SUPREME COURT
OF THE UNITED STATES

        IN THE SUPREME COURT OF THE UNITED STATES

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DEPARTMENT OF COMMERCE, ET AL.,   )

            Petitioners,   )

            v.   ) No. 18-966

NEW YORK, ET AL.,   )

            Respondents.   )

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Pages: 1 through 93

Place: Washington, D.C.

Date: April 23, 2019

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5   v.   ) No. 18-966

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9   Washington, D.C.

10   Tuesday, April 23, 2019

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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.

1   So it may be that 200 years of asking

2   a citizenship question in other forms may be

3   true, but not on the short survey. That's

4   what's at issue here.

5   GENERAL FRANCISCO: Well, but, Your

6   Honor, it has been part of the census for the

7   better part of 200 years, initially as part of

8   the overall census itself --

9   JUSTICE SOTOMAYOR: But don't we put

10   --

11   GENERAL FRANCISCO: -- that went to

12   all individuals.

13   JUSTICE SOTOMAYOR: -- don't we ask

14   the question in context? And for 65-odd-plus

15   years, everybody said don't add it?

16   GENERAL FRANCISCO: No, Your Honor,

17   because, in fact, it was included in the

18   long-form census until the year 2000.

19   JUSTICE SOTOMAYOR: That is a

20   different -- that's the whole issue. It could

21   have been -- it's still included -- or it could

22   have been included in the ACS form, which is

23   still being done. And that's being done every

24   first, third, and fifth year.

25   GENERAL FRANCISCO: Yes, Your Honor,

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1    but it has been part of the census in one form

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

3    has a long pedigree.

4              JUSTICE SOTOMAYOR:  So the question

5    now before us is --

6              GENERAL FRANCISCO:  The question,

7    therefore, is two things.  First, we think that

8    the Respondents' claims are not justiciable

9    because their injuries aren't fairly

10   attributable to the government or subject to

11   APA review.  And, secondly, the Secretary acted

12   well within his discretion when he determined

13   that reinstating the citizenship question would

14   provide the best evidence of citizenship.

15             JUSTICE GINSBURG:  Can we just go back

16   a bit to your opening?  Why was the citizenship

17   question dropped in 1960 and remained off for

18   all the decades after that?  What was the

19   reason for dropping it?

20             GENERAL FRANCISCO:  Your Honor, in

21   1960, it didn't appear in anything, and it was

22   moved on to the American Community Survey.

23             JUSTICE GINSBURG:  But -- but why --

24             GENERAL FRANCISCO:  That was part of

25   an overall movement of most of the demographic
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1   -- I'm sorry, onto the long-form census, not

2   the American Community Survey. And that was

3   part of a larger process that moved a large

4   number of demographic questions off of the

5   short form and onto the long form.

6   We no longer have a long form, so then

7   the question is do you reinstate the long form

8   or do you, in fact, move it back onto the

9   short-form census.

10   JUSTICE GINSBURG: But didn't --

11   didn't --

12   GENERAL FRANCISCO: It was eminently

13   --

14   JUSTICE GINSBURG: -- didn't the

15   Census Bureau give a reason why it was dropped?

16   GENERAL FRANCISCO: Well, they

17   generally wanted to move all of the demographic

18   questions onto the long form. We no longer

19   have a long form. And the problems with using

20   the American Community Survey are well known.

21   So you basically --

22   JUSTICE GINSBURG: But there was

23   nothing -- there was nothing in 1960 to the

24   effect that the Census Bureau found that

25   putting it on the short form would depress the

1   count of non-citizens? Nothing like that?

2   GENERAL FRANCISCO: Well -- well,

3   sure, Your Honor, but that's because they

4   thought that, along with all of the other

5   demographic questions in the census, had an

6   overall impact of -- on -- on -- on overall

7   census accuracy.

8   And that underscores why we don't

9   think this is really subject to judicial

10   review, because, really, what you're saying is

11   that Congress -- courts would have to review

12   every question on the long form to determine if

13   the informational value of the question

14   outweighed the impact on census accuracy,

15   because, at the end of the day, if you add any

16   particular question onto the census, you're

17   always trading off information and accuracy.

18   And 141(a) doesn't provide courts with

19   a basis for evaluating that determination. So

20   that's why we think this isn't subject to APA

21   review at all. But we also think that the

22   Respondents don't have standing here, because

23   they're injured if and only if, first, you have

24   third-party action; secondly, you have

25   third-party action that's illegal; and, third,

1   that third-party action is based on speculation

2   that the government will itself violate the

3   law.

4   CHIEF JUSTICE ROBERTS: On the -- on

5   the illegality, is -- is that a -- a predictive

6   factor? In other words, do we, as our cases

7   have often said, do not assume illegal behavior

8   in establishing standing, but is that simply

9   predictive? In other words, we doubt people

10   are going to engage on a regular basis in

11   illegal behavior, and, therefore, we don't

12   think their injury is -- is tangible or likely,

13   or is there something special about the fact

14   that it's illegal activity?

15   GENERAL FRANCISCO: Well, I think,

16   Your Honor, in -- in the Court's past cases, it

17   has often been used as a predictive factor, but

18   I also think that when you put it all together,

19   it breaks the chain of causation for Article

20   III causation purposes.

21   CHIEF JUSTICE ROBERTS: I mean, it is

22   true that if people go 60 miles an hour in a

23   55-mile-an-hour zone, that's unlawful. But you

24   wouldn't say that they're not going to do that

25   in forming public policy --

1   GENERAL FRANCISCO: And --

2   CHIEF JUSTICE ROBERTS: -- or

3   considering standing.

4   GENERAL FRANCISCO: -- I -- I agree,

5   Your Honor, and that's not our argument here.

6   I think that Clapper is a good analogy.   In

7   Clapper, it was quite clear that the plaintiffs

8   in that case suffered an injury in fact,

9   because they declined to use their cell phones

10   to communicate with their clients and their

11   clients declined to use their cell phones to

12   communicate with them out of a fear that their

13   phone calls would be intercepted.   No question

14   that there was an injury in fact.

