



Preparing for the 2020 Census: Considerations for State Attorneys General

John H. Thompson & Robert Yablon

State attorneys general must begin now to focus on the looming 2020 Census. Because this decennial event has major implications for every state, and because it presents complex legal and practical issues, it is vital for attorneys general to engage early and to remain engaged in order to represent their states effectively.

While the Census Bureau's last-minute attempt to add a citizenship question to the census, *see* discussion *infra*, has generated significant attention and controversy, it is important not to lose sight of other weighty census-related issues. These include the persistent challenge of reaching certain hard-to-count groups, the potential for technological snags, concerns about privacy and confidentiality, and the difficulty of staffing the census in a tight labor market. State attorneys general and other state and local officials must attend to these issues and work now to ensure that the census properly serves the interests of their jurisdictions.

I. Background

A. The Basics

The U.S. Constitution requires an "actual Enumeration" of the country's population every decade.¹ The federal government conducted the first of these decennial censuses in 1790, and it is now gearing up for the twenty-fourth installment in 2020.

Counting 300-plus million Americans is no small feat. The census has been called "the federal government's largest and most complex peacetime operation."² Congress has delegated primary responsibility for the census to the U.S. Census Bureau, which resides within the Department of Commerce.³ The Bureau's overarching tasks include identifying all of the places where people may live, using that information to obtain household-level headcounts and other

¹ U.S. CONST. art. I, § 2, cl. 3.

² COMM. ON NAT'L STATISTICS, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *THE 2000 CENSUS: COUNTING UNDER ADVERSITY 1* (Constance F. Citro et al. eds., 2004).

³ *See* 13 U.S.C. § 5 (2012).

data, and then generating accurate and usable aggregate results. Accomplishing all this requires the Bureau to develop an enormous technological infrastructure; to establish a physical presence in every state and territory; to conduct an extensive integrated advertising and local partnership program; and to recruit, train, and deploy hundreds of thousands of census takers and other staff. The Bureau began planning the 2020 Census even before the 2010 Census was complete, and it has already conducted multiple test runs. Yet much uncertainty remains about exactly how the upcoming census will unfold.

B. The Stakes

A lot rides on the census.

First, census results directly affect the distribution of political power at the federal, state, and local levels. The Constitution requires a census for the purpose of apportioning seats in the U.S. House of Representatives.⁴ After the 2010 Census, eighteen states gained or lost congressional representation as a result of changes to their relative populations. Similar shifts are likely after 2020.⁵ Relatedly, census results trigger decennial redistricting obligations for jurisdictions at all levels. To assure that electoral districts remain compliant with constitutionally rooted equal population requirements,⁶ states use census data to redraw the lines for their congressional and state legislative districts. Local governments do the same for their electoral districts. In short, the census is a cornerstone of our democratic system.

Second, census results drive the distribution of federal funds. According to a recent Census Bureau tally, 132 federal programs use census data to allocate funds totaling more than \$675 billion per year.⁷ This funding includes federal dollars that go to states and localities for Medicaid, food assistance, housing assistance, education, highway construction, and much

⁴ See U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

⁵ See KRISTIN D. BURNETT, U.S. CENSUS BUREAU, CONGRESSIONAL APPORTIONMENT: 2010 CENSUS BRIEFS (2011), available at <https://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf>. Arizona, Florida, Georgia, Nevada, South Carolina, Texas, Utah, and Washington each gained at least one representative. Illinois, Iowa, Louisiana, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio, and Pennsylvania each lost at least one representative. *Id.* Based on current population projections, the states most likely to gain congressional seats following the 2020 Census include Arizona, Colorado, Florida, North Carolina, Oregon, and Texas, while the states most likely to lose seats include Illinois, Michigan, Minnesota, Mississippi, New York, Ohio, Pennsylvania, Rhode Island, and West Virginia. See REBECCA TIPPETT, UNC, CAROLINA POPULATION CENTER, 2020 CONGRESSIONAL REAPPORTIONMENT: AN UPDATE (2017), available at <https://demography.cpc.unc.edu/2017/12/21/2020-congressional-reapportionment-an-update/>.

⁶ See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

⁷ MARISA HOTCHKISS & JESSICA PHELAN, U.S. CENSUS BUREAU, USES OF CENSUS BUREAU DATA IN FEDERAL FUNDS DISTRIBUTION 3 (2017), available at <https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf>.

more.⁸ State governments likewise look to census data when distributing state funds among local jurisdictions.

Third, federal, state, and local governments rely on census data as they develop and implement programs in a wide range of areas, including transportation, education, health care, and housing. Private businesses and other organizations use census data for similar planning purposes, including for determining where to invest and where to locate retail establishments, workplaces, and other facilities.

II. Looking Ahead to 2020 – Issues and Concerns

To date, one issue related to the 2020 Census has dominated headlines—namely, the Secretary of Commerce’s late-breaking decision on March 26, 2018 to ask all census respondents about their citizenship status.⁹ (The Bureau’s prior approach since 1950 had been to obtain information about citizenship through the American Community Survey, which the Bureau administers to a sample of the population each year.) There are widespread concerns that this citizenship question could drive down response rates among noncitizens. For areas with large immigrant populations, an undercount of noncitizens means losses of political representation and federal funding. In multiple lawsuits, litigants are challenging the inclusion of the citizenship question on both constitutional and statutory grounds.¹⁰

Because the citizenship question is already receiving significant public attention and pushback, it is not the primary focus of this Issue Brief. Instead, this Issue Brief seeks to identify other important issues that have not been as extensively aired. Some of these issues intersect with the citizenship question controversy, and they may become especially consequential if efforts to remove the citizenship question from the census are unsuccessful.

