

IN THE SUPREME COURT OF THE UNITED STATES

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1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -
3 DEPARTMENT OF COMMERCE, ET AL.,)
4 Petitioners,)
5 v.) No. 18-966
6 NEW YORK, ET AL.,)
7 Respondents.)
8 - - - - -
9 Washington, D.C.
10 Tuesday, April 23, 2019
11
12 The above-entitled matter came on for
13 oral argument before the Supreme Court of the
14 United States at 10:06 a.m.
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1 APPEARANCES:

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3 GEN. NOEL J. FRANCISCO, Solicitor General,
4 Department of Justice, Washington, D.C.;
5 on behalf of the Petitioners.

6 BARBARA D. UNDERWOOD, Solicitor General,
7 New York, New York;
8 on behalf of Respondents New York, et al.

9 DALE E. HO, ESQ., New York, New York;
10 on behalf of Respondents New York Immigration
11 Coalition, et al.

12 DOUGLAS N. LETTER, ESQ., Washington, D.C.; on behalf
13 of the United States House of Representatives,
14 as amicus curiae, in support of the Respondents.

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1 P R O C E E D I N G S

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 18-966, the
5 Department of Commerce versus New York.
6 General Francisco.

7 ORAL ARGUMENT OF GEN. NOEL J. FRANCISCO

8 ON BEHALF OF THE PETITIONERS

9 GENERAL FRANCISCO: Mr. Chief Justice,
10 and may it please the Court:

11 In March 2018, Secretary Ross
12 reinstated a citizenship question that has been
13 asked as part of the census in one form or
14 another for nearly 200 years. The district
15 court's invalidation --

16 JUSTICE SOTOMAYOR: I'm sorry.

17 GENERAL FRANCISCO: -- of that
18 decision was wrong for --

19 JUSTICE SOTOMAYOR: I'm sorry, it's
20 not been a part of the survey, which is where
21 he reinstated it, since 1950. And for 65
22 years, every Secretary of the Department of
23 Commerce, every statistician, including this
24 Secretary's statistician, recommended against
25 adding the question. So it may be that 200

1 years of asking a citizenship question in other
2 forms may be true, but not on the short survey.
3 That's what's at issue here.

4 GENERAL FRANCISCO: Well, but, Your
5 Honor, it has been part of the census for the
6 better part of 200 years, initially as part of
7 the overall census itself --

8 JUSTICE SOTOMAYOR: But don't we put
9 --

10 GENERAL FRANCISCO: -- that went to
11 all individuals.

12 JUSTICE SOTOMAYOR: -- don't we ask
13 the question in context? And for 65-odd-plus
14 years, everybody said don't add it?

15 GENERAL FRANCISCO: No, Your Honor,
16 because, in fact, it was included in the
17 long-form census until the year 2000.

18 JUSTICE SOTOMAYOR: That is a
19 different -- that's the whole issue. It could
20 have been -- it's still included -- or it could
21 have been included in the ACS form, which is
22 still being done. And that's being done every
23 first, third, and fifth year.

24 GENERAL FRANCISCO: Yes, Your Honor,
25 but it has been part of the census in one form

1 or another for a very long period of time. It
2 has a long pedigree.

3 JUSTICE SOTOMAYOR: So the question
4 now before us is --

5 GENERAL FRANCISCO: The question,
6 therefore, is two things. First, we think that
7 the Respondents' claims are not justiciable
8 because their injuries aren't fairly
9 attributable to the government or subject to
10 APA review. And, secondly, the Secretary acted
11 well within his discretion when he determined
12 that reinstating the citizenship question would
13 provide the best evidence of citizenship.

14 JUSTICE GINSBURG: Can we just go back
15 a bit to your opening? Why was the citizenship
16 question dropped in 1960 and remained off for
17 all the decades after that? What was the
18 reason for dropping it?

19 GENERAL FRANCISCO: Your Honor, in
20 1960, it didn't appear in anything, and it was
21 moved on to the American Community Survey.

22 JUSTICE GINSBURG: But -- but why --

23 GENERAL FRANCISCO: That was part of
24 an overall movement of most of the demographic
25 -- I'm sorry, onto the long form census, not

1 the American Community Survey. And that was
2 part of a larger process that moved a large
3 number of demographic questions off of the
4 short form and onto the long form.

5 We no longer have a long form, so then
6 the question is do you reinstate the long form
7 or do you, in fact, move it back under the
8 short-form census.

9 JUSTICE GINSBURG: But didn't --
10 didn't --

11 GENERAL FRANCISCO: It was eminently
12 --

13 JUSTICE GINSBURG: -- didn't the
14 Census Bureau give a reason why it was dropped?

15 GENERAL FRANCISCO: Well, they
16 generally wanted to move all of the demographic
17 questions onto the long form. We no longer
18 have a long form. And the problems with using
19 the American Community Survey are well known.
20 So you basically --

21 JUSTICE GINSBURG: But there was
22 nothing -- there was nothing in 1960 to the
23 effect that the Census Bureau found that
24 putting it on the short form would depress the
25 count of non-citizens? Nothing like that?

1 GENERAL FRANCISCO: Well -- well,
2 sure, Your Honor, but that's because they
3 thought that, along with all of the other
4 demographic questions in the census, had an
5 overall impact of -- on -- on -- on overall
6 census accuracy.

7 And that underscores why we don't
8 think this is really subject to judicial
9 review, because really what you're saying is
10 that Congress -- courts would have to review
11 every question on the long form to determine if
12 the informational value of the question
13 outweighed the impact on census accuracy,
14 because, at the end of the day, if you add any
15 particular question onto the census, you're
16 always trading off information and accuracy.

17 And 141(a) doesn't provide courts with
18 a basis for evaluating that determination. So
19 that's why we think this isn't subject to APA
20 review at all. But we also think that the
21 Respondents don't have standing here because
22 they're injured if and only if, first, you have
23 third-party action; secondly, you have
24 third-party action that's illegal; and, third,
25 that third-party action is based on speculation

1 that the government will itself violate the
2 law.

3 CHIEF JUSTICE ROBERTS: On the -- on
4 the illegality, is -- is that a -- a predictive
5 factor? In other words, do we, as our cases
6 have often said, do not assume illegal behavior
7 in establishing standing, but is that simply
8 predictive? In other words, we doubt people
9 are going to engage on a regular basis in
10 illegal behavior, and, therefore, we don't
11 think their injury is -- is tangible or likely,
12 or is there something special about the fact
13 that it's illegal activity?

14 GENERAL FRANCISCO: Well, I think,
15 Your Honor, in -- in the Court's past cases, it
16 has often been used as a predictive factor, but
17 I also think that when you put it all together,
18 it breaks the chain of causation for Article
19 III causation purposes.

20 CHIEF JUSTICE ROBERTS: I mean, it is
21 true that if people go 60 miles an hour in a
22 55-mile-an-hour zone, that's unlawful. But you
23 wouldn't say that they're not going to do that
24 in forming public policy --

25 GENERAL FRANCISCO: And --

1 CHIEF JUSTICE ROBERTS: -- or
2 considering standing.

3 GENERAL FRANCISCO: -- I agree, Your
4 Honor, and that's not our argument here. I
5 think that Clapper is a good analogy. In
6 Clapper, it was quite clear that the plaintiffs
7 in that case suffered an injury in fact,
8 because they declined to use their cell phones
9 to communicate with their clients and their
10 clients declined to use their cell phones to
11 communicate with them out of a fear that their
12 phone calls would be intercepted. No question
13 that there was an injury in fact.

14 But what the Court held was that that
15 injury wasn't fairly attributable to the
16 government because it was caused by the
17 plaintiffs' fear --

18 JUSTICE SOTOMAYOR: I -- I -- I'm
19 sorry, you're talking --

20 GENERAL FRANCISCO: -- that the
21 government would intercept their calls.

22 JUSTICE SOTOMAYOR: You're talking
23 proximate cause, which we've never used.

24 GENERAL FRANCISCO: No, Your Honor.

25 JUSTICE SOTOMAYOR: We've used

1 determinate or coercive effect. In Wayfair,
2 one of the reasons we found the stores, not the
3 states, to be injured is because consumers fail
4 to pay taxes, an illegality under the law. And
5 we said that's why the states were being
6 harmed.

7 In NAACP versus Alabama, we held the
8 NAACP had standing, even though it was their
9 members who would be injured by other people,
10 an illegality, harassment, but as the just --
11 as Chief Justice Roberts said, it's
12 predictable. There's no doubt that people will
13 respond less --

14 GENERAL FRANCISCO: Uh-huh.

15 JUSTICE SOTOMAYOR: -- because of the
16 census. That has been proven in study after
17 study. One census surveyor described an
18 incident where he walked into a home, started
19 asking citizenship, and the person stopped and
20 left his home, leaving the census surveyor
21 sitting there.

22 So, if you're talking about
23 prediction, this is about 100 percent that
24 people will answer less, so -- but I don't know
25 that it's prediction. It's an action by the

1 government will be a -- will be a cause of
2 this, not proximate necessarily, but that cause
3 will cause harm.

4 GENERAL FRANCISCO: Right, two
5 responses, Your Honor. First, we're not
6 talking about proximate cause. We're talking
7 about an analysis that was similar to what this
8 Court used in the Clapper case, where the
9 Clappers said that even though there was injury
10 in fact, even though the government's actions
11 were in a very real sense a but-for cause of
12 that injury in fact, it wasn't fair to
13 attribute that to the government because it was
14 based on the plaintiffs' speculation that the
15 government would intercept their telephone
16 calls.

17 JUSTICE SOTOMAYOR: But this is not --

18 CHIEF JUSTICE ROBERTS: You --

19 JUSTICE SOTOMAYOR: -- the plaintiff
20 acting; this is third parties acting.

21 GENERAL FRANCISCO: Yes, and that
22 makes it, we think, even worse because the
23 Court's cases have generally said you don't
24 rely on third-party standing. But --

25 CHIEF JUSTICE ROBERTS: You -- you

1 said you had two responses?

2 GENERAL FRANCISCO: Yeah. The second
3 is that on NAACP against Alabama, that was a
4 case where the NAACP was being directly
5 regulated by the statute that they were
6 challenging. They were forced to disclose
7 their private membership lists, and that was
8 their injury. There was nobody that stood in
9 between them and the disclosure of their
10 private injury -- private membership list.

11 But turning to the agency
12 reviewability argument, there really is nothing
13 in 141(a) that provides courts with a basis to
14 review this decision. The language is quite
15 similar to what the Court addressed in Webster.

16 Every -- the addition of any
17 particular demographic question is always going
18 to be a tradeoff between information and
19 accuracy. And I'd -- I'd -- I'd urge you to
20 look to the 2000 long form census that had
21 highly detailed questions about not just
22 citizenship but things like your commuting
23 time, how many bedrooms you had in your house,
24 whether you suffered from certain health
25 conditions.