15   But what the Court held was that that

16   injury wasn't fairly attributable to the

17   government because it was caused by the

18   plaintiffs' fear --

19   JUSTICE SOTOMAYOR: I -- I -- I'm

20   sorry, you're talking --

21   GENERAL FRANCISCO: -- that the

22   government would intercept their calls.

23   JUSTICE SOTOMAYOR: You're talking

24   proximate cause, which we've never used.

25   GENERAL FRANCISCO: No, Your Honor.

1   JUSTICE SOTOMAYOR: We've used

2   determinate or coercive effect. In Wayfair,

3   one of the reasons we found the stores, not the

4   states, to be injured is because consumers fail

5   to pay taxes, an illegality under the law. And

6   we said that's why the states were being

7   harmed.

8   In NAACP versus Alabama, we held the

9   NAACP had standing, even though it was their

10   members who would be injured by other people,

11   an illegality, harassment, but as the just --

12   as Chief Justice Roberts said, it's

13   predictable. There's no doubt that people will

14   respond less --

15   GENERAL FRANCISCO: Uh-huh.

16   JUSTICE SOTOMAYOR: -- because of the

17   census. That has been proven in study after

18   study. One census surveyor described an

19   incident where he walked into a home, started

20   asking citizenship, and the person stopped and

21   left his home, leaving the census surveyor

22   sitting there.

23   So, if you're talking about

24   prediction, this is about 100 percent that

25   people will answer less, so -- but I don't know

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 1      that it's prediction.  It's an action by the

 2      government will be a -- will be a cause of

 3      this, not proximate necessarily, but that cause

 4      will cause harm.

 5                GENERAL FRANCISCO:  Right, two

 6      responses, Your Honor.

 7                First, we're not talking about

 8      proximate cause.  We're talking about an

 9      analysis that was similar to what this Court

10      used in the Clapper case, where the Clappers

11      said that even though there was injury in fact,

12      even though the government's actions were in a

13      very real sense a but-for cause of that injury

14      in fact, it wasn't fair to attribute that to

15      the government because it was based on the

16      plaintiffs' speculation that the government

17      would intercept their telephone calls.

18                JUSTICE SOTOMAYOR:  But this is not --

19                CHIEF JUSTICE ROBERTS:  You --

20                JUSTICE SOTOMAYOR:  -- the plaintiff

21      acting; this is third parties acting.

22                GENERAL FRANCISCO:  Yes, and that

23      makes it, we think, even worse because the

24      Court's cases have generally said you don't

25      rely on third-party standing.  But --
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1   CHIEF JUSTICE ROBERTS: You -- you

2   said you had two responses?

3   GENERAL FRANCISCO: Yeah. The second

4   is that on NAACP against Alabama, that was a

5   case where the NAACP was being directly

6   regulated by the statute that they were

7   challenging. They were forced to disclose

8   their private membership lists, and that was

9   their injury. There was nobody that stood in

10   between them and the disclosure of their

11   private injury -- private membership list.

12   But turning to the agency

13   reviewability argument, there really is nothing

14   in 141(a) that provides courts with a basis to

15   review this decision. The language is quite

16   similar to what the Court addressed in Webster.

17   Every -- the addition of any

18   particular demographic question is always going

19   to be a tradeoff between information and

20   accuracy. And I'd -- I'd -- I'd urge you to

21   look to the 2000 long-form census that had

22   highly detailed questions about not just

23   citizenship but things like your commuting

24   time, how many bedrooms you had in your house,

25   whether you suffered from certain health

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 1    conditions.

 2           Under Respondents' position, courts

 3    would have to review each one of those

 4    questions to determine whether the

 5    informational value of that question outweighed

 6    any potential impact --

 7           JUSTICE BREYER:  On the main form --

 8           GENERAL FRANCISCO:   -- on census

 9    accuracy.

10           JUSTICE BREYER:   -- on the main form

11    -- on the main form, suppose the Secretary puts

12    in a question about sexual orientation.

13    Suppose he puts a question in about arrest

14    record.  Suppose he says, I'm going to have the

15    whole survey in French.

16           GENERAL FRANCISCO:  Uh-huh.

17           JUSTICE BREYER:  In other words, we

18    have no role to play no matter how extreme?

19           GENERAL FRANCISCO:  Your Honor, you

20    certainly do have a role to play, and I think

21    --

22           JUSTICE BREYER:  All right.  Well,

23    then that's the question.

24           GENERAL FRANCISCO:   -- and I think

25    your examples --
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1   JUSTICE BREYER: That's the question.

2   GENERAL FRANCISCO: Yeah.

3   JUSTICE BREYER: That's the question.

4   And in this case, there's a statute, and the

5   statute says that the Secretary -- at least on

6   this form, the main form, he shall use

7   administrative records, unless -- it says to

8   the maximum extent possible. Don't ask direct

9   questions. Use administrative records, because

10   they want to keep it short.

11   GENERAL FRANCISCO: Right.

12   JUSTICE BREYER: To the maximum extent

13   possible. So I have two rather technical

14   questions in what I think is the heart of this

15   case. It's a technical case.

16   All right. The first question is the

17   Secretary, I gather from the record -- and

18   we've looked at it, my office, pretty carefully

19   -- is told by the Census Bureau in three

20   studies that if you ask this question on the

21   regular form, you will get back fewer answers.

22   And they extrapolated to do that from

23   the other surveys and so forth, and those

24   extrapolations, you know, holding for

25   everything constant, showed that the

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 1    non-citizens often didn't say they were

 2    non-citizens.

 3              GENERAL FRANCISCO:  Uh-huh.

 4              JUSTICE BREYER:  And some didn't

 5    return it at all.

 6              Now I haven't seen any evidence to the

 7    contrary.  So I'm asking you where the evidence

 8    is on that.

 9              GENERAL FRANCISCO:  Sure.

10              JUSTICE BREYER:  And as to the second,

11    same question, the second is that several

12    surveys, including Dr. Abowd, told the

13    Secretary:  Mr. Secretary, if you add the

14    question to the census, the short form, the

15    direct form, you will discover that even the

16    information you want about citizenship is worse

17    than if you just look at the administrative

18    record.  Now how can that be?