A. Undercounting and Inaccuracies

The controversy surrounding the citizenship question points to broader issues concerning the accuracy of the census. Some subsets of the population are more difficult to count than others. These include non-English speakers and those with limited literacy; the homeless and others with unconventional or unstable living arrangements; groups that tend to be particularly

⁸ *Id.* at 3-7; *see also* U.S. CENSUS BUREAU, 2020 CENSUS COMPLETE COUNT COMMITTEE GUIDE, app. A (“50 Ways Census Data Are Used”), *available at*

<https://www.census.gov/content/dam/Census/newsroom/press-kits/2018/ccc-guide-d-1280.pdf>.

⁹ *See* Memorandum from Secretary Wilbur Ross to Karen Dunn Kelley, Under Secretary for Economic Affairs (Mar. 26, 2018), *available at* https://www.commerce.gov/sites/commerce.gov/files/2018-03-26_2.pdf.

¹⁰ *See, e.g.*, *La Unión del Pueblo Entero v. Ross*, No. 18-cv-1570 (D. Md. filed May 31, 2018); *City of San Jose v. Ross*, No. 18-cv-2279 (N.D. Cal. filed Apr. 17, 2018); *Kravitz v. U.S. Dep’t of Commerce*, No. 18-cv-1041 (D. Md. filed Apr. 11, 2018); *New York v. U.S. Dep’t of Commerce*, No. 18-cv-2921 (S.D.N.Y. filed Apr. 3, 2018); *California v. Ross*, 18-cv-1865 (N.D. Cal. filed Mar. 26, 2018).

distrustful of the government, such as undocumented immigrants; and those displaced by natural disasters.¹¹

The Census Bureau has long recognized the existence of hard-to-count segments of the population, and it takes various remedial steps. Among other things, the Bureau prints census forms in numerous languages; it attempts to hire field staff with relevant local knowledge and language skills; it uses special protocols to try to reach individuals living in shelters and other group settings; and it engages in extensive community outreach efforts. Yet undercounts have persisted. In particular, past censuses have disproportionately missed racial and ethnic minorities and the economically disadvantaged, as well as urban dwellers and young children.¹²

Demographic shifts and changing societal norms are likely to create an especially challenging environment for the 2020 Census. The United States is more diverse than ever. More than 21 percent of U.S. residents speak a language at home other than English (with at least 350 different languages being spoken), and nearly 9 percent of residents self-report that they speak

¹¹ See, e.g., NAT'L ADVISORY COMM. ON RACIAL, ETHNIC, AND OTHER POPULATIONS, ADMIN. RECORDS, INTERNET & HARD TO COUNT POPULATION WORKING GROUP, FINAL REPORT 2 (2016), available at https://www2.census.gov/cac/nac/reports/2016-07-admin_internet-wg-report.pdf; Brendan Kearns, *Down for the Count: Overcoming the Census Bureau's Neglect of the Homeless*, 8 STAN. J. CIV. RTS. & CIV. LIBERTIES 155, 156 (2012).

¹² See, e.g., Press Release, U.S. Census Bureau, Census Bureau Releases Estimates of Undercount & Overcount in the 2010 Census (May 22, 2012), available at https://www.census.gov/newsroom/releases/archives/2010_census/cb12-95.html (estimating that the 2010 Census undercounted 2.1 percent of the black population, 1.5 percent of the Hispanic population, and 4.9 percent of the population of Native Americans living on reservations, while overcounting the white non-Hispanic population by 0.8 percent); U.S. CENSUS BUREAU, INVESTIGATING THE 2010 UNDERCOUNT OF YOUNG CHILDREN – A NEW LOOK AT 2010 CENSUS OMISSIONS BY AGE 1 (2016), available at <https://www2.census.gov/programs-surveys/decennial/2020/program-management/memo-series/2020-report-2010-undercount-children-omissions.pdf> (estimating “a net undercount in the 2010 Census of about 4.6 percent for children aged 0 to 4”); JENNIFER D. WILLIAMS, CONG. RESEARCH SERV., THE 2010 DECENNIAL CENSUS: BACKGROUND AND ISSUES 8 (2011), available at <https://www.census.gov/history/pdf/2010-background-crs.pdf>; Note, *Race, Rights, and Remedies: Census Sampling and the Voting Rights Act*, 114 HARV. L. REV. 2502, 2505–06 (2001). The Census Bureau estimates undercounts and overcounts based on post-enumeration surveys and data analysis. See *Coverage Measurement*, U.S. CENSUS BUREAU, https://www.census.gov/coverage_measurement/ (last visited Oct. 1, 2018).

English less than “very well.”¹³ Meanwhile, living arrangements have become increasingly varied.¹⁴ And public trust in government is at a historically low level.¹⁵

There are also concerns that the Census Bureau may be behind in its efforts to develop and implement the processes necessary to enumerate hard-to-count populations accurately in 2020. A recent report from the Government Accountability Office observed that, “[a]side from the inherent difficulties of counting such individuals, the Bureau faces certain management challenges related to its hard-to-count efforts,” including the need to coordinate and adequately staff important operations across the Bureau’s decentralized organizational structure.¹⁶

B. Technology-Related Issues

The 2020 Census will be far more technologically advanced than previous enumerations. From 1970 to 2010, the Census Bureau mailed paper questionnaires to all U.S. households and asked recipients to complete them and mail them back. Field staff then followed up in person and/or by phone with non-responding households.¹⁷ For 2020, the Census Bureau is shifting for the first time to an internet-first response system for most households. Households will receive a mailer from the Bureau with information about how to complete the census questionnaire online. Households that fail to respond will later receive paper questionnaires and in-person contacts from field staff as necessary.¹⁸

The Bureau is also incorporating new technologies into other aspects of its work. In the past, Bureau employees physically checked every census block to generate a master file of the U.S. addresses to be canvassed. For the 2020 Census, the Bureau is instead relying largely on databases and satellite imagery to carry out this key preparatory step.¹⁹ During the canvassing stage, Bureau field staff will use mobile devices to manage their workflow and collect data from

¹³ See CAMILLE RYAN, U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY REPORTS, LANGUAGE USE IN THE UNITED STATES: 2011 (2013), *available at* <https://www2.census.gov/library/publications/2013/acs/acs-22/acs-22.pdf>; Press Release, U.S. Census Bureau, Census Bureau Reports at Least 350 Languages Spoken in U.S. Homes (Nov. 3, 2015), *available at* <https://www.census.gov/newsroom/press-releases/2015/cb15-185.html>.