1 Under Respondents' position, courts
2 would have to review each one of those
3 questions to determine whether the
4 informational value of that question outweighed
5 any potential impact --

6 JUSTICE BREYER: On the main form --

7 GENERAL FRANCISCO: -- on census
8 accuracy.

9 JUSTICE BREYER: -- on the main form
10 -- on the main form, suppose the Secretary puts
11 in a question about sexual orientation.
12 Suppose he puts a question in about arrest
13 record. Suppose he says, I'm going to have the
14 whole survey in French.

15 GENERAL FRANCISCO: Uh-huh.

16 JUSTICE BREYER: In other words, we
17 have no role to play no matter how extreme?

18 GENERAL FRANCISCO: Your Honor, you
19 certainly do have a role to play, and I think
20 --

21 JUSTICE BREYER: All right. Well,
22 then that's the question.

23 GENERAL FRANCISCO: -- and I think
24 your examples --

25 JUSTICE BREYER: That's the question.

1 GENERAL FRANCISCO: Yeah.

2 JUSTICE BREYER: That's the question.

3 And in this case, there's a statute, and the
4 statute says that the Secretary -- at least on
5 this form, the main form, he shall use
6 administrative records, unless -- it says to
7 the maximum extent possible. Don't ask direct
8 questions. Use administrative records, because
9 they want to keep it short.

10 GENERAL FRANCISCO: Right.

11 JUSTICE BREYER: To the maximum extent
12 possible. So I have two rather technical
13 questions in what I think is the heart of this
14 case. It's a technical case.

15 All right. The first question is the
16 Secretary, I gather from the record -- and
17 we've looked at it, my office, pretty carefully
18 -- is told by the Census Bureau in three
19 studies that if you ask this question on the
20 regular form, you will get back fewer answers.

21 And they extrapolated to do that from
22 the other surveys and so forth, and those
23 extrapolations, you know, holding for
24 everything constant, showed that the
25 non-citizens often didn't say they were

1 non-citizens.

2 GENERAL FRANCISCO: Uh-huh.

3 JUSTICE BREYER: And some didn't
4 return it at all.

5 Now I haven't seen any evidence to the
6 contrary. So I'm asking you where the evidence
7 is on that.

8 GENERAL FRANCISCO: Sure.

9 JUSTICE BREYER: And as to the second,
10 same question, the second is that several
11 surveys, including Dr. Abowd, told the
12 Secretary: Mr. Secretary, if you add the
13 question to the census, the short form, the
14 direct form, you will discover that even the
15 information you want about citizenship is worse
16 than if you just look at the administrative
17 record. Now how can that be?

18 GENERAL FRANCISCO: Sure.

19 JUSTICE BREYER: Well, A, they say 13
20 million people, it'll be a wash because you
21 won't get information either way. They won't
22 return it and you don't have it over on the
23 administrative part.

24 But, as to 22 million, which you
25 highlight in your brief --

1 GENERAL FRANCISCO: Yeah.

2 JUSTICE BREYER: -- what about them?

3 And as to them, what Dr. Abowd says he says,
4 and I saw it in the record, he says, as to
5 those 22 million, I'll tell you what, you just
6 look to the census returns and you're going to
7 find it not that accurate because some are not
8 going to tell the truth.

9 GENERAL FRANCISCO: Right.

10 JUSTICE BREYER: So go look at the
11 administrative returns, and they won't be
12 there, but we'll model them.

13 Now the question is, which is more
14 accurate as to citizenship?

15 GENERAL FRANCISCO: Sure.

16 JUSTICE BREYER: The models over here
17 on the administrative part or the answer to the
18 questions on the census part?

19 And here is what Dr. Abowd says: 22
20 million, he's asked, if you follow your
21 practice, you'd use a survey response, not
22 model it; is that right?

23 That's right.

24 And in your opinion, that would be
25 less accurate than if you just went with

1 modeling over on the administrative part?

2 That's correct.

3 And the conclusion of the Census
4 Bureau remains that adding the question over
5 here, even if you use the administrative part
6 too, produces worse citizen -- worse data on
7 citizenship than just using the administrative
8 data alone? That's the question.

9 GENERAL FRANCISCO: Yep.

10 JUSTICE BREYER: Answer from the
11 expert: "That's correct."

12 So I read that, and, you know, the
13 judges below have listed 14 other examples or
14 40 other examples of many other examples and --
15 and -- but that's the most direct.

16 So where in the decision memo did the
17 Secretary address that problem?

18 GENERAL FRANCISCO: So, sure, Your
19 Honor.

20 JUSTICE BREYER: Both problems. There
21 are two problems.

22 GENERAL FRANCISCO: Yes, yes. And I'd
23 like to address that evidentiary issue first
24 and then I would like to come back to your
25 question about Section 6(c) of the statute as

1 well.

2 If you look at the Joint Appendix page
3 148, the -- the Census Bureau staff
4 specifically told the Secretary -- and here I'm
5 quoting from it -- that it "cannot quantify the
6 relative magnitude of the errors across
7 alternatives" -- and he's talking about
8 Alternatives C and D -- "at this time."

9 So what he was saying was that I don't
10 know if the response error from asking the
11 question is going to be more or less than the
12 prediction error if I --

13 JUSTICE BREYER: No, he said just what
14 you said. He said, I cannot quantify it.

15 GENERAL FRANCISCO: Sure.

16 JUSTICE BREYER: And that means he
17 can't put scientific numbers. Of course, they
18 said that they wanted two years to test it, but
19 they can't quantify it.

20 But we do have three studies, and
21 those studies look at what happened when you
22 asked this question before, and what happened
23 when you asked this question before --

24 GENERAL FRANCISCO: Right.

25 JUSTICE BREYER: -- is the response

1 rate fell.

2 GENERAL FRANCISCO: And so, if I could
3 complete my answer, what the Bureau staff told
4 him was that they didn't know which one would
5 be better or worse.

6 So what the Secretary --

7 JUSTICE SOTOMAYOR: I'm sorry.

8 JUSTICE BREYER: Where does it say
9 that? Where does it say that?

10 CHIEF JUSTICE ROBERTS: Maybe you
11 could, if you don't mind, maybe you could
12 complete your answer.

13 GENERAL FRANCISCO: Sure. That is
14 specifically, Your Honor, at page 148 of the
15 Joint Appendix, where it specifically says and
16 explains that it cannot quantify the relative
17 magnitude of the errors across the
18 alternatives, Alternatives C and D, at this
19 time because it didn't know if the response
20 errors from asking the question would be more
21 or less than the prediction errors from the
22 model.

23 So what the Secretary knew was two
24 basic things --

25 JUSTICE SOTOMAYOR: I'm sorry. They

1 -- they have prediction models. They say
2 multiple times, at least three, if not more,
3 that Alternative D, which was the Secretary's
4 alternative, and their Alternative C, so
5 everybody's clear C was simply to use
6 administrative records, D was the Secretary's
7 idea of adding the question to the survey plus
8 administrative records.

9 And on the prediction models, which is
10 what scientists can do, each and every time
11 they said D would be less accurate than C.

12 Now you're asking --

13 GENERAL FRANCISCO: Except for the one
14 time where it mattered, Your Honor, in the key
15 differences --

16 JUSTICE SOTOMAYOR: But comparative --

17 GENERAL FRANCISCO: -- memo, where
18 they specifically said that they did not know
19 if C was better than D.

20 And so what the Secretary knew --

21 JUSTICE SOTOMAYOR: No, no, no, no,
22 that's not what he said.

23 GENERAL FRANCISCO: That is exactly
24 what he said.

25 JUSTICE SOTOMAYOR: He said you can't

1 -- you're -- the words "comparative errors"
2 have a different meaning than you're giving it.
3 Comparative errors are I'm comparing this type
4 of error to that type of error and what they
5 compare each other to. You can't do that to a
6 scientific certainty.

7 But you can have predictive models,
8 which is what they did, and they --

9 GENERAL FRANCISCO: Right.

10 JUSTICE SOTOMAYOR: -- showed you,
11 time and again they told you, you add the
12 survey question, it's going to be less accurate
13 than just relying on administrative records.

14 GENERAL FRANCISCO: Your Honor, I --

15 JUSTICE SOTOMAYOR: So how do you --
16 how do you take or pluck out of what they say
17 in one sentence, if you're the Secretary, and
18 rely on that one sentence and ignore the wealth
19 of statistics, graphs, testimony, proof,
20 control studies of how -- how these response
21 rates came about and decide that that one
22 sentence is enough to justify ignoring
23 everything else?

24 GENERAL FRANCISCO: Because, Your
25 Honor, I respectfully disagree with your

1 reading of the administrative record.
2 If you read through the key
3 differences memo, what the Bureau staff is
4 telling to the Secretary -- and, look, there's
5 no question that the Bureau staff preferred not
6 to have this question on the census -- but what
7 they were telling the Secretary was that they
8 couldn't tell which model would be more or less
9 accurate. But they did give him specific
10 information.

11 JUSTICE KAGAN: But, General --

12 GENERAL FRANCISCO: They told him that
13 --

14 JUSTICE KAGAN: Please finish.

15 GENERAL FRANCISCO: They told him that
16 if he actually asked the question for 30 -- for
17 22.2 million people for whom no administrative
18 records existed, he would have got actual
19 answers at 98 percent accuracy.

20 And that the alternative, their
21 preferred alternative, was to use a statistical
22 model to estimate citizenship, not just for the
23 22.2 million, but for 35 million, but they had
24 not yet constructed that model and didn't know
25 what the error rate in that model would be.

1 JUSTICE KAGAN: But I -- I --

2 GENERAL FRANCISCO: And so the --

3 JUSTICE KAGAN: -- I think, General, I
4 mean, 98 percent sounds awfully high, but it's
5 kind of irrelevant too.

6 The question is whether, if you used
7 the model, it would be greater than 98 percent.
8 It would be 99.5 percent.

9 GENERAL FRANCISCO: Right.

10 JUSTICE KAGAN: Because then the
11 Secretary would have no basis for saying that
12 you should use the question rather than the
13 model.

14 And as to that, as I think my
15 colleagues are suggesting, there is a bottom
16 line conclusion from the Census Bureau, and the
17 bottom line conclusion is that Alternative D,
18 which is the proposal that the Secretary
19 eventually took, would still have all the
20 negative cost and quality implications of
21 Alternative B, which was simply adding the
22 question alone, and would result in poorer
23 quality citizenship data than Alternative C,
24 which is just using the administrative records
25 plus the modeling.

1 So there is a bottom line conclusion
2 from the Census Bureau. And it seems as though
3 what the Secretary needs is some -- I mean, a
4 Secretary can deviate --

5 GENERAL FRANCISCO: Uh-huh.

6 JUSTICE KAGAN: -- from his experts'
7 recommendations and from his experts' bottom
8 line conclusions.

9 GENERAL FRANCISCO: Right.

10 JUSTICE KAGAN: But the Secretary
11 needs reasons to do that, and I searched the
12 record and I don't see any reason.