19              GENERAL FRANCISCO:  Sure.

20              JUSTICE BREYER:  Well, A, they say 13

21    million people, it'll be a wash because you

22    won't get information either way.  They won't

23    return it and you don't have it over on the

24    administrative part.

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

2   GENERAL FRANCISCO: Yeah.

3   JUSTICE BREYER: -- what about them?

4   And as to them, what Dr. Abowd says he says,

5   and I saw it in the record, he says, as to

6   those 22 million, I'll tell you what, you just

7   look to the census returns and you're going to

8   find it not that accurate because some are not

9   going to tell the truth.

10   GENERAL FRANCISCO: Right.

11   JUSTICE BREYER: So go look at the

12   administrative returns, and they won't be

13   there, but we'll model them.

14   Now the question is, which is more

15   accurate as to citizenship?

16   GENERAL FRANCISCO: Sure.

17   JUSTICE BREYER: The models over here

18   on the administrative part or the answer to the

19   questions on the census part?

20   And here is what Dr. Abowd says: 22

21   million, he's asked, if you follow your

22   practice, you'd use a survey response, not

23   model it; is that right?

24   That's right.

25   And in your opinion, that would be

1   less accurate than if you just went with

2   modeling over on the administrative part?

3   That's correct.

4   And the conclusion of the Census

5   Bureau remains that adding the question over

6   here, even if you use the administrative part

7   too, produces worse citizen -- worse data on

8   citizenship than just using the administrative

9   data alone? That's the question.

10   GENERAL FRANCISCO: Yep.

11   JUSTICE BREYER: Answer from the

12   expert: "That's correct."

13   So I read that, and, you know, the

14   judges below have listed 14 other examples or

15   40 other examples, many other examples, and --

16   and -- but that's the most direct.

17   So where in the decision memo did the

18   Secretary address that problem?

19   GENERAL FRANCISCO: So, sure, Your

20   Honor.

21   JUSTICE BREYER: Both problems. There

22   are two problems.

23   GENERAL FRANCISCO: Yes, yes. And I'd

24   like to address that evidentiary issue first

25   and then I would like to come back to your

1   question about Section 6(c) of the statute as

2   well.

3   If you look at the Joint Appendix page

4   148, the -- the Census Bureau staff

5   specifically told the Secretary -- and here I'm

6   quoting from it -- that it "cannot quantify the

7   relative magnitude of the errors across

8   alternatives" -- and he's talking about

9   Alternatives C and D -- "at this time."

10   So what he was saying was that I don't

11   know if the response error from asking the

12   question is going to be more or less than the

13   prediction error if I use --

14   JUSTICE BREYER: No, he said just what

15   you said. He said, I cannot quantify it.

16   GENERAL FRANCISCO: Sure.

17   JUSTICE BREYER: And that means he

18   can't put scientific numbers. Of course, they

19   said that they wanted two years to test it, but

20   they can't quantify it.

21   But we do have three studies, and

22   those studies look at what happened when you

23   asked this question before, and what happened

24   when you asked this question before --

25   GENERAL FRANCISCO: Right.

1   JUSTICE BREYER: -- is the response

2   rate fell.

3   GENERAL FRANCISCO: And so, if I could

4   complete my answer, what the Bureau staff told

5   him was that they didn't know which one would

6   be better or worse.

7   So what the Secretary --

8   JUSTICE SOTOMAYOR: I'm sorry.

9   JUSTICE BREYER: Where does it say

10   that? Where does it say that?

11   CHIEF JUSTICE ROBERTS: Maybe you

12   could, if you don't mind, maybe you could

13   complete your answer.

14   GENERAL FRANCISCO: Sure. That is

15   specifically, Your Honor, at page 148 of the

16   Joint Appendix, where it specifically says and

17   explains that it cannot quantify the relative

18   magnitude of the errors across the

19   alternatives, Alternatives C and D, at this

20   time because it didn't know if the response

21   errors from asking the question would be more

22   or less than the prediction errors from the

23   model.

24   So what the Secretary knew was two

25   basic things --

1   JUSTICE SOTOMAYOR: I'm sorry.   They

2   -- they have prediction models.   They say

3   multiple times, at least three, if not more,

4   that Alternative D, which was the Secretary's

5   alternative, and their Alternative C, so

6   everybody's clear, C was simply to use

7   administrative records, D was the Secretary's

8   idea of adding the question to the survey plus

9   administrative records.

10   And on the prediction models, which is

11   what scientists can do, each and every time

12   they said D would be less accurate than C.

13   Now you're asking --

14   GENERAL FRANCISCO: Except for the one

15   time where it mattered, Your Honor, in the key

16   differences --

17   JUSTICE SOTOMAYOR: But comparative --

18   GENERAL FRANCISCO: -- memo, where

19   they specifically said that they did not know

20   if C was better than D.

21   And so what the Secretary knew --

22   JUSTICE SOTOMAYOR: No, no, no, no,

23   that's not what he said.

24   GENERAL FRANCISCO: That is exactly

25   what he said.

1   JUSTICE SOTOMAYOR: He said you can't

2   -- you're -- the words "comparative errors"

3   have a different meaning than you're giving it.

4   Comparative errors are I'm comparing this type

5   of error to that type of error and what they

6   compare each other to. You can't do that to a

7   scientific certainty.

8   But you can have predictive models,

9   which is what they did, and they --

10   GENERAL FRANCISCO: Right.

11   JUSTICE SOTOMAYOR: -- showed you,

12   time and again they told you, you add the

13   survey question, it's going to be less accurate

14   than just relying on administrative records.

15   GENERAL FRANCISCO: Your Honor, I --

16   JUSTICE SOTOMAYOR: So how do you --

17   how do you take or pluck out of what they say

18   in one sentence, if you're the Secretary, and

19   rely on that one sentence and ignore the wealth

20   of statistics, graphs, testimony, proof,

21   control studies of how -- how these response

22   rates came about and decide that that one

23   sentence is enough to justify ignoring

24   everything else?