¹⁴ See JONATHAN VESPA ET AL., U.S. CENSUS BUREAU, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: 2012 (2013), *available at* <https://www.census.gov/prod/2013pubs/p20-570.pdf>.

¹⁵ See *Public Trust in Government: 1958-2017*, PEW RESEARCH CENTER (Dec. 14, 2017), <http://www.people-press.org/2017/12/14/public-trust-in-government-1958-2017/>.

¹⁶ U.S. GOV’T ACCOUNTABILITY OFFICE, 2020 CENSUS: ACTIONS NEEDED TO ADDRESS CHALLENGES TO ENUMERATING HARD-TO-COUNT GROUPS, REPORT TO CONGRESSIONAL REQUESTERS (2018), *available at* <https://www.gao.gov/assets/700/693450.pdf>.

¹⁷ See Williams, *supra* note 12, at 3.

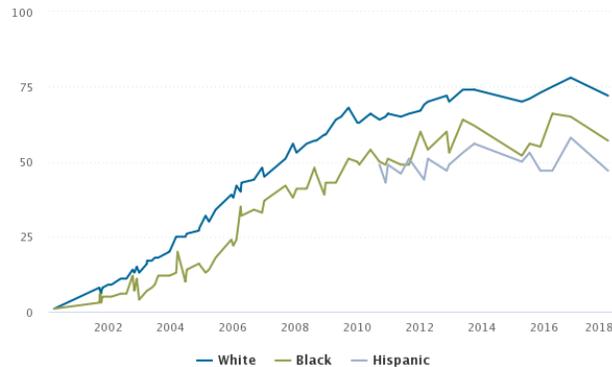
¹⁸ See U.S. CENSUS BUREAU, 2020 CENSUS OPERATIONAL PLAN 95-97 (2017) [hereinafter “Operational Plan”], *available at* <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan3.pdf>. In areas with low internet connectivity, paper questionnaires will be provided in the first instance, along with information about how to respond online. See *id.*

¹⁹ See *id.* at 15-16, 74-79.

households during in-person visits.²⁰ And the Bureau will use social media and microtargeting techniques as part of its effort to encourage participation.²¹

The Census Bureau’s technological upgrades have important benefits. The shift to an internet-first response system should make it easier for many households to complete the census, and it has the potential to increase efficiency and reduce costs. But that change also gives rise to several concerns. First, it may place those who lack internet access or skills at a disadvantage. In many instances, these will be individuals who are already among the hard-to-count segments of the population. The charts below from the Pew Research Center highlight the significant racial, economic, education, and age disparities in home broadband internet access. Second, as the Bureau has recognized, many people may be reluctant to share data online.²² Their misgivings could reduce overall response rates, which would require more follow-up from the Bureau than anticipated, potentially jeopardizing count quality if employees are stretched too thin. Third, there is the danger that one or more technologies will malfunction with disruptive effect. According to the Government Accountability Office, the Bureau plans to use fifty-two IT systems during the 2020 Census, and some may not be fully tested before being deployed.²³

% of U.S. adults who are home broadband users, by race



Note: The Center has used several different question wordings to identify broadband users in recent years, which may account for some variance in broadband adoption figures between 2015 and 2018. Our survey conducted in July 2015 used a directly comparable question wording to the one conducted in January 2018. Source: Surveys conducted 2000–2018. Data for Hispanics includes only surveys that included Spanish-language interviews.

PEW RESEARCH CENTER

% of U.S. adults who are home broadband users, by income



Note: The Center has used several different question wordings to identify broadband users in recent years, which may account for some variance in broadband adoption figures between 2015 and 2018. Our survey conducted in July 2015 used a directly comparable question wording to the one conducted in January 2018. Source: Surveys conducted 2000–2018.

PEW RESEARCH CENTER

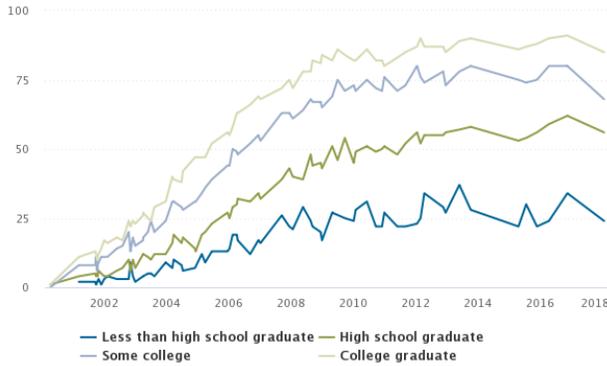
²⁰ See *id.* at 26.

²¹ See *id.* at 92-93.

²² See *id.* at 162.

²³ See ROBERT GOLDENKOFF & DAVID A. POWNER, U.S. GOV’T ACCOUNTABILITY OFFICE, 2020 CENSUS: CONTINUED MANAGEMENT ATTENTION NEEDED TO MITIGATE KEY RISKS JEOPARDIZING A COST-EFFECTIVE AND SECURE ENUMERATION, TESTIMONY BEFORE THE SUBCOMMITTEE ON COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES, COMMITTEE ON APPROPRIATIONS, HOUSE OF REPRESENTATIVES 5-16 (2018), available at <https://www.gao.gov/assets/700/691316.pdf>.

