsey, Trump derides protections for immigrants from 'shithole' countries, Washington Post, Jan 12, 2018 (https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?noredirect=on&utm_term=.e1b43d296475); Bess Levin, *Trump Suggests Kneeling Football Players Should Be Deported*, Vanity Fair, May 24, 2018, (<https://www.vanityfair.com/news/2018/05/trump-suggests-kneeling-nfl-players-should-be-deported>); Philip Rucker, *Trump Says He is Considering a New Family Separation Policy at U.S.-Mexico Border*, Washington Post, Oct 13, 2018, (https://www.washingtonpost.com/politics/trump-says-he-is-considering-a-new-family-separation-policy-at-us-mexico-border/2018/10/13/ea2f256e-cf25-11e8-920f-dd52e1ae4570_story.html?utm_term=.b783b8bfd72d).

¹⁴ Memorandum Center for Survey Management, U.S. Census Bureau, to Associate Directorate for Research and Methodology ("ARDM"): *Respondent Confidentiality Concerns* (Sept. 20, 2017) (<https://www2.census.gov/cac/nac/meetings/2017-11/Memo-Regarding-Respondent-Confidentiality-Concerns.pdf>) ("CSM Memo").

¹⁵ CSM Memo at 1-2.

¹⁶ *Id.* at 1.

residents in immigrant and HTC communities were increasingly fearful of responding to Field Representatives, “...given the political temperature these days.”¹⁷

One Field Representative reported that a respondent stated “...that he was not a citizen, and then appeared to lie about his country of origin. When the [Field Representative] started asking about his year of entry into the U.S., he ‘shut down’ and stopped responding to her questions. He then walked out and left her alone in the apartment, which had never happened to her during an interview before.”¹⁸ The CSM Memo noted that these negative impacts are “particularly troubling given that they impact hard-to-count populations disproportionately, and have implications for data quality and nonresponse.”¹⁹

These are just some of the fears that many Field Representatives reported and they are grounded in a reality where the Trump Administration actively engages in forced family separations at the southern border; a reality where President Trump refers to various Black and Latinx countries in the most vulgar of derogatory terms and advocates for deporting residents and American citizens without affording them due process.²⁰ This harmful rhetoric and the administration’s accompanying policies have ramped up fear in communities of African descent and immigrant communities. The resultant rational fear of government will further contribute to a massive census undercount which will make accurately enumerating historically HTC communities even more challenging than usual. As a result, the communities that you represent, which are some of the most vulnerable communities in our nation, will lose out on their fair share of political representation and the vitally necessary resources, upon which they depend.

How U.S. History Shapes Current Census Reality: A Tale of Two Families

To see how this plays out in real life, I’d like to introduce you to two families: The Jackson family and the Johnson family.

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 7 (emphasis added).

²⁰ Dawsey, *supra* note 13; Levin, *supra* note 13; Rucker, *supra* note 13.

The Jackson family is typical of many Black families that reside in New York State. They live in a multiunit building. Their grandparents live upstairs, mom, dad and children on the parlor floor and their uncles live down in the basement apartment.

This family comes from a community that is traditionally under counted on the census. This family's history of interaction with the United States government is one that has been scarred by government sponsored racial discrimination and the denial of equitable civic and societal engagement opportunities. This family knows that when the government typically asks for information, the end result is rarely one that benefits their Black family.

In the 1600s and 1700s, when this family heard a strange knock at the door or received a demand for information, what followed might mean family members being sold into slavery, sent away to parts unknown, tortured, raped or killed. In the 1800s, a government request for information might result in escaped formerly enslaved family members being returned to brutal owners under the Fugitive Slave Act. Even free Blacks who had never been enslaved, could be kidnapped and transported into slave states where they lived out the rest of their years in bondage – all under the watchful eye of government.

In the 1900s and 2000s, government demands for information might result in an ACS case where your children were taken from you, or your family home was broken up. It might mean that banks would issue your formerly red-lined community fraudulent loans (assuming you get a loan at all). These loans were riddled with such racist toxic loan products that entire Black communities lost *and continue to lose* more than half of their collective wealth through the foreclosure crisis.

As a result of this history, the Jackson family are justifiably reluctant to deal with the federal government. They might fill out one census form. Perhaps a parent, either mom or dad, will submit a form and maybe they will include a few of the children. They're not likely to count the grandparents or the uncles living on the ground floor. And, they will likely attempt to minimize the amount of information that they actually give. As a result, this family will live in a community that has fewer schools and early childcare options. The education options they do have will be overcrowded and there will be fewer programs designed to help children get into college. They'll have fewer senior citizen services, grocery stores, banks and healthcare options. They will also receive fewer political representatives.

