



# The Supreme Court Temporarily Blocks Citizenship Question on the 2020 Census

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*UPDATE: On July 2, 2019, the Department of Justice announced that the 2020 census form will not include a citizenship question. This development likely renders moot all pending challenges to the Department of Commerce’s decision to add a citizenship question to the 2020 census. Nonetheless, the Supreme Court’s decision in *Department of Commerce v. New York* could have important implications for administrative law and election law, as well as for any future effort to add a citizenship question to the census.*

*The original post from June 28, 2019, is below.*

On June 27, 2019, the Supreme Court issued its decision in *Department of Commerce v. New York*—the case involving several challenges to the decision by the Secretary of the Department of Commerce (Commerce), Wilbur Ross, to add a citizenship question to the 2020 census. Chief Justice Roberts authored the opinion for a majority of the Court, though different combinations of Justices comprised the majority for different parts of the opinion. In that opinion, the Supreme Court held that the Secretary’s decision did not violate the Enumeration Clause of the U.S. Constitution or the Census Act, and that the Secretary’s decision was supported by evidence before the agency. However, the Chief Justice—joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan—concluded that the Secretary’s decision was unlawful because the reason he gave for adding the citizenship question was not the actual reason for his decision. The Court thus instructed that the case be sent back to Commerce to allow the Secretary to provide a non-pretextual justification for his decision. But the window for the agency to provide that justification is closing: the United States has represented that the deadline for finalizing the 2020 census questionnaire is the end of [June 2019](#) while the plaintiffs have suggested that the deadline is the end of [October 2019](#).

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Moreover, at least one ongoing lawsuit challenging the Secretary’s decision involves a legal argument not addressed by the Supreme Court’s decision, thus presenting another possible barrier to the addition of a citizenship question to the 2020 census.

This Sidebar provides an overview of the legal framework governing the census and the legal challenges to Commerce’s decision to include a citizenship question on the 2020 census. The Sidebar then discusses the Supreme Court’s decision, identifies issues left unresolved by the decision, and addresses potential considerations for Congress.

## Legal Framework for the Census

[Article I, section 2](#) of the U.S. Constitution, as amended by [Section 2](#) of the Fourteenth Amendment, requires that an “actual Enumeration” be taken—that is, that “the whole number of . . . persons” in each State be counted—“every . . . Term of ten Years, in such Manner as [Congress] shall by Law direct.” The results of the [decennial census](#) are [used](#) to determine the number of seats each state will have in the U.S. House of Representatives for the next decade and to [allocate](#) certain federal funds among the states.

In line with the Constitution’s directive, Congress, through the Census Act, has [required](#) the Secretary of Commerce to “take a decennial census of population” and grants the Secretary discretion to do so “in such form and content as he may determine” and to “obtain such other census information as necessary.” The discretion conferred by the Census Act, however, is not unlimited. Though the Secretary has [authority](#) to “prepare questionnaires” to obtain information by means of “[direct inquir\[y\]](#),” [Section 6\(c\)](#) of the Act [instructs](#) the Secretary to first attempt to obtain such information from federal, state, or local government administrative sources “[t]o the maximum extent possible” and “consistent with the kind, timeliness, quality and scope” of the information needed. Moreover, to facilitate congressional oversight, [Section 141\(f\)](#) of the Act [directs](#) the Secretary to “submit [reports] to the [appropriate] committees of Congress” identifying

1. the “subjects proposed to be included [on the census questionnaire], and the types of information to be compiled”;
2. “the questions proposed to be included in [the] census”; and
3. if “new circumstances exist” that require the “subjects, types of information, or questions” to be modified, a report containing those modifications.

To help ensure accurate census data, federal law [requires](#) individuals to respond to the census questionnaire. Those who refuse, willfully neglect to respond, or willfully give false answers, may be subject to monetary penalties. And to protect personal privacy, federal law [prohibits](#) Commerce employees (which [includes Census Bureau](#) employees) from using, publishing, or allowing others to “examine” census information (except in narrowly defined circumstances). Violators [may face](#) monetary penalties and imprisonment.

## Legal Challenges

Many prior decennial censuses have included a question related to national origin or citizenship. With one exception, a question about citizenship was asked of at least some of the population as part of every census from [1820 through 1950](#), though that question was removed from the general census questionnaire [after the 1950 census](#). From [1970 through 2000](#), a citizenship question [was included](#) in a longer version of the decennial census form sent to a [fraction](#) of the population. This “long form survey” was later [replaced](#) by the [American Community Survey](#)—an annual survey sent to only a [portion](#) of the population—which has included a citizenship question [since 2005](#).