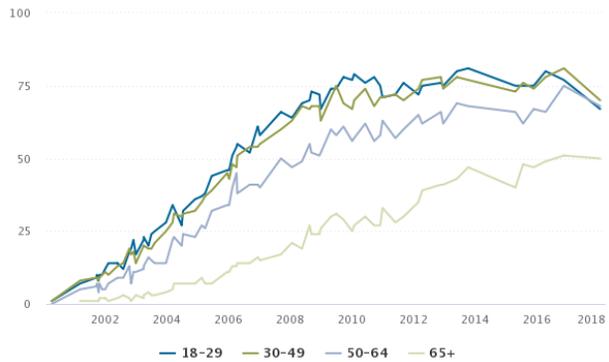
% of U.S. adults who are home broadband users, by education level



Note: The Center has used several different question wordings to identify broadband users in recent years, which may account for some variance in broadband adoption figures between 2015 and 2018. Our survey conducted in July 2015 used a directly comparable question wording to the one conducted in January 2018. Source: Surveys conducted 2000–2018.

PEW RESEARCH CENTER

% of U.S. adults who are home broadband users, by age



Note: The Center has used several different question wordings to identify broadband users in recent years, which may account for some variance in broadband adoption figures between 2015 and 2018. Our survey conducted in July 2015 used a directly comparable question wording to the one conducted in January 2018. Source: Surveys conducted 2000–2018.

PEW RESEARCH CENTER

C. Concerns about Privacy and Confidentiality

The Census Bureau’s increasing reliance on technology raises questions about whether the Bureau can and will respect personal privacy and maintain the confidentiality of the information it collects. This is of particular concern given waning public trust in government. These privacy and confidentiality concerns fall into at least two distinct categories. First, some worry that the government itself will misuse census information. Second, there are fears that census data will be vulnerable to hacking and other security breaches. For the Census Bureau and other stakeholders, the challenge is partly about assuring that information is indeed protected and partly about building public confidence. As the Bureau has recognized, even if its systems are secure, a contrary public perception could discourage participation in the census and threaten its accuracy.²⁴

As a formal matter, federal law does establish stringent rules against government misuse of census data. The Commerce Department is barred from using census data “for any purpose other than the statistical purposes for which it is supplied,” from releasing information that allows individuals to be personally identified, and from sharing individual-level responses with anyone outside the Department.²⁵ Other federal laws, including the Privacy Act of 1974²⁶ and the Confidential Information Protection and Statistical Efficiency Act,²⁷ further constrain the use of personally identifiable census data. Consistent with these enactments, the Bureau pledges that it “will never share a respondent’s personal information with immigration enforcement

²⁴ See Operational Plan, *supra* note 18, at 134.

²⁵ 13 U.S.C. § 9 (2012).

²⁶ An Act To Amend Title 5, United States Code, By Adding A Section 552A To Safeguard Individual Privacy From The Misuse Of Federal Records, To Provide That Individuals Be Granted Access To Records Concerning Them Which Are Maintained By Federal Agencies, To Establish A Privacy Protection Study Commission, And For Other Purposes, Pub. L. No. 93-579, 88 Stat. 1896 (1974); 5 U.S.C. § 552a.

²⁷ E-Government Act of 2002, Pub. L. No. 107-347, Title V, 116 Stat. 2899, 2962 (2002); 44 U.S.C. § 3501 note.

agencies, like ICE; law enforcement agencies, like the FBI or police; or allow it to be used to determine their eligibility for government benefits.”²⁸ Meanwhile, laws such as the Federal Information Security Modernization Act of 2014²⁹ and the Federal Cybersecurity Enhancement Act of 2015,³⁰ require the Census Bureau to take various steps to minimize cybersecurity risks.³¹

Practically speaking, however, doubts remain about whether the Census Bureau will indeed protect confidentiality and privacy and, as importantly, whether it can assure members of the public that their information is secure. With dozens of IT systems in use and hundreds of thousands of mobile devices deployed to collect data in the field, there will be real risks of loss, theft, or employee misuse.³² Meanwhile, foreign governments and others could target census infrastructure in the same way they have sought to infiltrate and disrupt other systems.³³ And federal agencies could step on each other’s toes. If ICE, for instance, were to conduct immigration enforcement operations proximate to census-related activities, that could well undermine confidence in the privacy of the census and reduce response rates.³⁴ In 2010, the Bureau had an informal understanding with ICE about steering clear of census events, but it is not clear that such an understanding exists this time around.³⁵

Ultimately, the success or failure of the 2020 Census will depend in large part on whether the Bureau, through its advertising and partnership programs, can convince the public—and especially hard-to-count populations—that their information is secure.

²⁸ U.S. CENSUS BUREAU, 2020 CENSUS COMPLETE COUNT COMMITTEE GUIDE 3, *available at*

<https://www.census.gov/content/dam/Census/newsroom/press-kits/2018/ccg-guide-d-1280.pdf>.

²⁹ Federal Information Security Modernization Act of 2014, Pub. L. No. 113-283, 128 Stat. 3073 (2014); 44 U.S.C. § 101 note.

³⁰ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division N, Title II, Subtitle B, §§ 221 et seq., 129 Stat. 2242, 2935-2936 (2015); 6 U.S.C. § 1501 note.

³¹ *See generally* JENNIFER D. WILLIAMS, CONG. RESEARCH SERV., CONFIDENTIALITY PROVISIONS FOR THE 2020 DECENNIAL CENSUS (2018).