13 GENERAL FRANCISCO: Sure. And, Your
14 Honor, so I want to just finish what I was
15 saying instantly before because I think it --
16 it responds to your question, and then I'd like
17 to expand directly in response to your
18 question.

19 What the Secretary concluded was, in
20 the face of uncertainty, he'd rather go with
21 the bird in a hand and ask the question at
22 98 percent accuracy than an unknown and
23 untested statistical model. And that's, after
24 all, the same preference that the Enumeration
25 Clause itself makes, a prefer -- preference for

1 actual counting over estimation, because actual
2 counting is less efficient.

3 JUSTICE SOTOMAYOR: But not census --

4 JUSTICE KAGAN: Well, if I can just
5 add to the question, and --

6 GENERAL FRANCISCO: But to go -- to go
7 to your question -- yes.

8 JUSTICE KAGAN: -- and let me just add
9 to it a bit because you said, you know, an
10 unknown and untested statistical model, but
11 here are his experts in the Census Bureau
12 saying we are confident that we can produce a
13 statistical model that will produce more
14 accurate bottom line results, and -- and,
15 again, this bottom line conclusion is the same.

16 They know what kind of statistical
17 models they can build. And this is the bottom
18 line conclusion. And where is the reason that
19 the Secretary gives as to why he rejects that?

20 GENERAL FRANCISCO: So there are a
21 couple of reasons, Your Honor. First of all,
22 although they had a high confidence that they
23 could create a good statistical model, they
24 were not able to tell him that they thought
25 that that model would be any better or worse an

1 estimation. They never were able to say that
2 would -- it would beat that 98 percent number.

3 So, in the face of that uncertainty,
4 he reasonably chose --

5 JUSTICE KAGAN: I think what I read
6 you is them saying that they could beat the
7 98 percent number.

8 GENERAL FRANCISCO: No, Your Honor, I
9 don't think that's what they're saying there.
10 I think what they're saying there is that if
11 you ask the citizenship question, it will make
12 the model a little bit less accurate because
13 you're going to have fewer people for whom
14 there are administrative records, but you
15 actually have to use that model for a much
16 smaller number of people because you have
17 actual answers from 22.2 million at 98 percent
18 accuracy.

19 So that's what they're saying. But
20 what they couldn't come down with a conclusion
21 on is whether it would be more or less accurate
22 to ask the question --

23 JUSTICE BREYER: All right. When you
24 answer this question --

25 GENERAL FRANCISCO: -- or use the

1 model.

2 JUSTICE KAGAN: So can I just ask --

3 JUSTICE BREYER: Would you answer this
4 question? Wait. I am trying, go back to my
5 question, to write down the pages. I'm not
6 going to, you know, resolve this right now.

7 So, when Justice Kagan asked the
8 question or I do, you've mentioned page 148.
9 Insofar in answer to her question or to mine,
10 if you could give me a few things to read to
11 show that he did consider it, to show that he
12 did give a reason for rejecting it, that would
13 be helpful to me. Sorry. Go back to you.

14 GENERAL FRANCISCO: So, Your Honor, if
15 you look at Secretary Ross's decision memo, the
16 pre- -- the decision memo in the Petitioners'
17 appendix, I would look to a couple of things.

18 First of all, I would look to his
19 discussion on pages 555a with the problems with
20 administrative records. The bureau is still
21 evolving its use of administrative records, and
22 the bureau does not yet have complete
23 administrative records data set for the entire
24 population.

25 And that points out why he preferred

1 asking the question and getting actual answers
2 from 22.2 million people at 98 percent
3 accuracy, because you simply didn't have
4 administrative records for 35 million people,
5 and the bureau had not yet figured out how to
6 do that estimation.

7 He then goes on to say on that same
8 page, more than 10 percent of the American
9 population, some 25 million voting-age people,
10 would need to have their citizen age imputed by
11 the Census Bureau. And so he was making clear
12 that he'd rather go with actual counting than
13 imputation.

14 And he pointed out that by proceeding
15 with his preferred course -- this is at page
16 556a of the Petitioners' appendix -- this may
17 eliminate the need for the Census Bureau to
18 have to impute an answer for millions of
19 people, specifically about 22.2 million people
20 for whom the bureau --

21 JUSTICE KAGAN: But --

22 GENERAL FRANCISCO: -- told him he
23 would get actual answers at 98 actual accuracy.

24 JUSTICE KAGAN: If I may say, General,
25 when you think about those statements, I mean,

1 it's just conclusory. It's just like, well,
2 this would eliminate the -- the -- the need for
3 modeling because we could ask a question.

4 But the question is, why is asking a
5 question better when you know that asking a
6 question is going to result in lots of
7 non-responses and in lots of false reporting?

8 And so you can't just go back to I'd
9 rather ask a question. You have to say why
10 you'd rather ask a question and what benefits
11 it has to ask a question.

12 GENERAL FRANCISCO: Right.

13 JUSTICE KAGAN: And if I may say --
14 I'll just finish here, General -- I mean, a lot
15 of your argument -- your briefs are extremely
16 well done.

17 GENERAL FRANCISCO: Thank you.

18 JUSTICE KAGAN: But a lot of your
19 argument just do not appear in the Secretary's
20 decision memo. And -- and the fact that SG
21 lawyers can come up with 60 pages of
22 explanation for a decision, that's all post hoc
23 rationalization.

24 The question is, what did the
25 Secretary say? Where did he say it? When did

1 he say it? What does it mean, other than just
2 ipse dixit and conclusions?

3 GENERAL FRANCISCO: Sure. Your --
4 Your Honor, I -- I'm tempted to pocket the
5 compliment and sit down, but I won't do that.

6 (Laughter.)

7 GENERAL FRANCISCO: I think the
8 Secretary fully acknowledged that there was an
9 upside to the request, and the upside was the
10 one the Department of Justice set forth in his
11 letter, that having citizenship data would help
12 improve Voting Rights Act enforcement.

13 He fully understood there was an
14 alternative using administrative records, and
15 he analyzed that alternative in the language
16 that I just read to Justice Breyer, and he
17 understood there was a downside, that adding
18 the citizenship question would potentially
19 increase self-response -- decrease -- increase
20 the number of -- decrease the number of
21 self-response rates.

22 But he found two things with respect
23 to that. First, he found -- and all of this is
24 in his letter -- that he could mitigate that to
25 at least a certain extent with follow-up

1 operations, perhaps not entirely but at least
2 to a certain extent, and, secondly, to the
3 extent that materialized, it was the product of
4 illegal activity.

5 So he considered the benefits. He
6 considered the alternatives. He considered the
7 costs --

8 JUSTICE GINSBURG: Which -- which
9 letter --

10 GENERAL FRANCISCO: -- and he
11 concluded that the benefits outweighed the
12 costs.

13 JUSTICE GINSBURG: General, which
14 letter are we talking about?

15 GENERAL FRANCISCO: Secretary Ross's
16 decision memo in March 2018, Your Honor.

17 JUSTICE GINSBURG: The memo, not --

18 GENERAL FRANCISCO: The memo, yes,
19 Your Honor.

20 JUSTICE GINSBURG: -- not the letter
21 from --

22 GENERAL FRANCISCO: Yeah.

23 JUSTICE GINSBURG: -- Department of
24 Justice.

25 GENERAL FRANCISCO: Yes, Your Honor,

1 the memo. But the Department of Justice's
2 letter is the one that articulated the Voting
3 Rights Act rationale that formed --

4 JUSTICE KAVANAUGH: Can you explain --

5 GENERAL FRANCISCO: -- the principal
6 benefit.

7 JUSTICE KAVANAUGH: -- can you explain
8 how it would improve Voting Rights Act
9 enforcement?

10 GENERAL FRANCISCO: Yes, Your Honor.
11 One of the critical elements of Voting Rights
12 Act enforcement is something called Citizen
13 Voting Age Population, or CVAP. Right now,
14 everything for CVAP comes from the census, with
15 the exception of citizenship. So population,
16 age, race, all of that comes from the census
17 except for citizenship, the C in CVAP.

18 So a large amount of voting rights
19 litigation focuses on expert witnesses who try
20 to fill in that missing C and try to estimate
21 that missing C through imputation based on the
22 American Community Survey, which goes to just
23 one in 38 households.

24 And the Department of Justice wanted
25 to get all of the same information from the

1 same database so that critical feature of
2 voting rights litigation, CVAP, all came from
3 the same place.

4 JUSTICE SOTOMAYOR: General --

5 JUSTICE KAGAN: And to just --

6 JUSTICE SOTOMAYOR: -- how do we know
7 that DOJ couldn't do Alternative C, rely on the
8 administrative records? The one thing that we
9 do know is that the Secretary went to the
10 Department -- went to DOJ at the beginning and
11 asked them for help in adding the citizenship
12 question. They initially said no. At least
13 their lower-level people said no, told them to
14 shop it to DHS and see if DHS wanted the
15 citizenship question. DHS said not our work --

16 GENERAL FRANCISCO: Uh-huh.

17 JUSTICE SOTOMAYOR: -- go back to DOJ.
18 They go back to DOJ, the people they're in
19 touch with, that are not low-level, but they're
20 not the highest level, say no.

21 And Secretary of Commerce speaks to
22 the head of DOJ at the time --

23 GENERAL FRANCISCO: Uh-huh.

24 JUSTICE SOTOMAYOR: -- and the head of
25 the DOJ says: We'll give you anything you

1 need. They do a letter, the letter says the
2 ACS is not enough.

3 What the letter doesn't say is, ah, if
4 you supplemented with administrative records,
5 which 6(c) lets you do and tells you you should
6 do to maximize the extent possible that the
7 actual count is accurate, and we do know that
8 there will be less people being reported, which
9 is the whole purpose of the survey --

10 GENERAL FRANCISCO: Uh-huh.

11 JUSTICE SOTOMAYOR: -- how many people
12 there are, and nobody doubts that there will be
13 less people reported.

14 That's a maximum need of the census
15 survey report, not citizenship. Let's not
16 confuse the two things. The enumeration is how
17 many people reside here, not how many are
18 citizens. That's what the census survey is
19 supposed to figure out.

20 GENERAL FRANCISCO: Uh-huh.

21 JUSTICE SOTOMAYOR: DOJ needs
22 citizenship. But, when the Bureau asks DOJ,
23 not the Secretary, to meet so they can discuss
24 why the administrative records are not good
25 enough, they say we don't need to.

1 So tell me, in that sequence, how does
2 the Secretary know the answer --

3 GENERAL FRANCISCO: Sure.

4 JUSTICE SOTOMAYOR: -- to that
5 question?

6 GENERAL FRANCISCO: Sure. So a couple
7 of responses to that, Your Honor. I'm going to
8 start with the 6(c) issue because I know that
9 was of interest to Justice Breyer as well.