25   GENERAL FRANCISCO: Because, Your

 1   Honor, I respectfully disagree with your

 2   reading of the administrative record.

 3   If you read through the key

 4   differences memo, what the Bureau staff is

 5   telling to the Secretary -- and, look, there's

 6   no question that the Bureau staff preferred not

 7   to have this question on the census -- but what

 8   they were telling the Secretary was that they

 9   couldn't tell which model would be more or less

10   accurate. But they did give him specific

11   information.

12   JUSTICE KAGAN: But, General --

13   GENERAL FRANCISCO: They told him that

14   --

15   JUSTICE KAGAN: Please finish.

16   GENERAL FRANCISCO: They told him that

17   if he actually asked the question for 30 -- for

18   22.2 million people for whom no administrative

19   records existed, he would have got actual

20   answers at 98 percent accuracy.

21   And that the alternative, their

22   preferred alternative, was to use a statistical

23   model to estimate citizenship, not just for the

24   22.2 million but for 35 million, but they had

25   not yet constructed that model and didn't know

1   what the error rate in that model would be.

2   JUSTICE KAGAN: But I -- I --

3   GENERAL FRANCISCO: And so the --

4   JUSTICE KAGAN: -- I think, General, I

5   mean, 98 percent sounds awfully high, but it's

6   kind of irrelevant too.

7   The question is whether, if you used

8   the model, it would be greater than 98 percent.

9   It would be 99.5 percent.

10   GENERAL FRANCISCO: Right.

11   JUSTICE KAGAN: Because then the

12   Secretary would have no basis for saying that

13   you should use the question rather than the

14   model.

15   And as to that, as I think my

16   colleagues are suggesting, there is a

17   bottom-line conclusion from the Census Bureau,

18   and the bottom-line conclusion is that

19   Alternative D, which is the proposal that the

20   Secretary eventually took, would still have all

21   the negative cost and quality implications of

22   Alternative B, which was simply adding the

23   question alone, and would result in poorer

24   quality citizenship data than Alternative C,

25   which is just using the administrative records

1   plus the modeling.

2   So there is a bottom-line conclusion

3   from the Census Bureau. And it seems as though

4   what the Secretary needs is some -- I mean, a

5   Secretary can deviate --

6   GENERAL FRANCISCO: Uh-huh.

7   JUSTICE KAGAN: -- from his experts'

8   recommendations and from his experts'

9   bottom-line conclusions.

10   GENERAL FRANCISCO: Right.

11   JUSTICE KAGAN: But the Secretary

12   needs reasons to do that, and I searched the

13   record and I don't see any reason.

14   GENERAL FRANCISCO: Sure. And, Your

15   Honor, so I want to just finish what I was

16   saying instantly before because I think it --

17   it responds to your question, and then I'd like

18   to expand directly in response to your

19   question.

20   What the Secretary concluded was, in

21   the face of uncertainty, he'd rather go with

22   the bird in a hand and ask the question at

23   98 percent accuracy than an unknown and

24   untested statistical model. And that's, after

25   all, the same preference that the Enumeration

1   Clause itself makes, a prefer -- preference for

2   actual counting over estimation, because actual

3   counting is less efficient.

4   JUSTICE SOTOMAYOR: But not census --

5   JUSTICE KAGAN: Well, if I can just

6   add to the question, and --

7   GENERAL FRANCISCO: But to go -- to go

8   to your question -- yes.

9   JUSTICE KAGAN: -- and let me just add

10   to it a bit because you said, you know, an

11   unknown and untested statistical model, but

12   here are his experts in the Census Bureau

13   saying we are confident that we can produce a

14   statistical model that will produce more

15   accurate bottom-line results, and -- and,

16   again, this bottom-line conclusion is the same.

17   They know what kind of statistical

18   models they can build. And this is the

19   bottom-line conclusion. And where is the

20   reason that the Secretary gives as to why he

21   rejects that?

22   GENERAL FRANCISCO: So there are a

23   couple of reasons, Your Honor. First of all,

24   although they had a high confidence that they

25   could create a good statistical model, they

1   were not able to tell him that they thought

2   that that model would be any better or worse an

3   estimation. They never were able to say that

4   would -- it would beat that 98 percent number.

5   So, in the face of that uncertainty,

6   he reasonably chose --

7   JUSTICE KAGAN: I think what I read

8   you is them saying that they could beat the

9   98 percent number.

10   GENERAL FRANCISCO: No, Your Honor, I

11   don't think that's what they're saying there.

12   I think what they're saying there is that if

13   you ask the citizenship question, it will make

14   the model a little bit less accurate because

15   you're going to have fewer people for whom

16   there are administrative records, but you

17   actually have to use that model for a much

18   smaller number of people because you have

19   actual answers from 22.2 million at 98 percent

20   accuracy.

21   So that's what they're saying. But

22   what they couldn't come down with a conclusion

23   on is whether it would be more or less accurate

24   to ask the question --

25   JUSTICE BREYER: All right. When you

1   answer this question --

2   GENERAL FRANCISCO: -- or use the

3   model.

4   JUSTICE KAGAN: So can I just ask --

5   JUSTICE BREYER: Would you answer this

6   question? Wait. I am trying, go back to my

7   question, to write down the pages. I'm not

8   going to, you know, resolve this right now.

9   So, when Justice Kagan asked the

10   question or I do, you've mentioned page 148.

11   Insofar in answer to her question or to mine,

12   if you could give me a few things to read to

13   show that he did consider it, to show that he

14   did give a reason for rejecting it, that would

15   be helpful to me. Sorry. Go back to you.

16   GENERAL FRANCISCO: So, Your Honor, if

17   you look at Secretary Ross's decision memo, the

18   pre- -- the decision memo in the Petitioners'

19   appendix, I would look to a couple of things.

20   First of all, I would look to his

21   discussion on pages 555a with the problems with

22   administrative records. The bureau is still

23   evolving its use of administrative records, and

24   the bureau does not yet have complete

25   administrative records data set for the entire

1   population.