³² *See* Goldenkoff & Powner, *supra* note 23, at 32 (observing that the Bureau “faces considerable challenges and uncertainties in ... managing the development and security of IT systems”).

³³ *See, e.g.,* Abby Vesoulis, *Why These Former Cybersecurity Officials Are Worried About the Census*, TIME (July 19, 2018), <http://time.com/5341881/2020-census-cybersecurity-concerns/>.

³⁴ *Cf.* Maria Sacchetti, *Amid Crackdown, Advocates for Immigrants Say Citizenship Question Will Spook Census-Takers*, WASH. POST (Apr. 16, 2018), https://www.washingtonpost.com/local/immigration/amid-crackdown-advocates-for-immigrants-say-citizenship-question-will-spook-census-takers/2018/04/16/ca2996c4-339d-11e8-8abc-22a366b72f2d_story.html?noredirect=on&utm_term=.82bfead6916d.

³⁵ We have submitted a FOIA request for information about the Census Bureau’s arrangements with immigration officials but have not received a response.

D. Staffing Issues

Notwithstanding the Census Bureau's increased reliance on technology, the Bureau's field staff and other employees remain indispensable to the counting process. In 2010, the Bureau employed more than 600,000 census takers and maintained a dozen regional census centers and nearly 500 area census offices.³⁶ For 2020, the Bureau plans a more streamlined operation, but it will still need to fill hundreds of thousands of positions with qualified workers.³⁷

The current labor market is likely to create staffing challenges. When the 2010 Census was staffed, the United States was recovering from a recession, and the unemployment rate was nearly ten percent.³⁸ Today, the unemployment rate is around four percent. Recognizing this difference, the Bureau is planning an aggressive recruiting campaign, but it may still find itself with fewer qualified applicants than it did a decade ago. Indeed, Bureau officials have reported "smaller applicant pools, declined job offers, and early turnover" during the initial stages of 2020 hiring.³⁹

Making matters more difficult, the Census Bureau will apparently limit its 2020 Census hiring to U.S. citizens.⁴⁰ This marks a shift from the Bureau's past practice. Although most federal hiring is limited to citizens, the Bureau in recent decades requested and received waivers from the federal government's Office of Personnel Management, which allowed the Bureau to hire noncitizens, at least when no qualified citizen was available.⁴¹ In 2010, the Bureau hired nearly 3,500 noncitizens to fill office and field positions.⁴² Because noncitizens may be uniquely well positioned to reach out to immigrant groups and language minorities, the exclusion of noncitizens from the 2020 Census labor pool could hamstring the Bureau's efforts to achieve a complete count.

III. The Role of State Attorneys General and Other State/Local Officials

Because the stakes are so high, attorneys general cannot afford to ignore the 2020 Census. Instead, they must work proactively to promote their state's interests before, during, and after the count. Given the scale and complexity of the census, the uncertainty surrounding it, and the likelihood of litigation, such engagement is crucial. As an initial step, attorneys general should

³⁶ Operational Plan, *supra* note 18, at 26.

³⁷ *Id.*; see also Robert Bernstein, *U.S. Census Bureau Needs Hundreds of Thousands of Workers*, U.S. CENSUS BUREAU (July 17, 2018), <https://www.census.gov/library/stories/2018/07/recruiting-for-2020-census.html>.

³⁸ Bernstein, *supra* note 38.

³⁹ U.S. Gov't Accountability Office, *supra* note 16, at 24.

⁴⁰ See Tara Bahrapour, *Non-Citizens Won't Be Hired as Census-Takers in 2020, Staff Is Told*, WASH. POST (Jan. 30, 2018), https://www.washingtonpost.com/local/social-issues/non-citizens-wont-be-hired-as-census-takers-in-2020-staff-is-told/2018/01/30/b327c8d8-05ee-11e8-94e8-e8b8600ade23_story.html?noredirect=on&utm_term=.4150c223d0b7.

⁴¹ *Id.*

⁴² See *id.*

immediately identify staff members who will become their inside experts on census-related matters—individuals who will make the census a top priority.

Some attorneys general offices are already monitoring and responding to census-related developments, especially with regard to the citizenship question. Attorneys general should similarly monitor other aspects of the Census Bureau’s work to ensure compliance with relevant constitutional, statutory, and regulatory requirements. If the Bureau’s conduct appears to run afoul of the law, attorneys general should seek correction from the Bureau and ultimately pursue legal action if the Bureau fails to change course.

Beyond performing these familiar watchdog and litigation functions, attorneys general can pursue their census-related goals through a variety of lesser-known mechanisms. The remainder of this memorandum focuses on these options. It first discusses actions that can be taken through formal Census Bureau channels. It then addresses steps that officials can take independently of the Bureau.

A. Participating in Census Bureau Processes

The Census Bureau formally invites state and local governments to participate at various stages of the census process. Much of this invited participation is cooperative, with the Bureau looking to state and local stakeholders to assist with census-related activities. In addition, there are opportunities for states and localities to pursue their interests through procedures that are somewhat more adversarial.

At the preparatory stage, the Bureau seeks state and local assistance as it works to generate the address lists and maps that it will use to conduct the census. The Bureau has already invited state and local governments to review the Bureau’s initial lists and maps and offer updates or corrections.⁴³ Later, at the data collection stage, the Bureau will give states a further opportunity to supply and review address data and to identify group housing units, such as nursing facilities and dormitories.⁴⁴ By keeping tabs on this process, attorneys general and other state officials (who are often “clients” of the attorney general) can help to ensure that the Bureau has the information it needs to conduct a full count in their jurisdictions.

As the census itself approaches, states and localities can support the Bureau’s counting efforts through State Complete Count Commissions and Complete Count Committees (collectively,

⁴³ See Operational Plan, *supra* note 18, at 80-83. This process is conducted pursuant to the Census Address List Improvement Act of 1994. Census Address List Improvement Act of 1994, Pub. L. No. 103-430, 108 Stat. 4393 (1994).