10 And under 6(c), under my -- my
11 friend's on the other side's position, you
12 actually couldn't even ask the citizenship
13 question on the American Community Survey. And
14 you also couldn't ask about sex and age on the
15 census itself since all of that information is
16 all also available in administrative records.

17 But the reason why administrative
18 records are insufficient under 6(c) for any of
19 these purposes is for the simple reason that
20 you don't have them for 35 million people.

21 In terms of the Department of
22 Justice's request and the Census Bureau's
23 alternative proposal, it simply wasn't
24 responsive to the Department of Justice's
25 request for two reasons.

1 First, administrative records didn't
2 solve the problem that the Department of
3 Justice was trying to solve, which was getting
4 all of their CVAP data from the same source and
5 covering the same time period. Administrative
6 records come from a different database and
7 cover a different time period than all of the
8 other information used to construct citizenship
9 voting age population.

10 JUSTICE SOTOMAYOR: That doesn't tell
11 you why it's not good enough. They may have
12 wanted something.

13 GENERAL FRANCISCO: Sure.

14 JUSTICE SOTOMAYOR: But they would
15 then be introduced with one database that has
16 been, according to the chief statistician of
17 the Bureau, introducing multiple layers of
18 uncertainty.

19 GENERAL FRANCISCO: Right.

20 JUSTICE SOTOMAYOR: Uncertainty about
21 or an undercount of people because they already
22 say that undercount's going to be at a minimum
23 5.8, less people are going to respond.

24 You're going to have a lesser number
25 that are going to group with the administrative

1 record. You're going to have 9.5 million that
2 conflict between their answer and the
3 administrative records. And we have to change
4 the Bureau's use of that information to be able
5 to use the administrative record.

6 And the Secretary doesn't ask, if we
7 change that, what else will it affect?

8 GENERAL FRANCISCO: Right.

9 JUSTICE SOTOMAYOR: So he doesn't know
10 that. And we now have error in the unreporting
11 population of at least 500,000.

12 So something the chief statistician of
13 the Bureau tells us is, unlike our simpler
14 prior models, this introduces more uncertainty
15 at every single level of the calculus.

16 And so that data is going to be more
17 suspect, more prone to cross -- to less
18 reliability, and less accurate.

19 And so, if the Bureau -- if the
20 Department of Justice refused to listen to
21 that, how can the Secretary conclude that he's
22 complying with 6(c) fully? Because it says to
23 the maximum extent possible, and how can you be
24 possible if you don't even ask why?

25 This seems like he thought of

1 something, I want to add a citizenship
2 question, I don't know why, but this is a
3 solution in search of a problem. I've got to
4 find a problem that fits what I want to do.

5 GENERAL FRANCISCO: So, Your Honor,
6 there's a whole lot in that question, but I
7 think I will start with where you ended.

8 And if you really think 6(c) is a
9 problem, then we really cannot ask the
10 citizenship question on the American Community
11 Survey since that is just as subject to 6(c) as
12 the census is.

13 JUSTICE SOTOMAYOR: No, what it says
14 -- what it says is to the maximum extent
15 possible.

16 GENERAL FRANCISCO: And here the
17 Secretary is using the administrative records
18 to the maximum extent possible because he's
19 combining them.

20 JUSTICE SOTOMAYOR: But the ACS is not
21 the survey.

22 GENERAL FRANCISCO: He's combining
23 them with the administrative records and the
24 self-responses and using administrative records
25 where they're available, using self-responses

1 at 98 percent accuracy --

2 JUSTICE SOTOMAYOR: But the problem --

3 GENERAL FRANCISCO: -- where

4 administrative records are not available.

5 JUSTICE SOTOMAYOR: -- but the problem

6 is you can't confuse the survey, which is

7 really the question of 6(c) --

8 GENERAL FRANCISCO: No.

9 JUSTICE SOTOMAYOR: -- or the focus.

10 GENERAL FRANCISCO: It's not.

11 JUSTICE SOTOMAYOR: Because --

12 GENERAL FRANCISCO: 6(c) applies to

13 all census instruments, not just the census.

14 It fully applies to the American Community

15 Survey. And it likewise applies --

16 JUSTICE SOTOMAYOR: But the ACS is not

17 used -- the ACS is not used for the citizenship

18 purpose. You already said why it wasn't.

19 GENERAL FRANCISCO: But, Your Honor,

20 your question -- your question is about 6(c).

21 6(c) applies to the ACS and it applies to the

22 census.

23 And sex and age information, which we

24 ask on the census, is also available in

25 administrative records. Indeed, administrative

1 records are more accurate with respect to sex
2 and age because, presumably, your birth date
3 and your sex don't change over the course of
4 time, whereas your citizenship status does.

5 So, if you really think that 6(c) is a
6 problem, we can't ask it on the ACS and we
7 can't ask sex and age on the census, so that's
8 why I think that is plainly wrong. It really
9 does boil down to whether the Secretary's
10 judgment here is a reasonable one.

11 And in the face of two competing
12 possibilities, either asking the question,
13 getting answers for two-thirds of the people
14 for whom no administrative records existed, at
15 98 percent accuracy, or using an estimation
16 model that had not yet been created and had an
17 unknown error rate, the Secretary reasonably
18 chose to go --

19 JUSTICE KAGAN: But just --

20 GENERAL FRANCISCO: -- with the bird
21 in the hand.

22 JUSTICE KAGAN: -- general, just going
23 back to Justice Kavanaugh's simple question
24 about why the Secretary thought that there was
25 a need for this data, and then part of what

1 Justice Sotomayor was talking about was that it
2 did really seem like the Secretary was shopping
3 for a need.

4 Goes to the Justice Department.
5 Justice Department says we don't need anything.
6 Goes to DHS. DHS says they don't need
7 anything. Goes back to the Justice Department.
8 Makes it clear that he's going to put in a call
9 to the Attorney General. Finally, the Justice
10 Department comes back to him and says: Okay,
11 we can give you what you want.

12 So you can't read this record without
13 sensing that this -- this need is a contrived
14 one. Nobody had -- there have been lots of
15 assistant attorney general in the Civil Rights
16 Division that have never made a plea for this
17 kind of data.

18 And -- and just the way this went back
19 and forth, I guess I'd like an answer to that
20 simple question.

21 GENERAL FRANCISCO: Yeah. Sure. And
22 I have two responses, Your Honor. And then, if
23 I may, I'd like to reserve the remainder of my
24 time for rebuttal.

25 First, I think it is quite common for

1 cabinet Secretaries to come into office with
2 ideas and inclinations to discuss with their
3 staff and discuss with their colleagues whether
4 there is a legal and policy basis for that
5 inclination.

6 Secondly, there's no evidence in this
7 record that the Secretary would have asked this
8 question had the Department of Justice not
9 requested it. And there's no evidence in this
10 record that the Secretary didn't believe that
11 the Department of Justice actually wanted this
12 information to improve Voting Rights Act
13 enforcement.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 General.

16 General Underwood.

17 ORAL ARGUMENT OF BARBARA D. UNDERWOOD

18 ON BEHALF OF RESPONDENTS NEW YORK, ET AL.

19 MS. UNDERWOOD: Mr. Chief Justice, and
20 may it please the Court:

21 The Secretary decided to add this
22 question about citizenship to the 2020 census
23 although the record before him contained
24 uncontradicted and strong evidence that it will
25 cause a decline in the response rate of

1 non-citizens and Hispanics, to the detriment of
2 the states and localities where they live.

3 He gave three reasons for the
4 decision, and none of them can survive APA
5 review.

6 One, he said there was inadequate
7 evidence of an effect on the response rate.
8 But that is flatly contrary to the record.

9 He said he could dismiss or discount
10 any such effect because non-response is an
11 illegal act. But that is an irrational and
12 impermissible factor to consider on this
13 question.

14 And he said that adding the question
15 would help voting rights enforcement. But that
16 claim is unsupported by the record as well.

17 CHIEF JUSTICE ROBERTS: Do you -- do
18 you think it wouldn't help voting rights
19 enforcement? The CVAP, Citizen Voting Age
20 Population, is the critical element in voting
21 rights enforcement, and this is getting citizen
22 information.

23 MS. UNDERWOOD: Well, as we have -- as
24 has been discussed at length in the -- during
25 the previous argument, the evidence before him

1 was that it would not give better citizenship
2 information than -- that it's the 22 million
3 that the government points to, the 22 million
4 whose citizenship information will be either
5 modeled or the result of the answer to a census
6 question.

7 JUSTICE GINSBURG: Was there anything
8 that showed that the Department would have been
9 aided in either past cases or cases on the
10 drawing board? Any case?

11 MS. UNDERWOOD: There was not. And
12 what I'd like to point out is that the
13 comparison should be to using administrative
14 records.

15 The Department of Justice letter taken
16 at face value says the old ACS survey data that
17 we've been using is inadequate and we need an
18 improvement over that.

19 The Census Bureau produced this
20 answer, which is we can do this by linking the
21 existing census information to administrative
22 records. The Department of Justice never
23 commented on that.

24 The Department of Justice actually
25 declined to meet with the Census Bureau people

1 who wanted to meet about it. So there was
2 nothing before the Secretary to say that this
3 survey -- this census information would be an
4 improvement -- there was no comparison at all
5 from the Department of Justice about whether
6 this would be an improvement or not.

7 It seems to me that at least with so
8 much question about whether this information
9 would be better or worse than the -- the use of
10 modeling from administrative records, the
11 Secretary had an obligation to find out the
12 answer to that question.

13 JUSTICE KAVANAUGH: What if the answer
14 was uncertain?

15 MS. UNDERWOOD: Well, if the answer is
16 uncertain, then it is hard to invoke that as a
17 reason. Now we get back to the cost in the
18 enumeration. That is, if the -- if it's
19 unclear, we think it's worse. But, if it's
20 just unclear whether this question will improve
21 voting rights enforcement, that is not
22 sufficient to pay the cost of the steep decline
23 in the enumeration because the enumeration is,
24 after all, the primary purpose of the census.

25 JUSTICE ALITO: Well, on the

1 modeling --

2 CHIEF JUSTICE ROBERTS: Well, is that
3 -- go ahead.

4 JUSTICE ALITO: On the modeling, there
5 was a lot of talk during the first part of the
6 argument about -- I think it's 22.6 million
7 people who it would -- it is predicted would
8 answer the citizenship question and as to whom
9 there is not administrative data.

10 And there was an estimate that those
11 answers would be 98 percent accurate. And the
12 comparison then has to be between that
13 98 percent predicted accuracy rate and whatever
14 the accuracy rate would be for the model.

15 And is there anything in the
16 administrative record that shows that the model
17 was tested and that it was possible to extract
18 a -- a predicted error rate for the model?

19 MS. UNDERWOOD: What we have -- what
20 we have is that this -- the model hadn't been
21 generated, but what we have is the Census
22 Bureau saying this is like other modeling that
23 we routinely do. We're confident that we can
24 do it.