2   And that points out why he preferred

3   asking the question and getting actual answers

4   from 22.2 million people at 98 percent

5   accuracy, because you simply didn't have

6   administrative records for 35 million people,

7   and the bureau had not yet figured out how to

8   do that estimation.

9   He then goes on to say on that same

10   page, more than 10 percent of the American

11   population, some 25 million voting-age people,

12   would need to have their citizen age imputed by

13   the Census Bureau. And so he was making clear

14   that he'd rather go with actual counting than

15   imputation.

16   And he pointed out that by proceeding

17   with his preferred course -- this is at page

18   556a of the Petitioners' appendix -- this may

19   eliminate the need for the Census Bureau to

20   have to impute an answer for millions of

21   people, specifically about 22.2 million people

22   for whom the bureau --

23   JUSTICE KAGAN: But --

24   GENERAL FRANCISCO: -- told him he

25   would get actual answers at 98 percent

1   accuracy.

2   JUSTICE KAGAN: -- if I may say,

3   General, when you think about those statements,

4   I mean, it's just conclusory. It's just like,

5   well, this would eliminate the -- the -- the

6   need for modeling because we could ask a

7   question.

8   But the question is, why is asking a

9   question better when you know that asking a

10   question is going to result in lots of

11   non-responses and in lots of false reporting?

12   And so you can't just go back to I'd

13   rather ask a question. You have to say why

14   you'd rather ask a question and what benefits

15   it has to ask a question.

16   GENERAL FRANCISCO: Right.

17   JUSTICE KAGAN: And if I may say --

18   I'll just finish here, General -- I mean, a lot

19   of your argument -- your briefs are extremely

20   well done.

21   GENERAL FRANCISCO: Thank you.

22   JUSTICE KAGAN: But a lot of your

23   argument just do not appear in the Secretary's

24   decision memo. And -- and the fact that SG

25   lawyers can come up with 60 pages of

1   explanation for a decision, that's all post hoc

2   rationalization.

3   The question is, what did the

4   Secretary say? Where did he say it? When did

5   he say it? What does it mean, other than just

6   ipse dixit and conclusions?

7   GENERAL FRANCISCO: Sure. Your --

8   Your Honor, I -- I'm tempted to pocket the

9   compliment and sit down, but I won't do that.

10   (Laughter.)

11   GENERAL FRANCISCO: I think the

12   Secretary fully acknowledged that there was an

13   upside to the request, and the upside was the

14   one that the Department of Justice set forth in

15   its letter, that having citizenship data would

16   help improve Voting Rights Act enforcement.

17   He fully understood there was an

18   alternative, using administrative records, and

19   he analyzed that alternative in the language

20   that I just read to Justice Breyer, and he

21   understood there was a downside, that adding

22   the citizenship question would potentially

23   increase self-response -- decrease -- increase

24   the number of -- decrease the number of

25   self-response rates.

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 1              But he found two things with respect
 2    to that.  First, he found -- and all of this is
 3    in his letter -- that he could mitigate that to
 4    at least a certain extent with follow-up
 5    operations, perhaps not entirely but at least
 6    to a certain extent, and, secondly, to the
 7    extent that materialized, it was the product of
 8    illegal activity.
 9              So he considered the benefits.  He
10    considered the alternatives.  He considered the
11    costs --
12              JUSTICE GINSBURG:  Which -- which
13    letter --
14              GENERAL FRANCISCO:   -- and he
15    concluded that the benefits outweighed the
16    costs.
17              JUSTICE GINSBURG:  General, which
18    letter are we talking about?
19              GENERAL FRANCISCO:  Secretary Ross's
20    decision memo in March 2018, Your Honor.
21              JUSTICE GINSBURG:  The memo, not --
22              GENERAL FRANCISCO:   The memo, yes,
23    Your Honor.
24              JUSTICE GINSBURG:   -- not the letter
25    from --
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1   GENERAL FRANCISCO: Yeah.

2   JUSTICE GINSBURG: -- Department of

3   Justice.

4   GENERAL FRANCISCO: Yes, Your Honor,

5   the memo.   But the Department of Justice's

6   letter is the one that articulated the Voting

7   Rights Act rationale that formed --

8   JUSTICE KAVANAUGH: Can you explain --

9   GENERAL FRANCISCO: -- the principal

10   benefit.

11   JUSTICE KAVANAUGH: -- can you explain

12   how it would improve Voting Rights Act

13   enforcement?

14   GENERAL FRANCISCO: Yes, Your Honor.

15   One of the critical elements of Voting Rights

16   Act enforcement is something called Citizen

17   Voting Age Population, or CVAP.   Right now,

18   everything for CVAP comes from the census, with

19   the exception of citizenship.   So population,

20   age, race, all of that comes from the census,

21   except for citizenship, the C in CVAP.

22   So a large amount of voting rights

23   litigation focuses on expert witnesses who try

24   to fill in that missing C and try to estimate

25   that missing C through imputation based on the

34

1   American Community Survey, which goes to just

2   one in 38 households.

3   And the Department of Justice wanted

4   to get all of the same information from the

5   same database so that critical feature of

6   voting rights litigation, CVAP, all came from

7   the same place.

8   JUSTICE SOTOMAYOR: General --

9   JUSTICE KAGAN: And to just --

10   JUSTICE SOTOMAYOR: -- how do we know

11   that DOJ couldn't do Alternative C, rely on the

12   administrative records? The one thing that we

13   do know is that the Secretary went to the

14   Department -- went to DOJ at the beginning and

15   asked them for help in adding the citizenship

16   question. They initially said no. At least

17   their lower-level people said no, told them to

18   shop it to DHS and see if DHS wanted the

19   citizenship question. DHS said not our work --

20   GENERAL FRANCISCO: Uh-huh.

21   JUSTICE SOTOMAYOR: -- go back to DOJ.

22   They go back to DOJ, the people they're in

23   touch with, that are not low-level, but they're

24   not the highest level, say no.