⁴⁴ See Operational Plan, *supra* note 18, at 131-34. This review occurs through the Federal-State Cooperative for Population Estimates (FSCPE). Each state’s governor designates an FSCPE point-of-contact, and the Bureau works with that designee. *Id.*; see also *FSCPE Contacts*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/popest/about/fscpe/contacts.html> (last updated Aug. 22, 2018).

CCCs).⁴⁵ CCCs are volunteer organizations that states and localities (as well as tribal governments and private citizens) establish to raise awareness of the census and encourage participation.⁴⁶ During the 2010 census, more than 10,000 CCCs operated around the country in partnership with the Bureau.⁴⁷ CCCs can harness local knowledge and identify local issues that the Bureau might otherwise overlook. CCCs are already forming to prepare for 2020, and some jurisdictions are directing significant resources toward census outreach.⁴⁸ California's latest state budget allocates more than \$90 million to census-related activities.⁴⁹ Attorneys general and other officials are well positioned to encourage the formation and funding of CCCs. Once CCCs are up and running, officials can seek to support their outreach efforts (or they can participate directly as CCC members). By supplementing the Census Bureau's work in this way, jurisdictions can minimize the likelihood of a damaging undercount.

Once the Bureau's initial enumeration is complete, the Bureau gives states and localities an opportunity to review data and raise challenges to the count. Specifically, the Bureau has a Count Question Resolution process, the details of which have not yet been finalized for 2020.⁵⁰ Attorneys general may want to participate in the Bureau's finalization of this process.

⁴⁵ State Complete Count Commissions (SCCCs), which are new for the 2020 census, are similar to but somewhat more formalized than Complete Count Committees, which have existed in prior censuses. Specifically, SCCCs enter into formal partnerships with the Census Bureau pursuant to state executive order or legislation. *See* U.S. CENSUS BUREAU, 2020 CENSUS COMPLETE COUNT COMMITTEE TRAINING MANUAL (DRAFT) 5, *available at* https://uploads-ssl.webflow.com/59fb4f76691c1b000103c309/5ac690b856b2db257820afb2_CCC%20Training%20Manual%20D-1255--draft.pdf.

⁴⁶ U.S. CENSUS BUREAU, 2020 CENSUS COMPLETE COUNT COMMITTEE GUIDE, *available at* <https://www.census.gov/content/dam/Census/newsroom/press-kits/2018/ccc-guide-d-1280.pdf>.

⁴⁷ *Id.* at 5; *see also*, 2020 Census: Complete Count Committees, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/decennial-census/2020-census/complete_count.html (last updated July 25, 2018).

⁴⁸ *See, e.g.*, Cal. Exec. Order B-49-87 (Apr. 13, 2018), *available at* <https://census.assembly.ca.gov/sites/census.assembly.ca.gov/files/4.13.18-Census-Executive-Order.pdf> (establishing the California Complete Count Committee); Ill. Public Act 100-0390 (2017) (establishing the Illinois Complete Count Commission); N.Y. Assembly Bill A9505D, Part OO (enacted Apr. 12, 2018) (establishing New York State 2020 Complete Count Committee); *see also* CA Census 2020, STATE OF CALIFORNIA, <https://census.ca.gov/>; 2020 Census, NEW YORK STATE, <https://www.ny.gov/programs/2020-census>.

⁴⁹ *Notable Expenditures in \$139 Billion California Budget*, U.S. NEWS & WORLD REPORT (June 27, 2018), <https://www.usnews.com/news/best-states/california/articles/2018-06-27/notable-expenditures-in-139-billion-california-budget>; *see also* Patrick R. Potyondy, *The Census Is Coming and States Are Preparing*, NATIONAL CONFERENCE OF STATE LEGISLATURES BLOG (Apr. 26, 2018), <http://www.ncsl.org/blog/2018/04/26/the-census-is-coming-and-states-are-preparing.aspx>.

⁵⁰ *See* Operational Plan, *supra* note 18, at 134-35.

After the 2010 Census, more than 200 post-count challenges were brought, and many resulted in count adjustments.⁵¹ This mechanism, however, is principally a way to correct discrete tallying errors, not to remedy systemic undercounts. Jurisdictions have sometimes brought lawsuits in an effort to address systemic undercounts, but they have had little success.⁵² The reality is that undercounts are difficult to fix after the fact, which is why it is vital for states and localities to try to prevent them from occurring in the first place.

B. Additional Options

Attorneys general and other stakeholders are, of course, free to act independently of CCCs and the Census Bureau. This could simply mean speaking out about the census and coordinating with public and private stakeholders to encourage participation. In addition, attorneys general should consider taking or facilitating at least two other discrete census-related actions.

First, states can adjust their employment laws through legislation or regulation to spur residents to apply to work for the Census Bureau. Attorneys general can draft such measures and counsel governors and lawmakers about them. In 2010, thirty-four states adopted rules allowing Medicaid recipients to take temporary census jobs without having their census wages adversely affect their Medicaid eligibility.⁵³ Similar numbers of states acted to allow those receiving aid under Temporary Assistance for Needy Families (TANF) and the Supplemental Nutritional Assistance Program to work for the Census Bureau without jeopardizing their benefits.⁵⁴ Thousands of state and local governments also entered into agreements with the Bureau in 2010 to allow individuals to be simultaneously employed by state or local jurisdictions and the federal government.⁵⁵ According to the Bureau, these measures “enabled many well-qualified individuals to work on the 2010 Census who otherwise might not have applied for jobs, particularly in some hard-to-enumerate areas.”⁵⁶ Attorneys general can seek to ensure that such accommodations are again made for 2020. Beyond this action, attorneys general might consider working with state employment offices to promote Census Bureau jobs, and they could encourage their jurisdictions, whether through CCCs or otherwise, to hire qualified noncitizens

⁵¹ U.S. CENSUS BUREAU, 2010 CENSUS COUNT QUESTION RESOLUTION, CHALLENGING JURISDICTIONS AS OF 01/31/2014, available at <https://www2.census.gov/programs-surveys/decennial/2010/program-management/5-review/cqr/cqr-gu-status-rpt-01-31-14.pdf>.