25 JUSTICE ALITO: So, if the Secretary

1 is -- has to choose between two things, and, on
2 one, the Secretary knows there's a 98 percent
3 accuracy rate, and as to the other, the Census
4 Bureau says we're going to create a model, and
5 we don't know how -- we can't give you any
6 statistics, but trust us, it's going to be more
7 accurate than 98 percent, is it arbitrary and
8 capricious for the Secretary to say, I'll go
9 with the 98 percent because that's a known
10 quantity?

11 MS. UNDERWOOD: If there were no cost
12 to the enumeration, that would be a different
13 question. But, when there is this much
14 uncertainty, then it is arbitrary and
15 capricious to take that kind of risk --

16 JUSTICE BREYER: I don't understand --
17 sorry.

18 MS. UNDERWOOD: -- with the
19 enumeration.

20 JUSTICE BREYER: I don't understand
21 uncertainty. I thought the 98 percent -- of
22 course, it's 98 percent. Most people are
23 citizens.

24 MS. UNDERWOOD: Right.

25 JUSTICE BREYER: The people who are

1 citizens are not going to -- you know, they'll
2 say they're citizens. All you'd ever expect
3 are a few percent who are not citizens.

4 Then I have on pages J -- Joint
5 Appendix 882 through 884 Mr. Abowd's testimony
6 where he unequivocally says three times that in
7 -- in -- not 98 percent -- in respect to those
8 people who are not citizens, the administrative
9 model will be more accurate than just asking
10 the census question, and if you add the census
11 question, then you look to it for the answer,
12 you will discover that you are less accurate in
13 respect to non-citizens.

14 Now he says that. That's why I asked
15 the Solicitor General what is their contrary to
16 that, and he gave me things to look at. And I
17 would say the most contrary thing, which I want
18 to ask you about, is Dr. Abowd, at the trial,
19 said, "There's no credible quantitative
20 evidence that the addition of a citizenship
21 question will affect the accuracy of the
22 count." All right? That's what he said.

23 MS. UNDERWOOD: Yes.

24 JUSTICE BREYER: Now I'm sure in their
25 reply brief they pointed right to that. You

1 can't simply ignore it. And so I want to hear
2 what your answer is to that, which the
3 government says is contrary evidence.

4 MS. UNDERWOOD: If you look at that
5 testimony in context, it is perfectly clear
6 that what he is saying is that he didn't have
7 enough evidence for a firm quantitative
8 statement, meeting scientific standards. He
9 actually defined the term "credible
10 quantitative evidence."

11 And if you'll bear with me, he -- he
12 said it's evidence that is specifically related
13 to the insertion of a citizenship question into
14 the otherwise planned 2020 census that
15 identifies the citizenship question itself as
16 the likely or one of the causal elements
17 associated with changes in the outcomes and
18 that would stand up to extensive peer review
19 within the Census Bureau and with the
20 scientific community.

21 CHIEF JUSTICE ROBERTS: That --

22 MS. UNDERWOOD: And -- and the --

23 CHIEF JUSTICE ROBERTS: -- that's the
24 evidence that he found was not available?

25 MS. UNDERWOOD: Yes, that's right. He

1 said he didn't have enough to quantify accord
2 -- in accordance with peer-reviewed standards.
3 He didn't say there would be no effect. He
4 said, I don't have enough to give what I --
5 what I believe as a scientist to be this term,
6 "credible quantitative" -- to make a credible,
7 quantitative evidence.

8 JUSTICE KAVANAUGH: Can -- can I ask
9 --

10 MS. UNDERWOOD: So he is --

11 JUSTICE KAVANAUGH: I'm sorry, please
12 finish.

13 MS. UNDERWOOD: And -- and my point is
14 that, at the same trial, if we're going to look
15 at the trial testimony, at the same trial,
16 other experts said: Maybe so, but there is
17 enough evidence to make a different kind of
18 judgment, not a firm scientific, quantified
19 judgment, but a judgment.

20 JUSTICE ALITO: Do you think it's
21 proper to look at the trial record on this
22 issue? There's a lot of citation in the
23 Respondents' brief to trial testimony.

24 Aren't we reviewing the administrative
25 record?

1 MS. UNDERWOOD: We are. Well, as for
2 standing, we're reviewing the whole record.
3 And as --

4 JUSTICE ALITO: That's correct. But
5 as to the arbitrary and capricious review --

6 MS. UNDERWOOD: Correct. That's --
7 that -- that is correct, but that would make
8 this statement also of Dr. Abowd off the
9 record, off the administrative record.

10 JUSTICE KAVANAUGH: Can I --

11 MS. UNDERWOOD: But what I --

12 JUSTICE KAVANAUGH: -- can I ask a --

13 MS. UNDERWOOD: Yes. Please.

14 JUSTICE KAVANAUGH: Please finish.

15 MS. UNDERWOOD: No, going -- going --
16 going back to your question --

17 CHIEF JUSTICE ROBERTS: Wait a minute,
18 Justice Kavanaugh.

19 MS. UNDERWOOD: -- while I think there
20 is good evidence, and nothing contrary, that
21 this 22 million would be more accurately
22 identified by the modeling than by the census,
23 I think it is sufficient for this purpose to
24 treat it as somewhat uncertain because it is
25 uncertainty with respect to the discretionary

1 part of what the Census Bureau does; namely,
2 collect extra information.

3 The core function of the census, not
4 of the Census Bureau in all its actions, but of
5 -- on the census form --

6 JUSTICE KAVANAUGH: But the -- the
7 United Nations recommends that countries ask a
8 citizenship question on the census. And a
9 number of other countries do it. Spain,
10 Germany, Canada, Australia, Ireland, Mexico ask
11 a citizenship question.

12 And the United States has asked a
13 citizenship question, as you know, in one form
14 or another since 1820, excluding 1840. And,
15 again, long form at times, in more recent
16 times, and then on the ACS since 2005.

17 The question is, does that
18 international practice, that U.N.
19 recommendation, that historical practice in the
20 United States, affect how we should look at the
21 inclusion of a citizenship question in this
22 case?

23 MS. UNDERWOOD: The same guidance from
24 the U.N. also says to be careful to test
25 questions to make sure they don't interfere

1 with the enumeration. It says you need to make
2 a judgment in context. It may be that those
3 countries either haven't examined or don't have
4 the problem that has been identified -- the
5 problem of depressing the enumeration that the
6 United States has.

7 It's certainly something to look at,
8 but --

9 JUSTICE KAVANAUGH: But you agree it's
10 very -- it's a very common question
11 internationally?

12 MS. UNDERWOOD: Well, it is certainly
13 useful information for a country to have. And
14 I'm not suggesting at all that that information
15 shouldn't be collected.

16 The question is whether it should be
17 collected on the very instrument that is --
18 whose principal function is to count the
19 population, when we have such strong evidence
20 that it will depress that count, make it less
21 accurate, and make it less accurate in a --

22 CHIEF JUSTICE ROBERTS: Well, the
23 principal purpose -- you're -- you're right,
24 the principal purpose is to count the
25 population, but we've had demographic questions

1 on the census -- I don't know how far back,
2 but, certainly, it's quite common.

3 MS. UNDERWOOD: That's -- that's
4 correct, but we have no evidence about --

5 CHIEF JUSTICE ROBERTS: Sex, age,
6 things like that. You go back and it looks --
7 you know, do you -- do you own your house? Do
8 you own a radio? I mean, the questions go
9 quite beyond how many people there are.

10 MS. UNDERWOOD: Well, I'd like to say
11 two things about that. We have no comparable
12 evidence about any of those other questions
13 that they depress the count in this substantial
14 a way and in this disproportionate a way
15 because, as this Court said in Wisconsin,
16 distributive accuracy is even more important
17 for the census.

18 JUSTICE ALITO: Well, the -- the --
19 the response rate is very important, so can I
20 ask you a question about that?

21 A lot of your argument and a lot of
22 the district court's argument seems to hinge on
23 this prediction that there will be 5.1 percent
24 fewer responses if the citizenship question is
25 included on the census.

1 But that seems -- that is based, as I
2 understand it, on the fact that non-citizens
3 are somewhat less likely to complete the ACS,
4 which includes the citizenship question, than
5 are citizens. Am I right in understanding
6 that? That's fundamentally where that comes
7 from?

8 MS. UNDERWOOD: It's not about not
9 completing. It's about not -- I mean, it's not
10 about skipping questions on a form.

11 JUSTICE ALITO: Not -- not responding.

12 MS. UNDERWOOD: It's about not
13 responding. Yes.

14 JUSTICE ALITO: That's correct. Okay.
15 They are somewhat less likely to respond to the
16 ACS than are --

17 MS. UNDERWOOD: The ACS in one study
18 and the long form in another.

19 JUSTICE ALITO: Okay. But what jumps
20 out is the fact that citizens and non-citizens
21 differ in a lot of respects other than
22 citizenship. They differ in socioeconomic
23 status. They differ in education. They differ
24 in language ability.

25 So I don't think you have to be much

1 of a statistician to wonder about the
2 legitimacy of concluding that there is going to
3 be a 5.1 percent lower response rate because of
4 this one factor. But maybe there is something
5 more there.

6 So what -- what does that analysis
7 miss?

8 MS. UNDERWOOD: The strong -- well, a
9 couple of things. The strong empirical
10 evidence that is the basis for that judgment,
11 which, by the way, has not been contested by
12 the government, the government has other things
13 to say but does not contest this decline --

14 JUSTICE ALITO: I thought they did
15 but, in any event, go ahead.

16 MS. UNDERWOOD: I will come back to
17 that -- is a -- is a retrospective review of
18 comparing in one case for 2010 the short form
19 census and the ACS, and in 2000 it was to
20 compare the short form and the long form
21 census.

22 It's a comparable comparison. In each
23 case the longer one had a citizenship question
24 on it.

25 In each case everyone, population

1 groups notwithstanding, there was a decline
2 from the short form to the long form. But
3 there was a much greater decline among
4 Hispanics and non-citizens.

5 JUSTICE GORSUCH: But, counsel,
6 doesn't Justice Alito have a point, to the
7 extent that there could be multiple reasons why
8 individuals don't complete the form.

9 MS. UNDERWOOD: Well, the lay --

10 JUSTICE GORSUCH: And we haven't --

11 MS. UNDERWOOD: I'm sorry, go ahead.

12 JUSTICE GORSUCH: Plenty of
13 interrupting. But we don't have any evidence
14 disaggregating the reasons why the forms are
15 left uncompleted. What do we do with that?

16 I mean, normally we would have a
17 regression analysis that would disaggregate the
18 potential cause and identify to a 95th
19 percentile degree of certainty what the reason
20 is that persons are not filling out this form
21 and we could attribute it to this question.

22 We don't have anything like that here.
23 So what are we supposed to do about that?

24 MS. UNDERWOOD: Well, I think -- I
25 think there are a few things to say.

1 JUSTICE GORSUCH: And -- and -- and --

2 MS. UNDERWOOD: Well --

3 JUSTICE GORSUCH: -- and let me just
4 throw in one other question. I know your light
5 is on but I really wanted to get it to you and
6 I'm sorry we haven't gotten there.