If this family lives in a typical New York City community where there is a 56% census return rate, this community is only going to get 56% of the government resources and political representation that it deserves. That means 56% of the elected officials, the schools and teachers, homework help, transportation services, medical care, healthy food and affordable housing options, and of the legal services to which this community is entitled.

Now I'd like to introduce you to the Johnson family. The Johnson family, like their distant neighbors the Jackson's, also live in a multiunit building. They have several children, their grandparents live upstairs and their aunts and cousins live on the ground floor. This family has a different racial history.

This family has a history that is marked by racial privilege and the over distribution of societal engagement and benefit opportunities. They have a positive history of civic engagement and this family knows that when the government asks for information, once they turn it over, good things follow. The Johnsons benefited from racist policies and legislation like the Homestead Acts wherein the United States government forcibly removed the Native Americans and opened up Native lands to White families like the Johnsons. Which means they became landowners and homeowners nearly overnight, practically free of charge.

When their grandfather came home from the war, he was able to participate in the G.I. Bill and received preferential rates for student aid loans and mortgages. As a result, the Johnson family was able to grow the wealth that they received in the form of free land and housing and increased it with education and housing benefits that were racially distributed to Whites and often Whites only.

So when this family is asked to turn over information on the census, they have a history that encourages them to do so. Not only will the parents fill out a census form that reflects their entire family unit, but they will ensure that the grandparents who live in the unit upstairs also fill out a form. They will also make sure the aunts downstairs fill one out for their unit. They will call their daughter who is away at college and remind her fill out a census form so that she too can be counted in her college community. They will also ensure that the summer home, where they vacation each year, will also have a census form submitted so that their needs can be met regardless of whether they are at home or away on vacation.

As a result, the Johnson family will have three or four census forms submitted and they will live in a community that is going to receive their fair share of services and political representation. If they live in a community where at 95% of their community is filling out the census, they will end up with 95% of the elected officials, schools, teachers, homework help programs, transportation services, medical care, healthy food and affordable housing options, etc. Not only will they receive the services in their home community, they will also receive the services in their vacation community, and in their child's college community.

The reality is, the history of racial oppression in this country is directly related to the racially disparate participation in the census enumeration. All of this is a challenge, even before we add the element of Black immigration policy to the analysis.

Black Immigrants in New York

According to the Black Alliance for Just Immigration's report entitled The State of Black Immigrants (sponsored by BAJI and the NYU Immigration Law Clinic), the number of Black immigrants in the United States has increased remarkably in recent decades. In New York State, Black immigrants make up almost 30% of the total Black population, which makes it the top state for Black immigrants in the U.S.

While all of the typical immigration related fears related to decreased census participation also impact Black immigrants, immigrants of African descent are also burned by the racial discrimination experienced by Black people – which means census participation in the Black immigrant communities presents an additional challenge that lies at the intersection of race and immigration policy.

Additionally, for the first time, on the 2020 Census, persons of African descent—regardless of nationality or ethnicity—will be able to indicate their ethnicity/nationality ***and*** their race. Which means, not only must we educate Black communities in our state about the census generally. We must also ensure that there is a vibrant education and media campaign that encourages communities of African descent to understand the nuances that shape American distinctions between race and nationality.

The Racial Digital Divide

Add to these challenges, the fact that the 2020 Census will include a digital response first touch. It is common knowledge that the Black communities have a widespread lack of digital knowledge and familiarity that is estimated at 30-40% in New York City. The request in 2020 for census completion online will serve to further depress initial participation by Black New Yorkers.

Recommendations

All of which means, when it comes to census 2020 participation in Black communities, we must apply a culturally responsive approach to census outreach and education. It is imperative that Black community organizations and faith-based groups are funded for census work so that they, the trusted voices, are able to educate and empower Black community residents to both understand and engage with the census. The survival of our communities literally depends on our ability to hire, train and deploy people power and resources to those hard to count New York communities of African descent.

Additionally, members of Congress and this committees must exercise any and all oversight powers to ensure the Census Bureau is conducting the census in a manner that will produce an accurate count. This means rejecting the use of any policies or questions on the census that are likely to reduce census participation. It also means fully funding the Census Bureau, whose 2020 Census programs remain woefully underfunded. While census participation is not the most titillating aspect of government life, it is certainly one of the most vital to ensuring that democracy has a fighting chance. We look to this committee to ensure that our nation's most vulnerable communities are protected.