25   And Secretary of Commerce speaks to

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 1      the head of DOJ at the time --

 2              GENERAL FRANCISCO:  Uh-huh.

 3              JUSTICE SOTOMAYOR:  -- and the head of

 4      the DOJ says:  We'll give you anything you

 5      need.  They do a letter, the letter says the

 6      ACS is not enough.

 7              What the letter doesn't say is, ah, if

 8      you supplemented with administrative records,

 9      which 6(c) lets you do and tells you you should

10      do to maximize the extent possible that the

11      actual count is accurate, and we do know that

12      there will be less people being reported, which

13      is the whole purpose of the survey --

14              GENERAL FRANCISCO:  Uh-huh.

15              JUSTICE SOTOMAYOR:  -- how many people

16      there are, and nobody doubts that there will be

17      less people reported.

18              That's a maximum need of the census

19      survey report, not citizenship.  Let's not

20      confuse the two things.  The enumeration is how

21      many people reside here, not how many are

22      citizens.  That's what the census survey is

23      supposed to figure out.

24              GENERAL FRANCISCO:  Uh-huh.

25              JUSTICE SOTOMAYOR:  DOJ needs
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 1    citizenship.  But, when the Bureau asks DOJ,

 2    not the Secretary, to meet so they can discuss

 3    why the administrative records are not good

 4    enough, they say, we don't need to.

 5              So tell me, in that sequence, how does

 6    the Secretary know the answer --

 7              GENERAL FRANCISCO:  Sure.

 8              JUSTICE SOTOMAYOR:  -- to that

 9    question?

10              GENERAL FRANCISCO:  Sure.  So a couple

11    of responses to that, Your Honor.  I'm going to

12    start with the 6(c) issue because I know that

13    was of interest to Justice Breyer as well.

14              And under 6(c), under my -- my

15    friend's on the other side's position, you

16    actually couldn't even ask the citizenship

17    question on the American Community Survey.  And

18    you also couldn't ask about sex and age on the

19    census itself since all of that information is

20    all also available in administrative records.

21              But the reason why administrative

22    records are insufficient under 6(c) for any of

23    these purposes is for the simple reason that

24    you don't have them for 35 million people.

25              In terms of the Department of
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1   Justice's request and the Census Bureau's

2   alternative proposal, it simply wasn't

3   responsive to the Department of Justice's

4   request for two reasons.

5   First, administrative records didn't

6   solve the problem that the Department of

7   Justice was trying to solve, which was getting

8   all of their CVAP data from the same source and

9   covering the same time period. Administrative

10   records come from a different database and

11   cover a different time period than all of the

12   other information used to construct Citizen

13   Voting Age Population.

14   JUSTICE SOTOMAYOR: That doesn't tell

15   you why it's not good enough. They may have

16   wanted something.

17   GENERAL FRANCISCO: Sure.

18   JUSTICE SOTOMAYOR: But they would

19   then be introduced with one database that has

20   been, according to the chief statistician of

21   the Bureau, introducing multiple layers of

22   uncertainty.

23   GENERAL FRANCISCO: Right.

24   JUSTICE SOTOMAYOR: Uncertainty about

25   or an undercount of people because they already

1   say that undercount's going to be at a minimum

2   5.8, less people are going to respond.

3   You're going to have a lesser number

4   that are going to group with the administrative

5   record. You're going to have 9.5 million that

6   conflict between their answer and the

7   administrative records. And we have to change

8   the bureau's use of that information to be able

9   to use the administrative record.

10   And the Secretary doesn't ask, if we

11   change that, what else will it affect?

12   GENERAL FRANCISCO: Right.

13   JUSTICE SOTOMAYOR: So he doesn't know

14   that. And we now have error in the unreporting

15   population of at least 500,000.

16   So something the chief statistician of

17   the bureau tells us is, unlike our simpler

18   prior models, this introduces more uncertainty

19   at every single level of the calculus.

20   And so that data is going to be more

21   suspect, more prone to cross -- to less

22   reliability, and less accurate.

23   And so, if the bureau -- if the

24   Department of Justice refused to listen to

25   that, how can the Secretary conclude that he's

            1   complying with 6(c) fully? Because it says to

            2   the maximum extent possible, and how can you be

            3   possible if you don't even ask why?

            4   GENERAL FRANCISCO: So --

            5   JUSTICE SOTOMAYOR: This seems like he

            6   thought of something, I want to add a

            7   citizenship question, I don't know why, but

            8   this is a solution in search of a problem.

            9   I've got to find a problem that fits what I

            10   want to do.

            11   GENERAL FRANCISCO: So, Your Honor,

            12   there's a whole lot in that question, but I

            13   think I will start with where you ended.

            14   And if you really think 6(c) is a

            15   problem, then we really cannot ask the

            16   citizenship question on the American Community

            17   Survey since that is just as subject to 6(c) as

            18   the census is.

            19   JUSTICE SOTOMAYOR: No, what it says

            20   -- what it says is to the maximum extent

            21   possible.

            22   GENERAL FRANCISCO: And here the

            23   Secretary is using the administrative records

            24   to the maximum extent possible because he's

            25   combining them.

1   JUSTICE SOTOMAYOR: But the ACS is not

2   the survey.

3   GENERAL FRANCISCO: He's combining

4   them with the administrative records and the

5   self-responses and using administrative records

6   where they're available, using self-responses

7   at 98 percent accuracy --

8   JUSTICE SOTOMAYOR: But the problem --

9   GENERAL FRANCISCO: -- where

10   administrative records are not available.

11   JUSTICE SOTOMAYOR: -- but the problem

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

13   really the question of 6(c) --

14   GENERAL FRANCISCO: No.

15   JUSTICE SOTOMAYOR: -- or the focus.

16   GENERAL FRANCISCO: It's not.

17   JUSTICE SOTOMAYOR: Because --

18   GENERAL FRANCISCO: 6(c) applies to

19   all census instruments, not just the census.

20   It fully applies to the American Community

21   Survey. And it likewise applies --

22   JUSTICE SOTOMAYOR: But the ACS is not

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

24   purpose.

25   GENERAL FRANCISCO: But, Your Honor,

1   your question --

2   JUSTICE SOTOMAYOR: You already said

3   why it wasn't.

4   GENERAL FRANCISCO: -- your question

5   is about 6(c). 6(c) applies to the ACS and it

6   applies to the census.