On March 26, 2018, Secretary Ross issued a [memorandum](#) stating that the Census Bureau would add a [citizenship question](#) to the 2020 decennial census form that would be distributed to every household. As the sole basis for the inclusion of this question, Secretary Ross [explained](#) that he made this decision because the Department of Justice (DOJ) had requested the inclusion of a citizenship question to facilitate enforcement of [Section 2](#) of the Voting Rights Act (VRA). Section 2 of the VRA prohibits voting practices that [dilute](#) minority voting power and a plaintiff making a “vote dilution” claim [must show](#) (among other things) that the “[eligible voters](#)” of a minority group—who usually must be citizens—are “a majority in a single-member district” capable of electing their candidate of choice.

After the memorandum was released, several plaintiff groups filed lawsuits in federal district court in [California](#), [Maryland](#), and [New York](#), challenging the Secretary’s decision. They argued, among other things, that the decision violated (1) the [Enumeration Clause](#), (2) the [equal protection component](#) of the [Fifth Amendment’s Due Process Clause](#), (3) [Sections 6\(c\)](#) and [141\(f\)](#) of the Census Act, and (4) the [Administrative Procedure Act](#) (APA).

On January 15, 2019, the U.S. District Court for the Southern District of New York issued a 277-page [opinion](#) concluding that Secretary Ross’s decision to add a citizenship question to the 2020 census was unlawful. [First](#), the court ruled that the Secretary’s decision violated [Section 6\(c\)](#)’s requirement that Commerce rely “[t]o the maximum extent possible” on state and federal administrative records to obtain desired information. [Second](#), the court held that the Secretary violated [Section 141\(f\)](#) by failing to timely report to Congress that citizenship would be a “subject” addressed on the census questionnaire. [Finally](#), the court concluded that Secretary Ross’s decision was arbitrary and capricious, reasoning that his reliance on the DOJ’s request was pretextual [because](#) he “made the decision to add the citizenship question well before DOJ requested its addition in December 2017.” The court further held that Secretary Ross unjustifiably departed from certain administrative procedures and failed to fully consider possible alternatives in light of the evidence before him. To reach these conclusions, the district court relied on evidence outside the administrative record that the plaintiffs had obtained through discovery—an action it justified (in part) by [concluding](#) that the Secretary had likely acted in bad faith by not disclosing the true basis for his decision. Finally, the court [concluded](#) the plaintiffs had not produced sufficient evidence to support their equal protection claim. In so doing, the court dispensed with the last of the plaintiffs’ constitutional claims, having [dismissed](#) their Enumeration Clause claim in a prior order.

Though district court decisions are normally appealed to a federal court of appeals, [the United States](#) [asked](#) the Supreme Court to directly review the Southern District of New York’s decision, based on its [representation](#) that the census questionnaire must be finalized by the end of June 2019. The Supreme Court [agreed](#). After federal district courts in [California](#) and [Maryland](#) concluded that the addition of a citizenship question would violate the Enumeration Clause, the Supreme Court [expanded](#) the scope of its review to include that issue. However, though the Maryland district court (like the Southern District of New York) had also [rejected](#) the plaintiffs’ equal protection claim, the Supreme Court did not review that issue.

## The Supreme Court’s Decision

On June 27, 2019, the Supreme Court issued its [decision](#) in *Department of Commerce v. New York*. Chief Justice Roberts’s opinion garnered a majority of the Court, though the Justices comprising the majority for each issue varied. The Court rejected the plaintiffs’ Enumeration Clause and Census Act claims, while also concluding that the Secretary’s decision to reinstate a citizenship question could be supported by the evidence before him. However, the Court also recognized that agencies are required to disclose the reasons for their decisions in order to facilitate meaningful judicial review. Upon reviewing the evidence, the Court determined that the Secretary’s stated reason for reinstating the citizenship question—to provide DOJ with citizenship information for VRA enforcement—was not the actual reason for his decision. On that basis, the Court ruled that the Secretary’s decision was unlawful.