7 And, that is, what do we do also --
8 and it's totally different, so I'm really
9 sorry -- what do we do with the fact that, as I
10 understand it, some of the Respondents and
11 other people in litigation have complained when
12 -- when folks have relied on the ACS to
13 extrapolate citizenship for purposes of
14 redistricting and, in fact, argued that we
15 should rely only on actual census data?

16 And I understand Respondents have made
17 that argument in litigation. So what do we do
18 with that?

19 MS. UNDERWOOD: There are a lot of
20 complaints about the ACS. The Census Bureau's
21 proposal to use administrative records solves
22 most of them. It's not a question of just the
23 ACS, which is a survey about which there have
24 been many complaints, and the -- putting the
25 question on the census.

1 The Census Bureau is -- they are data
2 experts. There are many ways of trying to
3 collect data. The question in this case is
4 whether doing it on the census form is
5 warranted, even though it causes such a harm to
6 the count.

7 JUSTICE SOTOMAYOR: I thought that --

8 MS. UNDERWOOD: Now that brings us
9 back --

10 JUSTICE SOTOMAYOR: -- Dr. Abowd's
11 testimony, or at least the letter, somewhere I
12 read, that they controlled for -- for all of
13 the other reasons that Justice Gorsuch was
14 mentioning as reasons why people would not
15 complete?

16 MS. UNDERWOOD: Well, they certainly
17 controlled for the length of the form. That
18 was the -- that was the --

19 JUSTICE BREYER: Well, not just that.
20 On page 110 --

21 MS. UNDERWOOD: Yes. Yes.

22 JUSTICE BREYER: -- of the Joint
23 Appendix, it says whether the response --
24 dah-dah-dah -- that they are much greater. It
25 says in comparable rates for other demographic

1 variables like sex, birth date --

2 MS. UNDERWOOD: Yes.

3 JUSTICE BREYER: -- age, race,
4 ethnicity. So I thought that that was an
5 effort to control for the things that Justice
6 Alito --

7 MS. UNDERWOOD: It --

8 JUSTICE BREYER: -- mentioned insofar
9 as their relevance.

10 MS. UNDERWOOD: It was. The -- the
11 only limitation on it was that they had to deal
12 with data that already existed. Dr. Abowd
13 wanted to do a random controlled test of this
14 question and wasn't permitted to do so.

15 JUSTICE ALITO: But that's not --
16 that's a different issue, isn't it, what
17 Justice Breyer mentioned?

18 JUSTICE GORSUCH: It's totally
19 different, yeah.

20 JUSTICE ALITO: It's the decline in
21 the response rate based on those variables, but
22 not -- it doesn't -- it doesn't, as Justice
23 Gorsuch says, disaggregate the many factors
24 that could explain a decline when you're
25 distinguishing between citizens and

1 non-citizens.

2 MS. UNDERWOOD: Well, it did try to
3 control for other properties that citizens have
4 --

5 JUSTICE GORSUCH: But we don't --

6 MS. UNDERWOOD: -- and non-citizens --

7 JUSTICE KAGAN: Am I right --

8 MS. UNDERWOOD: -- have --

9 JUSTICE KAGAN: -- that there --

10 JUSTICE GORSUCH: It's fair to say we
11 don't have this isolated, though, isn't it?

12 MS. UNDERWOOD: They did their best.

13 JUSTICE GORSUCH: They did their best.

14 MS. UNDERWOOD: There is some degree
15 of isolation, enough to enable them to believe
16 that they had isolated the factors that people
17 thought of as plausible.

18 JUSTICE BREYER: I mean --

19 JUSTICE KAGAN: Would it be right to
20 say --

21 JUSTICE BREYER: -- there are a
22 million factors.

23 MS. UNDERWOOD: Yes.

24 JUSTICE BREYER: There is pet dogs,
25 you know.

1 MS. UNDERWOOD: Yes.

2 JUSTICE BREYER: I mean, there are
3 cats. And -- and so if, in fact, there were
4 some factors that are relevant, which were not
5 in the data, because they only controlled for
6 six other factors instead of 600, I would
7 expect somewhere in this record someone to have
8 written that there were these other factors
9 that also should have been controlled for.

10 I know what you are going to say,
11 unless I'm wrong, you better not tell me that I
12 am right if I'm not. But I could not --

13 (Laughter.)

14 JUSTICE BREYER: -- find any such
15 place in the record.

16 MS. UNDERWOOD: Nobody proposed, that
17 I know of, proposed factors that might be
18 alternative explanations that should have been
19 tested for.

20 JUSTICE KAGAN: And -- and would it be
21 right to say, General, that it was the Census
22 Bureau's conclusion, a Bureau full of
23 statisticians --

24 MS. UNDERWOOD: Yes.

25 JUSTICE KAGAN: -- that it was the

1 citizen -- citizenship question that was
2 driving the differential response rates?

3 MS. UNDERWOOD: That is -- that is
4 correct.

5 CHIEF JUSTICE ROBERTS: Are there
6 other -- are there other questions on the
7 census for which the administrative records
8 provide more accurate information?

9 MS. UNDERWOOD: There is nothing in
10 the record about that.

11 CHIEF JUSTICE ROBERTS: Well, then I
12 don't want to hear about it.

13 MS. UNDERWOOD: Okay. Okay.

14 JUSTICE SOTOMAYOR: Could you answer
15 the General's point that, if you rely on 6(c),
16 then you shouldn't be even asking this on the
17 ACS form?

18 MS. UNDERWOOD: No. The -- for one
19 thing, in order to do modeling, in order to do
20 sampling, they need some survey data to compare
21 it to.

22 And so some judgments can be made and
23 the judgment might be made that the ACS or some
24 questionnaire that doesn't involve harm to the
25 count that is sampling or -- or some other form

1 of -- less -- less than universal questioning,
2 that testing questions on that kind of
3 instrument is the way to do it. But --

4 CHIEF JUSTICE ROBERTS: Thank you.
5 Thank you, General.

6 Mr. Ho.

7 ORAL ARGUMENT OF DALE E. HO
8 ON BEHALF OF RESPONDENTS NEW YORK
9 IMMIGRATION COALITION, ET AL.

10 MR. HO: Mr. Chief Justice and may it
11 please the Court:

12 The Secretary's decision rested
13 primarily on one assertion, that it would
14 improve the accuracy of citizenship data
15 provided to the Department of Justice.

16 But the administrative record revealed
17 precisely the opposite, that it would make that
18 data less accurate and, thus, harm the
19 Secretary's stated purpose of Voting Rights Act
20 enforcement.

21 And the Secretary's explanation for
22 his decision misstated the evidence in the
23 record in three critical respects.

24 First, the Secretary asserted that
25 adding the question would maximize the Census

1 Bureau's ability to use administrative records
2 on citizenship, but the government has conceded
3 that that was not true.

4 At page 32 of their brief, they
5 acknowledge that, if the question is added, the
6 number of people who can be matched to these
7 administrative records, the most accurate
8 information that we have on citizenship, will
9 fall by one million.

10 Second, the Secretary asserted that
11 adding the question would improve the Bureau's
12 imputation of citizenship for people who lack
13 -- for people for whom the government lacks any
14 such records.

15 But the government has conceded that
16 that was not true either. At page 34 of their
17 opening brief, they acknowledge that the Census
18 Bureau determined that if the question is
19 added, the imputation process will become less
20 accurate.

21 And here's why: The accuracy of
22 imputation depends upon the accuracy of
23 existing data. Federal administrative records
24 are based on a person's legal documents of
25 their citizenship, and, thus, are quite

1 accurate and reliable for this purpose.

2 But the citizenship question is not.
3 The evidence shows that non-citizens respond to
4 the question inaccurately one-third of the
5 time. So, if the question is used, the data
6 that's used for imputation will be contaminated
7 by those incorrect responses, making the output
8 of the imputation process less accurate, making
9 the data less accurate, and, again, harming the
10 Secretary's stated purpose of improving the
11 accuracy of citizenship information.

12 The Secretary misstated the evidence
13 in a third respect. He asserted that adding
14 the question would fill in the gaps in 22
15 million -- for 22 million people in
16 administrative records on citizenship. But the
17 Census Bureau concluded specifically, on the
18 last page of their March 1 memo in the
19 administrative record, that the Secretary's
20 decision will not solve that problem.

21 And the reason is, again, because
22 responses to the question are highly
23 inaccurate, whereas the imputation process,
24 based solely on -- on administrative records,
25 would be more accurate. That's reflected in

1 the Census Bureau's bottom line conclusion in
2 its March 1 memo, and it's reflected in the
3 testimony of Dr. Abowd on that trial.

4 JUSTICE ALITO: But this takes us
5 back, does it not, if I'm following your
6 argument, to the 22.6 million people who will
7 answer the citizenship question but as to whom
8 there aren't administrative records? That's
9 what you're talking about?

10 MR. HO: Yes, Justice Alito.

11 JUSTICE ALITO: Okay. And so then
12 this is territory that we've -- we've covered,
13 but, if the Secretary is told here's the error
14 rate that we can expect for those who answer
15 the citizenship question, and on the other
16 hand, we have this model and we can't tell you
17 how accurate it is, but trust us, it's going to
18 be better, is it arbitrary and capricious for
19 the Secretary to say, I don't want to go with
20 this model because I don't know what the
21 accuracy of that is?

22 MR. HO: Justice Alito, respectfully,
23 I think the Census Bureau said a little bit
24 more than trust us. What the Census Bureau
25 said was we can develop a highly accurate model

1 for this that's going to be better than getting
2 the question wrong one-third of the time, which
3 is what --

4 JUSTICE ALITO: Yeah, well, they said,
5 in our opinion, this would be better, but they
6 can't quantify it. They -- they don't provide
7 a specific number; they don't even provide a
8 range. Am I right on that?

9 MR. HO: They do say that it would be
10 more accurate than responses to the citizenship
11 question, which they do quantify as being
12 incorrect one-third of the time for
13 non-citizens. And if I could get back to --

14 CHIEF JUSTICE ROBERTS: But it is a --

15 MR. HO: -- Justice Kavanaugh's --

16 CHIEF JUSTICE ROBERTS: Go ahead.

17 MR. HO: Oh, I'm sorry. Justice
18 Kavanaugh's question earlier about whether or
19 not that can help with Voting Rights Act
20 enforcement, it can't. And -- and here's why:
21 Citizenship data matters in the Voting Rights
22 Act.

23 CHIEF JUSTICE ROBERTS: I'm sorry,
24 just to -- what can't?

25 MR. HO: I'm sorry.

1 CHIEF JUSTICE ROBERTS: I lost sight
2 of the "it" in your answer.

3 MR. HO: The Secretary's question,
4 Mr. Chief -- the Secretary's decision,
5 Mr. Chief Justice. And responses --

6 CHIEF JUSTICE ROBERTS: I thought you
7 were talking about whether it's helpful with
8 respect to the voting rights information.