⁵² See, e.g., *Wisconsin v. City of New York*, 517 U.S. 1 (1996) (rejecting New York City’s efforts to cure an undercount after the 1990 census).

⁵³ KAREN S. SEEBOLD, U.S. CENSUS BUREAU, THE 2010 CENSUS RECRUITING AND HIRING ASSESSMENT 7 (2011), available at https://www.census.gov/content/dam/Census/library/publications/2011/dec/2010_cpex_155.pdf.

⁵⁴ *Id.* at 8-9.

⁵⁵ *Id.* at 45.

⁵⁶ *Id.* at 27.

to perform census-related work, since such individuals will likely be ineligible to work directly for the Bureau.

Second, attorneys general can spur reflection and reform when it comes to how their jurisdictions use census data. Although the federal government must rely on the Census Bureau's actual enumeration for purposes of congressional apportionment,⁵⁷ states often have more flexibility to use adjusted numbers or to decouple state programs from census data. By way of example, the Census Bureau counts prisoners at their incarceration site rather than at their prior place of residence. This practice, which some dub "prison gerrymandering," has long been controversial because it serves to shift political representation and public funding toward communities with correctional facilities and away from prisoners' home communities.⁵⁸ Seeing this as inequitable, a handful of states have rejected the Census Bureau's approach and reallocate prisoners to their communities of origin when counting their populations for redistricting and other purposes.⁵⁹ Other states could consider making similar adjustments. Along these lines, if states conclude that particular geographic regions or population groups have been undercounted, they could seek to modify state funding allocation formulas in ways that produce more equitable outcomes.

IV. Resources and Experts

Numerous nonprofit organizations are already preparing for the 2020 Census in a variety of ways, including by monitoring Census Bureau activities and conducting census-related public outreach. In addition to the Bureau itself, they can provide valuable information and partnership opportunities. The list below offers a starting point. Many additional resources are available.

⁵⁷ See *Dep't of Commerce v. U.S. House of Reps.*, 525 U.S. 316 (1999) (holding that the Census Act prohibits the use of statistical sampling to determine population numbers for congressional apportionment).

⁵⁸ See, e.g., Michael Skocpol, Note, *The Emerging Constitutional Law of Prison Gerrymandering*, 69 STAN. L. REV. 1473 (2017); Sean Suber, *The Senseless Census: An Administrative Challenge to Prison-Based Gerrymandering*, 21 VA. J. SOC. POL'Y & L. 471 (2014); Michelle Davis, *Assessing the Constitutionality of Adjusting Prisoner Census Data in Congressional Redistricting: Maryland's Test Case*, 43 U. BALT. L.F. 35 (2012); Peter Wagner, *Breaking the Census: Redistricting in an Era of Mass Incarceration*, 38 WM. MITCHELL L. REV. 1241, 1242 (2012); David Hamsher, *Counted Out Twice—Power, Representation & the "Usual Residence Rule" in the Enumeration of Prisoners: A State-Based Approach to Correcting Flawed Census Data*, 96 J. CRIM. L. & CRIMINOLOGY 299, 300 (2005); Eric Lotke & Peter Wagner, *Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From*, 24 PACE L. REV. 587, 588 (2004).

⁵⁹ See *Solutions*, PRISON POLICY INITIATIVE, <https://www.prisonersofthecensus.org/solutions.html#states> (last visited Oct. 1, 2018).

U.S. Census Bureau Resources

Census Bureau Regional Offices. The Census Bureau has six regional Offices each with a permanent Regional Director. The Regional Offices will be an excellent contact point for 2020 Census activities including the partnership program.⁶⁰

The Regional Directors are located in the following cities:

- Atlanta
- Chicago
- Denver
- Los Angeles
- New York
- Philadelphia

2020 Census State Complete Count Commission Guide. This document contains information on the importance of state level complete count commissions, and Census Bureau regional contacts to assist in launching a Complete Count Commission.⁶¹

Census Bureau Response Outreach Area Mapper. This interactive mapping system will assist in identifying small areas that may be hard-to-enumerate for the 2020 Census. It is a very useful tool for targeting local efforts.⁶²

Census Bureau National Advisory Committee on Racial, Ethnic, and Other Populations. The committee, known as NAC, consists of up to 32 members appointed by the Director of the Census Bureau. The NAC is an important source of information regarding national and local concerns about the 2020 Census. The NAC members are also a valuable resource for the states where they reside.⁶³

State Data Center Program. Each state has a State Data Center that is a valuable resource for accessing Census Bureau data and providing current insights into the status of the 2020 Census.

⁶⁰ *Regional Offices*, U.S. CENSUS BUREAU, <https://www.census.gov/regions> (last visited Oct. 1, 2018).

⁶¹ *2020 Census State Complete Count Commissions*, U.S. CENSUS BUREAU, <https://www.census.gov/content/dam/Census/newsroom/press-kits/2018/sccc.pdf> (last visited Oct. 1, 2018).

⁶² *Response Outreach Area Mapper*, U.S. CENSUS BUREAU, <https://www.census.gov/roam> (last visited Oct. 1, 2018).

⁶³ *Census Advisory Committees*, U.S. CENSUS BUREAU, <https://www.census.gov/about/cac/nac.html> (last visited Oct. 1, 2018).