7   And sex and age information, which we

8   ask on the census, is also available in

9   administrative records. Indeed, administrative

10   records are more accurate with respect to sex

11   and age because, presumably, your birth date

12   and your sex don't change over the course of

13   time, whereas your citizenship status does.

14   So, if you really think that 6(c) is a

15   problem, we can't ask it on the ACS and we

16   can't ask sex and age on the census, so that's

17   why I think that is plainly wrong. It really

18   does boil down to whether the Secretary's

19   judgment here is a reasonable one.

20   And in the face of two competing

21   possibilities, either asking the question,

22   getting answers for two-thirds of the people

23   for whom no administrative records existed, at

24   98 percent accuracy, or using an estimation

25   model that had not yet been created and had an

 1   unknown error rate, the Secretary reasonably

 2   chose to go --

 3   JUSTICE KAGAN: But just --

 4   GENERAL FRANCISCO: -- with the bird

 5   in the hand.

 6   JUSTICE KAGAN: -- General, just going

 7   back to Justice Kavanaugh's simple question

 8   about why the Secretary thought that there was

 9   a need for this data, and then part of what

10   Justice Sotomayor was talking about was that it

11   did really seem like the Secretary was shopping

12   for a need.

13   Goes to the Justice Department.

14   Justice Department says, we don't need

15   anything. Goes to DHS. DHS says they don't

16   need anything. Goes back to the Justice

17   Department, makes it clear that he's going to

18   put in a call to the Attorney General.

19   Finally, the Justice Department comes back to

20   him and says: Okay, we can give you what you

21   want.

22   So you can't read this record without

23   sensing that this -- this need is a contrived

24   one. Nobody had -- there have been lots of

25   assistant attorney general in the Civil Rights

 1   Division that have never made a plea for this

 2   kind of data.

 3   And -- and just the way this went back

 4   and forth, I guess I'd like an answer to that

 5   simple --

 6   GENERAL FRANCISCO: Yeah. Sure.

 7   JUSTICE KAGAN: -- question.

 8   GENERAL FRANCISCO: And I have two

 9   responses, Your Honor. And then, if I may, I'd

10   like to reserve the remainder of my time for

11   rebuttal.

12   First, I think it is quite common for

13   cabinet Secretaries to come into office with

14   ideas and inclinations to discuss with their

15   staff and discuss with their colleagues whether

16   there is a legal and policy basis for that

17   inclination.

18   Secondly, there's no evidence in this

19   record that the Secretary would have asked this

20   question had the Department of Justice not

21   requested it. And there's no evidence in this

22   record that the Secretary didn't believe that

23   the Department of Justice actually wanted this

24   information to improve Voting Rights Act

25   enforcement.

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1   CHIEF JUSTICE ROBERTS: Thank you,

2   General.

3   General Underwood.

4   ORAL ARGUMENT OF BARBARA D. UNDERWOOD

5   ON BEHALF OF RESPONDENTS NEW YORK, ET AL.

6   MS. UNDERWOOD: Mr. Chief Justice, and

7   may it please the Court:

8   The Secretary decided to add this

9   question about citizenship to the 2020 census

10   although the record before him contained

11   uncontradicted and strong evidence that it will

12   cause a decline in the response rate of

13   non-citizens and Hispanics, to the detriment of

14   the states and localities where they live.

15   He gave three reasons for the

16   decision, and none of them can survive APA

17   review.

18   One, he said there was inadequate

19   evidence of an effect on the response rate.

20   But that is flatly contrary to the record.

21   He said he could dismiss or discount

22   any such effect because non-response is an

23   illegal act. But that is an irrational and

24   impermissible factor to consider on this

25   question.

1   And he said that adding the question

2   would help voting rights enforcement. But that

3   claim is unsupported by the record as well.

4   CHIEF JUSTICE ROBERTS: Do you -- do

5   you think it wouldn't help voting rights

6   enforcement? The CVAP, Citizen Voting Age

7   Population, is the critical element in voting

8   rights enforcement, and this is getting citizen

9   information.

10   MS. UNDERWOOD: Well, as we have -- as

11   has been discussed at length in the -- during

12   the previous argument, the evidence before him

13   was that it would not give better citizenship

14   information than -- that it's the 22 million

15   that the government points to, the 22 million

16   whose citizenship information will be either

17   modeled or the result of the answer to a census

18   question.

19   JUSTICE GINSBURG: Was there anything

20   that showed that the Department would have been

21   aided in either past cases or cases on the

22   drawing board? Any case?

23   MS. UNDERWOOD: There was not. And

24   what I'd like to point out is that the

25   comparison should be to using administrative

         1   records.

         2   The Department of Justice letter,

         3   taken at face value, says the old ACS survey

         4   data that we've been using is inadequate and we

         5   need an improvement over that.

         6   The Census Bureau produced this

         7   answer, which is we can do this by linking the

         8   existing census information to administrative

         9   records. The Department of Justice never

        10   commented on that.

        11   The Department of Justice actually

        12   declined to meet with the Census Bureau people

        13   who wanted to meet about it. So there was

        14   nothing before the Secretary to say that this

        15   survey -- this census information would be an

        16   improvement -- there was no comparison at all

        17   from the Department of Justice about whether

        18   this would be an improvement or not.

        19   It seems to me that at least with so

        20   much question about whether this information

        21   would be better or worse than the -- the use of

        22   modeling from administrative records, the

        23   Secretary had an obligation to find out the

        24   answer to that question.

        25   JUSTICE KAVANAUGH: What if the answer

1   was uncertain?

2   MS. UNDERWOOD: Well, if the answer is

3   uncertain, then it is hard to invoke that as a

4   reason. Now we get back to the cost in the

5   enumeration. That is, if the -- if it's

6   unclear -- we think it's worse. But, if it's

7   just unclear whether this question will improve

8   voting rights enforcement, that is not

9   sufficient to pay the cost of the steep decline

10   in the enumeration because the enumeration is,

11   after all, the primary purpose of the census.