## The Majority Opinion

On the merits, the Chief Justice—joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh—first **concluded** that the Secretary’s decision to reinstate a citizenship question did not violate the Enumeration Clause. In particular, the Court observed **that** “demographic questions have been asked in *every* census since 1790” and **that** “questions about citizenship in particular have been asked for nearly as long.” Based on this “**consistent** historical practice”—combined with the “**virtually unlimited discretion**” given Congress to conduct the census—the Court **determined** that the Enumeration Clause does not prohibit the Secretary of Commerce from inquiring about citizenship on the census questionnaire.

Next, these Justices disagreed with the district court’s determination that the Secretary’s decision was contrary to the evidence. The Court **concluded** that the Secretary’s decision to rely on both administrative records and a citizenship question to obtain accurate citizenship data—rather than relying *solely* on administrative records—was a reasonable exercise of the Secretary’s discretion in light of the available evidence. Either option, the Court **concluded**, “entailed tradeoffs between accuracy and completeness,” and, where the “**choice** [is] between reasonable policy alternatives,” the Secretary has authority to choose. The Court also **decided** that the Secretary had reasonably weighed the costs and benefits of reinstating the citizenship question. The Court noted that the Secretary had **explained** why the “risk[s] w[ere] difficult to assess,” and concluded that he had **reasonably** “[w]eigh[ed] that uncertainty against the value of obtaining more complete and accurate citizenship data.” In the end, the Court was unwilling to second-guess the Secretary’s conclusion, particularly as “**the evidence** before [him] hardly led ineluctably to just one reasonable course of action.”

The same Justices also **ruled** that the Secretary’s decision did not violate the Census Act. With respect to Section 6(c), the Court **determined** that the Secretary reasonably concluded that exclusive reliance on administrative records to obtain citizenship data “would not . . . provide the more complete and accurate data that DOJ sought.” **Thus**, because administrative records alone would not supply the “kind and quality” of “statistics required,” the Court ruled that the Secretary had complied with Section 6(c)’s requirement to rely “to the maximum extent possible” on administrative records. The Court also **determined** that the Secretary complied with Section 141(f) of the Census Act. Though the Secretary had not included “citizenship” as a “subject” in his initial report to Congress, the Court **concluded** that by listing “citizenship” as a “question” in a later report, the Secretary had complied with the Census Act’s procedures for modifying an earlier report. Regardless, the Court **reasoned** that any violation “would surely be harmless” as “the Secretary nonetheless fully informed Congress of, and explained, his decision.”

Lastly, the Chief Justice—joined now by Justices Ginsburg, Breyer, Sotomayor, and Kagan—**held** that the Secretary’s sole stated reason for adding the citizenship question to the census (*i.e.*, providing the DOJ with citizenship data for VRA enforcement) was not the real reason for his decision. The Court **began** by reaffirming that agencies are required to disclose the actual reasons for their decisions in order to facilitate effective judicial review. And, while courts **normally accept** as true an agency’s stated reason for its action, **courts may** review evidence outside the agency record to probe the justifications for an agency action if there has been a strong showing of bad faith or improper behavior by the agency.

Based on these principles, the Court first **determined** that evidence outside the agency record was properly considered in evaluating the lawfulness of the Secretary’s action because some of the evidence suggested that the Secretary’s stated reason for adding a citizenship question was pretextual. The Court then conducted its own review of the evidence, and **noted** that while the Secretary “began taking steps to reinstate a citizenship question about a week into his tenure,” there was “**no hint** that he was considering VRA enforcement” at that time. In addition, the Court **observed** that Commerce had itself gone “to great lengths to elicit the request [to add a citizenship question] from DOJ.” In the end, “viewing the evidence

as a whole,” the Court **concluded** that “the decision to reinstate a citizenship question [could not] be adequately explained in terms of DOJ’s request for improved citizenship data to better enforce the VRA.”

Given this “**disconnect** between the decision made and the explanation given,” the Court agreed with the Southern District of New York that the Secretary’s decision violated the APA because the Secretary had not disclosed the actual reason for his decision. However, the Court was **clear** that it was “not hold[ing] that the [Secretary’s] decision . . . was substantively invalid,” but was instead requiring the Secretary to disclose his reason for that decision. And to give the Secretary this opportunity, the Court **directed** the district court to send the case back to the Department of Commerce.