9 MR. HO: That's right. Adding a
10 citizenship question to the census, I'm sorry,
11 is not helpful for Voting Rights Act purposes
12 because responses to the question are
13 inaccurate so frequently for non-citizens.
14 Citizenship matters in the Voting Rights Act
15 context when you're dealing with a population
16 in which there's a large number of
17 non-citizens.

18 The VRA requires the drawing of
19 districts in which minority voters constitute a
20 majority sometimes under some circumstances.
21 Now, under normal circumstances, voting age
22 population data will be sufficient for that
23 purpose if citizenship rates are high.

24 But, if the minority group has
25 relatively low citizenship rates, for example,

1 as is the case with Hispanic populations in
2 some circumstances, then you need citizenship
3 data to make sure that you're drawing a
4 district in which minority voters are, in fact,
5 a majority of the population.

6 And data that's wrong one-third of the
7 -- the time with respect to non-citizens just
8 doesn't help you draw districts --

9 JUSTICE GORSUCH: Well, when we --

10 MR. HO: -- at that granular
11 block-by-block level.

12 JUSTICE GORSUCH: Well, when we talk
13 about the block-by-block level, one of the
14 complaints that we've heard from the other side
15 is that the data that we rely on from the ACS
16 is at too high a level and that the census goes
17 down to a more granular level.

18 And, in fact, some of the states who
19 are now Respondents before us have in
20 litigation, including in this Court, argued
21 that ACS data should not be relied upon for
22 purposes of citizenship or other purposes, that
23 the census data is more accurate.

24 What do we do about that? It seems to
25 me like you kind of put the government in a bit

1 of a Catch 22. You say they shouldn't use the
2 census, except for in later litigation when
3 they have to use the census.

4 MR. HO: Justice Gorsuch, let me say
5 two things in response to that. The first is
6 that, to the extent that more granular
7 citizenship data were, in fact, necessary for
8 Voting Rights Act enforcement purposes, and we,
9 I think, set forth a number of reasons in our
10 brief why that's not, in fact, the case, but
11 just assuming that it is, the --

12 JUSTICE GORSUCH: Well, we -- we know
13 states have argued this, including some of the
14 Respondents before us. So I'm -- you know, it
15 is a thing.

16 MR. HO: Okay, that -- that's fair.
17 But what the Census Bureau recommended was that
18 it could develop that block-level data either
19 with existing ACS data or using administrative
20 records and that that would be, in fact, the
21 best and most accurate way to do that. And --

22 JUSTICE GORSUCH: So -- so the states
23 that said previously that wasn't enough now are
24 going in all future litigation to bind
25 themselves to accept that it is enough?

1 MR. HO: Well --

2 JUSTICE GORSUCH: Are you prepared to
3 say that?

4 MR. HO: -- Justice Gorsuch, we've
5 never taken -- our clients have never taken
6 that position, and I -- I'm not aware of my
7 organization ever taking that position in
8 litigation.

9 JUSTICE GORSUCH: And how -- how about
10 the under-reporting or the folks who stop and
11 break off answering the long form and -- and
12 we're asked to believe that that's solely
13 attributable to this question? We have a whole
14 bunch of states that say that, in fact, the
15 break-off rate because of that question, at
16 that question, is something like 0.36 percent.

17 MR. HO: Well --

18 JUSTICE GORSUCH: So that it's very
19 difficult to understand why that question would
20 be the cause of people stopping answering,
21 whereas another possible explanation that
22 hasn't been explored, as I understand it at
23 least, is the length of the form itself may
24 deter those with less means and less time to
25 fill them out, just as simple as that, and we

1 don't know.

2 And what do we do with the fact that
3 we don't know?

4 MR. HO: Justice Gorsuch, the Census
5 Bureau's conclusion was that the most likely
6 explanation was the citizenship question. The
7 only difference in that comparative estimate
8 was the presence of a non-citizen in a
9 household, and citizenship is obviously the
10 most salient question that goes to the
11 difference between those two populations.

12 And the number on the break-off rates
13 for the Internet ACS survey, which I believe
14 Your Honor was referring to, they showed that
15 Hispanics were actually eight times as likely
16 to break off in responding to the ACS upon
17 encountering the citizenship question.

18 Now, by contrast, there isn't a shred
19 of evidence in the administrative record that
20 suggests that this question will not have the
21 effect of harming response rates or will
22 actually improve the citizenship data provided
23 to the Department of Justice.

24 But if I could make one other point in
25 response to your earlier question, Justice

1 Gorsuch, adding the citizenship question
2 doesn't even solve that granularity problem
3 that you referenced, and here's why: Because
4 the Census Bureau can only produce estimates of
5 citizenship at the block level. The government
6 has now conceded that on page 18 of their reply
7 brief, which is quite remarkable, because the
8 government's rationale for asking this question
9 has been to provide a full count of
10 citizenship.

11 And because of the Census Bureau's
12 disclosure avoidance protocols, it actually
13 can't do that at the block level. It
14 undermines the whole rationale for adding this
15 question, and the Secretary didn't even address
16 it in his decisional memo, which renders his
17 decision arbitrary and capricious under State
18 Farm.

19 JUSTICE KAVANAUGH: It seems to me --

20 JUSTICE KAGAN: So --

21 JUSTICE KAVANAUGH: Go ahead.

22 JUSTICE KAGAN: -- I was just -- what
23 is the "it" in that sentence? What did the
24 Secretary not address?

25 MR. HO: He did not address the fact

1 that because of the bureau's disclosure
2 avoidance protocols, it can only provide
3 estimates of citizenship at the block level.

4 If I could, let me explain why. The
5 statute requires the Census Bureau not to
6 disclose information that could result in the
7 identification of a person's census responses.
8 If you have 100 people living on a block and
9 the Census Bureau says, well, there are 100
10 citizens there, you will have necessarily
11 identified all of their census responses.

12 So what the bureau does is it alters
13 demographic totals for census blocks before
14 publishing them. That means that that data is
15 an approximation, it's an estimate, just like
16 the ACS data that the Department of Justice
17 currently relies on. And here's what's
18 critical.

19 JUSTICE ALITO: Well, this is -- this
20 gets really, really technical, but -- well, and
21 your -- I'm sorry.

22 CHIEF JUSTICE ROBERTS: No, go ahead.

23 JUSTICE ALITO: That's -- that's fine.

24 CHIEF JUSTICE ROBERTS: Okay. Thank
25 you, counsel.

1 MR. HO: Thank you, Your Honors.

2 CHIEF JUSTICE ROBERTS: Mr. Letter.

3 ORAL ARGUMENT OF DOUGLAS N. LETTER
4 ON BEHALF OF THE UNITED STATES HOUSE OF
5 REPRESENTATIVES, AS AMICUS CURIAE,
6 IN SUPPORT OF THE RESPONDENTS

7 MR. LETTER: Mr. Chief Justice, and
8 may it please the Court:

9 I just want to say right upfront the
10 Speaker of the House wishes to thank the
11 Justices for their courtesy in hearing from the
12 House today.

13 CHIEF JUSTICE ROBERTS: Tell her she's
14 welcome.

15 (Laughter.)

16 MR. LETTER: Thank you. I'll pass
17 that along to her, Mr. Chief Justice.

18 I want to hit just a couple of points,
19 but one of the ones I want to hit right upfront
20 is something that -- that General Underwood
21 said and I think bears some emphasis, which is
22 the -- remember that the -- the census that
23 we're talking about here is the decennial
24 census provided for in the Constitution of
25 utmost importance to the House of

1 Representatives.

2 That provision obviously is the ground
3 -- has to be the grounding for the statute that
4 is being applied here. And so anything that
5 undermines the accuracy of the actual
6 enumeration is immediately a problem. So
7 there's been a lot of discussion here, quite
8 properly, because of the way this case has been
9 briefed, about will this help the Justice
10 Department and the Voting Rights Act, et
11 cetera. And that may be a very important
12 point, but it is not why the Census Bureau
13 carries out an actual enumeration, which goes
14 to the apportionment of representatives among
15 the states and then distribution within the
16 states.

17 So if there is something that
18 undermines the accuracy of that count, even if
19 it's important for other reasons, that is both
20 a statutory violation and, therefore, a
21 violation of the Administrative Procedure Act
22 and a constitutional violation.

23 Now, this Court does not have to reach
24 the constitutional question because it is a
25 statutory violation. I --

1 JUSTICE ALITO: But do you think that
2 any decrease in the actual count, if -- if you
3 add any question beyond counting people, and
4 that decreases the actual count to any degree,
5 then that additional question is improper?

6 MR. LETTER: Justice Alito, I -- I'm
7 sure that the -- the Court would find there is
8 a de minimis exception. There is no doubt
9 about that. So where this Court would draw
10 that line, I don't know.

11 What I -- I can tell you, and I'm --
12 I'm sure you know this but I will just -- from
13 the -- this Court said in the Wisconsin case
14 that -- a question there was could a
15 statistical adjustment be made, and this Court
16 set the standard of what actual enumeration
17 means and it says, "a reasonable relationship
18 to the accomplishment of an actual
19 enumeration."

20 And this discussion about the
21 importance of voting rights data obviously does
22 not bear a reasonable relationship to the
23 accomplishment of an actual --

24 JUSTICE GORSUCH: Mr. Letter, I'm sure
25 you've given this some thought, but -- I know

1 you have.

2 In terms of assessing what a
3 reasonable relationship is, what do we do with
4 the history and the fact that this question has
5 been on for what a long time was the only form
6 in the census through almost all of our
7 history, and it continues to be asked today in
8 the long form or in the ACS.

9 It's not like this question or anybody
10 in the room is suggesting the question is
11 improper to ask in some way, shape, or form.

12 And what we do as well with the
13 evidence of practice around the world and
14 virtually every English-speaking country and a
15 great many others besides ask this question in
16 their censuses? So I'm sure you have given
17 consideration, thought -- thoughtful
18 consideration to those questions.

19 MR. LETTER: Absolutely, Your Honor,
20 although I can tell you also have.

21 First of all, I don't know if the
22 other countries that are listed, for instance,
23 in the U.N. recommendations have an actual
24 Enumeration Clause written into their
25 constitution that is of paramount importance.

1 So I'm not sure that, when -- when the
2 U.N. made that recommendation, that that
3 matters for the United States.

4 Second, Your Honor, the -- if -- there
5 -- there are other factors that would undermine
6 actual enumeration.

7 There is no evidence in the record
8 here, as the Chief Justice pointed out, we're
9 dealing with a record here. It may be that
10 some people find questions about gender now
11 offensive or maybe in the future that will be
12 deemed offensive and that would undermine the
13 accuracy of the -- of the actual enumeration.
14 We don't have any evidence on that.