The link to the network contains more information about this program as well as a contact point for each state.⁶⁴

Non-Profit and Private Resources

The Census Project. This organization is a broad-based network of national, state, and local organizations that supports a fair and accurate 2020 Census. The Census Project is a good source of up-to-date information on the status of the 2020 Census. In addition, the Census Project has prepared a toolkit to educate state and local stakeholders on the importance of the Census to their communities.⁶⁵

The Leadership Conference on Civil and Human Rights. This organization represents a coalition of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States. One of their key issues areas is a 2020 Census that is fair and accurate. They are a good source of information regarding the 2020 Census, as well as a source of state and local organizations that could be of help in planning for the 2020 Census.⁶⁶

Brennan Center for Justice. This organization participates in litigation and public education on an array of democracy-related issues, including the 2020 Census. They have a number of census resources available on their website.⁶⁷

Funders Committee for Civic Participation 2020 Census Funders Toolkit. This toolkit was prepared with the support of a number of foundations concerned with an accurate 2020 Census. The toolkit contains useful information to develop community programs to support an accurate Census.⁶⁸

Counting for Dollars 2020: The Role of the Decennial Census in the Geographic Distribution of Federal Funds, George Washington University Institute of Public Policy. This research documents the distribution of approximately \$600 billion in annual federal fund distributions to

⁶⁴ *State Data Center (SDC) Program*, U.S. CENSUS BUREAU, <https://www.census.gov/about/partners/sdc.html> (last visited Oct. 1, 2018).

⁶⁵ THE CENSUS PROJECT, <https://thecensusproject.org/> (last visited Oct. 1, 2018).

⁶⁶ *2020 Census*, THE LEADERSHIP CONFERENCE, <https://civilrights.org/census/> (last visited Oct. 1, 2018).

⁶⁷ *2020 Census*, BRENNAN CENTER FOR JUSTICE, <https://www.brennancenter.org/issues/2020-census> (last visited Oct. 1, 2018).

⁶⁸ *2020 Census Funder Toolkit*, FCCP, <https://funderscommittee.org/2020-census-funder-toolkit/> (last visited Oct. 1, 2018).

states as well as the effects of Census undercounts on these distributions.⁶⁹In addition, a supplemental report extends this research to rural areas by state.⁷⁰

Terri Ann Lowenthal, consultant. Ms. Lowenthal is one of the most knowledgeable experts on all aspects of the conduct of decennial censuses. Ms. Lowenthal would be pleased to assist the State Attorney Generals in preparations for the 2020 Census.⁷¹

Conclusion

For state attorneys general charged with protecting the public interests of their states and residents, the census must be a top priority. The upcoming enumeration will have enormous implications for democratic representation and major economic and social impacts as well. As 2020 approaches, attorneys general should act now to develop and implement a holistic strategy aimed at ensuring that their jurisdictions are fully and fairly counted.

⁶⁹ *Counting for Dollars 2020: The Role of the Decennial Census in the Geographic Distribution of Federal Funds*, GEORGE WASHINGTON INSTITUTE OF PUBLIC POLICY, <https://gwipp.gwu.edu/counting-dollars-2020-role-decennial-census-geographic-distribution-federal-funds> (last visited Oct. 1, 2018).

⁷⁰ *Census-Guided Financial Assistance To Rural Areas*, GEORGE WASHINGTON INSTITUTE OF PUBLIC POLICY, <https://censusproject.files.wordpress.com/2018/09/gwururalamericasept2018.pdf> (last visited Oct. 1, 2018).

⁷¹ <https://terriannlowenthal.com/>.

About the Authors

John H. Thompson is a longtime leader in the social science research community. He most recently served as the Executive Director of the Council of Professional Associations on Federal Statistics. Prior to that, Thompson served as the 24th Director of the U.S. Census Bureau from August 2013 through June 2017. A statistician and executive, Thompson was President and CEO of NORC at the University of Chicago from 2008 through July 2013. He served as the independent research organization's Executive Vice President from 2002 to 2008. From 1975 through July 2002, Thompson served in various roles at the U.S. Census Bureau including as the career executive with management responsibilities for all phases of the 2000 Census. Thompson is an elected fellow of the American Statistical Association and past chair of the association's Social Statistics Section and Committee on Fellows. He served as a member of the Committee on National Statistics at the National Academy of Sciences. He holds bachelor's and master's degrees in mathematics from Virginia Tech.

Robert Yablon is an Assistant Professor of Law at the University of Wisconsin Law School. Yablon teaches Civil Procedure, Federal Jurisdiction, and the Law of Democracy. His research interests include political and election law, constitutional law, federal courts, and statutory interpretation. Professor Yablon received his bachelor's degree in economics and political science from the University of Wisconsin-Madison and his master's degree in social policy from the University of Oxford, where he was a Rhodes Scholar. He then earned his J.D. at Yale Law School, where he was an Articles Editor of the *Yale Law Journal*. Following law school, Yablon served as a law clerk for Judge William Fletcher of the U.S. Court of Appeals for the Ninth Circuit and for U.S. Supreme Court Justices Ruth Bader Ginsburg and Sonia Sotomayor.

About the American Constitution Society for Law and Policy

The American Constitution Society (ACS) believes that law should be a force to improve the lives of all people. ACS works for positive change by shaping debate on vitally important legal and constitutional issues through development and promotion of high-impact ideas to opinion leaders and the media; by building networks of lawyers, law students, judges and policymakers dedicated to those ideas; and by countering the activist conservative legal movement that has sought to erode our enduring constitutional values. By bringing together powerful, relevant ideas and passionate, talented people, ACS makes a difference in the constitutional, legal and public policy debates that shape our democracy.