### Justice Thomas’s Dissent

Though various Justices dissented from portions of the Court’s opinion, the most immediately consequential portion of the Court’s ruling—that the Secretary’s stated reason for reinstating the citizenship question was pretextual—prompted a dissent from Justice Thomas that was joined by Justices Gorsuch and Kavanaugh.

Justice Thomas first **argued** that the Court was wrong to rely on evidence outside the administrative record to assess whether the Secretary’s justification was pretextual. Under the APA, Justice Thomas **explained**, judicial review of an agency decision is normally based on “the agency’s contemporaneous explanation” for its decision, and courts may not invalidate the agency’s action even if it “**ha[d] other**, unstated reasons for the decision.” And though Justice Thomas **acknowledged** that review of extra-record materials may be permissible upon a showing of bad faith, **in his view** this case did not meet that standard. Moreover, Justice Thomas **concluded that**, even if such review were appropriate, none of the evidence established that the Secretary’s stated basis for his decision “**did not** factor *at all* into [his] decision.” In Justice Thomas’s view, the evidence **showed** “at most, that leadership at both the Department of Commerce and the DOJ believed it important—for a variety of reasons—to include a citizenship question on the census.” Finally, Justice Thomas criticized the Court’s decision as being the “**the first time** the Court has ever invalidated an agency action as ‘pretextual,’” and contended that the Court had “**depart[ed]** from traditional principles of administrative law” and “**opened** a Pandora’s box of pretext-based challenges in administrative law.”

### Post-Supreme Court Issues and Claims

Though the Supreme Court’s decision resolved most of the plaintiffs’ claims, it still left some issues unresolved. To begin, the Court’s decision appears to leave open the possibility that the citizenship question could still be added to the census. The Court made clear that it had not deemed the Secretary’s decision “substantively” unlawful, and so the Secretary may be able to reinstate the citizenship question if he provides a non-pretextual explanation for doing so. In the event the Secretary again decides to add a citizenship question to the 2020 census, that decision (like his first) could be challenged in federal district court. If it is, the losing party could still appeal that decision to the court of appeals or seek expedited review in the Supreme Court.

In addition, although the Supreme Court rejected the plaintiffs’ Enumeration Clause claim, it did not address the lower court’s rulings that the plaintiffs failed to establish a violation of the equal protection component of the Due Process Clause. In the Maryland case, the plaintiffs had appealed the dismissal of their equal protection claim to the U.S. Court of Appeals for the Fourth Circuit, but they later sought to have that claim reevaluated by the district court in light of **new evidence** allegedly indicating that Secretary Ross had a discriminatory motive for reinstating the citizenship question. The Fourth Circuit recently **granted** this request so the district court could conduct further proceedings. Once the district court issues a ruling on this claim, the non-prevailing party may seek review in the Fourth Circuit or the Supreme Court. In the meantime, the plaintiffs in the Maryland case have requested that the district court

enter an order preventing the United States from adding a citizenship question to the census while their equal protection claim is being adjudicated.

These ongoing proceedings could pose practical challenges for the inclusion of the citizenship question on the 2020 census. The United States has [represented](#) that the census questionnaire must be finalized by June 30 of this year, though some of the plaintiffs [have contended](#) that October 31 is the actual deadline. Whether the Department of Commerce will be able to add a citizenship question to the 2020 census could depend on which of these deadlines holds true. However, even if the October 2019 date applies, the parties may have difficulty obtaining full judicial review—from a court of appeals and/or the Supreme Court—of any rulings from the district courts before that deadline.

## Considerations for Congress

Though Congress has delegated significant responsibility for the census to the Secretary of Commerce, the Constitution makes clear that Congress has ultimate authority over how it is conducted. Congress thus has the authority to pass legislation, subject to presidential veto, that would either require or prohibit the inclusion of a citizenship question or other demographic questions in the future or impose additional restraints on the Secretary's [existing authority](#) to add questions to the decennial census. Alternatively, Congress could include language in the appropriations bill for the Department of Commerce regulating the manner in which funds may be used to implement a citizenship question on the 2020 census.

Congress could also enact more general guidance. For example, [bills introduced](#) in the 116th Congress would mandate a certain amount of research, study, and testing for any new questions or design features, and also require the Secretary to submit detailed statements on such testing to Congress and the general public. Though such requirements would not necessarily prevent the inclusion of a citizenship question on future census forms, they could require more extensive analysis before any question may be added to the census, thus providing Congress with more complete information about the consequences of doing so.