15 What we do know, Your Honor, as you
16 quite correctly pointed out, we have a history
17 of this, but what we do know now is the experts
18 right now say that this question, if it is put
19 on the -- the form, which, remember, is the
20 only form right now for the actual enumeration,
21 that will cause -- that will make the
22 undercount worse.

23 JUSTICE GINSBURG: Mr. Letter, the --
24 Congress has the primary control over what the
25 census will be, not the executive, and Congress

1 has been alerted to this citizenship question
2 for some time, and it has done nothing about
3 it.

4 So one question is who should decide?
5 Congress is silent. Should the Court then step
6 in?

7 MR. LETTER: It's a very fair
8 question, Your Honor. Two responses:

9 One, I think that this is a very
10 ironic point for General Francisco to be
11 making. He has said -- he has emphasized in
12 his brief Congress knows about this. Congress
13 should do something. This -- the Court can
14 take judicial notice of this because it's in
15 the public record.

16 The Secretary of Commerce has been
17 called before Congress to explain what he did
18 here, and Assistant Attorney General Gore, the
19 one, you know, about the -- the author of the
20 -- the request by the Justice Department has
21 been called to Congress.

22 They have been declining to answer.
23 They're not giving Congress the information it
24 requests because they say there's litigation
25 going on. And, I repeat, this is a matter of

1 public record.

2 So it's ironic for General Francisco
3 to be saying: This is for Congress. Well, if
4 that's for Congress, obviously the House needs
5 the information.

6 And yet we're being told we can't have
7 the information because it's -- because it's
8 only for you.

9 CHIEF JUSTICE ROBERTS: I thought all
10 the information available, as I understand it,
11 leads to only one answer. And so why isn't
12 that answer sufficient for them to take
13 whatever action they consider appropriate?

14 MR. LETTER: The -- I'm sorry, Chief
15 Justice.

16 CHIEF JUSTICE ROBERTS: Well, we've
17 been told there was no basis for the Secretary
18 to make any decision, other than the
19 recommendation that was submitted to him by the
20 Bureau, because that's the evidence. That's
21 the scientific evidence. And so there's no
22 room for the exercise of any discretion.

23 So what information -- what more
24 information does the Congress need to address
25 the problem?

1 MR. LETTER: We want to know what --
2 you -- you decided otherwise. Why did you
3 decide? As we know, his -- his -- his letter
4 provides not -- his memo provides not much
5 information. This -- the Justices here today
6 have been asking these key questions.

7 So we want to know what made you do --
8 what made you decide this? Was this just a
9 political decision?

10 JUSTICE KAVANAUGH: Well, I thought
11 Justice Ginsburg's question went more to why
12 doesn't Congress prohibit the asking of a
13 citizenship question in the same way that
14 Congress has explicitly provided that no one
15 can be compelled to provide religious
16 information?

17 MR. LETTER: Right. And so that is
18 something that Congress could attempt to do,
19 yes, and that is one of the things that would
20 be -- would be asked about.

21 But, as we know, that doesn't stop
22 this Court from interpreting the statute and
23 the Constitution.

24 As we know, this Court is the final
25 word on the Constitution.

1 JUSTICE KAVANAUGH: On the -- on the
2 statute I had one question, which is you make a
3 good first principles point about enumeration
4 being the purpose of the census.

5 But it turns out that the census, as
6 you know, has been used for lots of other
7 statistical and demographic collection purposes
8 throughout -- throughout our history.

9 So it's not just for enumeration. And
10 the statute that Congress has passed gives huge
11 discretion to the Secretary how to fill out the
12 form, what to put on the form. So how are we
13 to think about enumeration when the history and
14 the statute suggests that there is more than
15 just enumeration that's at stake here?

16 MR. LETTER: Your Honor is exactly
17 right. The -- the census information, the
18 census data, are used for all sorts of things
19 that are very important. Remember, the Census
20 Bureau does things way beyond just the
21 decennial census actual enumeration.

22 But, again, this Court was very clear,
23 and, by the way, the other thing is General
24 Francisco has argued no review. This Court has
25 reviewed how the actual enumeration has taken

1 place, I think, about five times.

2 So there is clearly judicial review
3 here.

4 JUSTICE KAVANAUGH: Well, assuming
5 there is review and assuming it's arbitrary and
6 capricious, as you know it's deferential.

7 MR. LETTER: Yes.

8 JUSTICE KAVANAUGH: And the question I
9 think here is a policy judgment that it's more
10 important to get accurate citizenship
11 information even at the expense, potentially,
12 of a slight decrease, potentially, in response
13 rates.

14 And the question is: Given the
15 statutes, why does that judgment fall below the
16 standard of reasonableness in assessing the
17 different policy considerations?

18 MR. LETTER: Our position is that,
19 one, the Justice Department can get this
20 information elsewhere, as we know.

21 But, two, you can't undermine the
22 accuracy of the actual enumeration in order to
23 get information --

24 JUSTICE KAVANAUGH: So --

25 MR. LETTER: -- for the Voting Rights

1 Act.

2 JUSTICE KAVANAUGH: -- the
3 constitutional backdrop, I think, if I'm
4 translating your argument, means that anything
5 that would undermine the enumeration is
6 impermissible and unreasonable?

7 MR. LETTER: I believe so, Your Honor.
8 And the only thing -- the only addition I would
9 make to that is, as I said to Justice Alito,
10 undoubtedly there is a de minimis
11 determination.

12 But, again, this Court is -- this
13 Court is the expert on the constitution. Thank
14 you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Four minutes, General Francisco.

18 REBUTTAL ARGUMENT OF GEN. NOEL J. FRANCISCO

19 ON BEHALF OF THE PETITIONERS

20 GENERAL FRANCISCO: Mr. Chief Justice,
21 thank you. I would like to make four points:

22 First, on the disclosure avoidance
23 protocols, we discussed those at our reply
24 brief at page 17. The bottom line is that
25 those protocols apply to all census data,

1 including on sex, on age, on race, that the
2 Department of Justice uses to construct citizen
3 voting age population.

4 It has never been a problem before.
5 There is no reason to think it will be a
6 problem now.

7 And I -- in fact, I think in the trial
8 record, Dr. Abowd testified how it would not be
9 a problem.

10 Second, I'd like to point the -- Your
11 Honors to the key differences memo at page 148
12 of the Joint Appendix, the very -- the one full
13 paragraph, the first sentence says, "The
14 relative quality of Alternative C versus
15 Alternative D will depend on the relative
16 importance of the errors in the administrative
17 data, response data, and imputations." It then
18 goes through and discusses the various types of
19 errors.

20 And its final conclusion is
21 "Unfortunately, the Census Bureau cannot
22 quantify the relative magnitude of the errors
23 across the alternatives."

24 Third, in terms of response rates, the
25 administrative record shows that the Census

1 Bureau staff believed that there would be a
2 5.1 percent decrease in the initial response
3 rates from adding the citizenship question.

4 But as Secretary Ross points out in
5 his memorandum, that doesn't take into account
6 follow-up operations. That's the response rate
7 drop before follow-up operations. And it
8 doesn't disaggregate between those who are
9 going to be put off by the citizenship question
10 itself, as opposed to those who are put off by
11 the larger macro environment because they don't
12 trust the government or don't like this
13 particular administration.

14 And that, I think, is one of the
15 reasons why Dr. Abowd concluded in the
16 testimony that Justice Breyer cited that
17 "there's no credible, quantitative evidence
18 that the addition of a citizenship question" --

19 JUSTICE SOTOMAYOR: I --

20 GENERAL FRANCISCO: -- "will affect
21 the accuracy of the count." And --

22 JUSTICE SOTOMAYOR: I thought that
23 Dr. Abowd stated and the district court found
24 that the follow-up process was, at best,
25 riddled with a number of -- of inadequacies,

1 and that it wouldn't be adequate enough to take
2 care of the shortfall.

3 GENERAL FRANCISCO: Well, we can
4 debate about whether it would be adequate
5 enough, but in order to say that the final
6 self-response rate would drop by 5.1 percent,
7 you have to conclude that it's zero percent
8 accurate.

9 And I don't think that there's any
10 basis in the record to conclude that it's --

11 JUSTICE SOTOMAYOR: So how much
12 accuracy --

13 GENERAL FRANCISCO: -- zero percent
14 accurate. So --

15 JUSTICE SOTOMAYOR: -- would be --
16 let's assume it were 5.8 or something close to
17 it. Is that de minimis to you? Is that --

18 GENERAL FRANCISCO: Your Honor, I
19 think --

20 JUSTICE SOTOMAYOR: --
21 inconsequential?

22 GENERAL FRANCISCO: -- I think that
23 that is largely an impossible question to
24 answer. That is not built into the
25 Constitution itself. There is always going to

1 be a tradeoff.

2 The long form census, for example,
3 caused a drop in self-response rates relative
4 to -- to the short form by, I believe, around
5 10 percent.

6 But my final point is one that Mr.
7 Letter alluded to, and that is under --

8 JUSTICE SOTOMAYOR: That's why you
9 keep --

10 -- my friend's --

11 JUSTICE SOTOMAYOR: -- the short form.

12 GENERAL FRANCISCO: Right, Your Honor.

13 And under my friend's on the other side's
14 position, you are effectively empowering any
15 group in the country to knock off any question
16 on the census if they simply get together and
17 boycott it.

18 There are many people in this country
19 who might find the sex question objectionable
20 because it limits individuals to a binary
21 choice. If a large number of people got
22 together in one state and said we're going to
23 boycott the census --

24 JUSTICE SOTOMAYOR: General --

25 GENERAL FRANCISCO: -- as long as you

1 include --

2 JUSTICE SOTOMAYOR: General --

3 GENERAL FRANCISCO: -- that sex

4 question you are effectively empowering --

5 JUSTICE SOTOMAYOR: General, are you

6 --

7 GENERAL FRANCISCO: -- to knock that

8 off --

9 JUSTICE SOTOMAYOR: -- suggesting --

10 CHIEF JUSTICE ROBERTS: Justice

11 Sotomayor.

12 JUSTICE SOTOMAYOR: Are you suggesting

13 that Hispanics are boycotting the census,

14 that --

15 GENERAL FRANCISCO: Not --

16 JUSTICE SOTOMAYOR: Are you suggesting

17 they don't have, whether it is rational or not,

18 that they don't have a legitimate fear?

19 GENERAL FRANCISCO: Not in the

20 slightest, Your Honor. I am suggesting that

21 the risk --

22 JUSTICE SOTOMAYOR: So --

23 GENERAL FRANCISCO: -- of my friend's

24 theory on the other side is that it countenance

25 as precisely that type of coordinated behavior

1 that would empower groups to knock off any
2 question of the census that they found to be
3 particularly objectionable.

4 Mr. Chief Justice, unless the Court
5 has further questions?

6 CHIEF JUSTICE ROBERTS: We're all
7 done.

8 GENERAL FRANCISCO: Thank you, Your
9 Honor.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 General. The case is submitted.

12 (Whereupon, at 11:28 a.m., the case
13 was submitted.)

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