12   JUSTICE ALITO: Well, on the

13   modeling --

14   CHIEF JUSTICE ROBERTS: Well, is that

15   -- go ahead.

16   JUSTICE ALITO: On the modeling, there

17   was a lot of talk during the first part of the

18   argument about -- I think it's 22.6 million

19   people who it would -- it is predicted would

20   answer the citizenship question and as to whom

21   there is not administrative data.

22   And there was an estimate that those

23   answers would be 98 percent accurate. And the

24   comparison then has to be between that

25   98 percent predicted accuracy rate and whatever

1   the accuracy rate would be for the model.

2   And is there anything in the

3   administrative record that shows that the model

4   was tested and that it was possible to extract

5   a -- a predicted error rate for the model?

6   MS. UNDERWOOD: What we have -- what

7   we have is that this -- the model hadn't been

8   generated, but what we have is the Census

9   Bureau saying this is like other modeling that

10   we routinely do. We're confident that we can

11   do it.

12   JUSTICE ALITO: So, if the Secretary

13   said -- has to choose between two things, and,

14   on one, the Secretary knows there's a

15   98 percent accuracy rate, and as to the other,

16   the Census Bureau says, we're going to create a

17   model, and we don't know how -- we can't give

18   you any statistics, but trust us, it's going to

19   be more accurate than 98 percent, is it

20   arbitrary and capricious for the Secretary to

21   say, I'll go with the 98 percent because that's

22   a known quantity?

23   MS. UNDERWOOD: If there were no cost

24   to the enumeration, that would be a different

25   question. But, when there is this much

  1   uncertainty, then it is arbitrary and

  2   capricious to take that kind of risk --

  3   JUSTICE BREYER: I don't understand --

  4   sorry.

  5   MS. UNDERWOOD: -- with the

  6   enumeration.

  7   JUSTICE BREYER: I don't understand

  8   uncertainty. I thought the 98 percent -- of

  9   course, it's 98 percent. Most people are

 10   citizens.

 11   MS. UNDERWOOD: Right.

 12   JUSTICE BREYER: The people who are

 13   citizens are not going to -- you know, they'll

 14   say they're citizens. All you'd ever expect

 15   are a few percent who are not citizens.

 16   Then I have on pages J -- Joint

 17   Appendix 882 through 884 Mr. Abowd's testimony,

 18   where he unequivocally says three times that in

 19   -- in -- not 98 percent -- in respect to those

 20   people who are not citizens, the administrative

 21   model will be more accurate than just asking

 22   the census question, and, if you add the census

 23   question, then you look to it for the answer,

 24   you will discover that you are less accurate in

 25   respect to non-citizens.

1   Now he says that. That's why I asked

2   the Solicitor General what is their contrary to

3   that, and he gave me things to look at. And I

4   would say the most contrary thing, which I want

5   to ask you about, is Dr. Abowd, at the trial,

6   said, "There's no credible quantitative

7   evidence that the addition of a citizenship

8   question will affect the accuracy of the

9   count." All right? That's what he said.

10   MS. UNDERWOOD: Yes.

11   JUSTICE BREYER: Now I'm sure in their

12   reply brief they pointed right to that. You

13   can't simply ignore it. And so I want to hear

14   what your answer is to that, which the

15   government says is contrary evidence.

16   MS. UNDERWOOD: If you look at that

17   testimony in context, it is perfectly clear

18   that what he is saying is that he didn't have

19   enough evidence for a firm quantitative

20   statement, meeting scientific standards. He

21   actually defined the term "credible

22   quantitative evidence."

23   And if you'll bear with me, he -- he

24   said it's evidence that is specifically related

25   to the insertion of a citizenship question into

1   the otherwise planned 2020 census that

2   identifies the citizenship question itself as

3   the likely or one of the causal elements

4   associated with changes in the outcomes and

5   that would stand up to extensive peer review

6   within the Census Bureau and with the

7   scientific community.

8   CHIEF JUSTICE ROBERTS: That --

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

10   CHIEF JUSTICE ROBERTS: -- that's the

11   evidence that he found was not available?

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

13   said he didn't have enough to quantify accord

14   -- in accordance with peer-reviewed standards.

15   He didn't say there would be no effect. He

16   said, I don't have enough to give what I --

17   what I believe as a scientist to be this term,

18   "credible quantitative" -- to make credible

19   quantitative evidence.

20   JUSTICE KAVANAUGH: Can -- can I ask

21   --

22   MS. UNDERWOOD: So he is --

23   JUSTICE KAVANAUGH: I'm sorry, please

24   finish.

25   MS. UNDERWOOD: And -- and my point is

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 1      that, at the same trial, if we're going to look

 2      at the trial testimony, at the same trial,

 3      other experts said:  Maybe so, but there is

 4      enough evidence to make a different kind of

 5      judgment, not a firm scientific, quantified

 6      judgment, but a judgment.

 7                  JUSTICE ALITO:  Do you think it's

 8      proper to look at the trial record on this

 9      issue?  There's a lot of citation in the

10      Respondents' brief to trial testimony.

11                  Aren't we reviewing the administrative

12      record?

13                  MS. UNDERWOOD:  We are.  Well, as for

14      standing, we're reviewing the whole record.

15      And as --

16                  JUSTICE ALITO:  That's correct.  But

17      as to the arbitrary and capricious review --

18                  MS. UNDERWOOD:  Correct.  That's --

19      that -- that is correct, but that would make

20      this statement also of Dr. Abowd off the

21      record, off the administrative record.

22                  JUSTICE KAVANAUGH:  Can I --

23                  MS. UNDERWOOD:  But what I --

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

25                  MS. UNDERWOOD:  Yes.  Please.
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1   JUSTICE KAVANAUGH: Please finish.

2   MS. UNDERWOOD: No, going -- going --

3   going back to your question --

4   CHIEF JUSTICE ROBERTS: Wait a minute,

5   Justice Kavanaugh.

6   MS. UNDERWOOD: -- while I think there

7   is good evidence, and nothing contrary, that

8   this 22 million would be more accurately

9   identified by the modeling than by the census,

10   I think it is sufficient for this purpose to

11   treat it as somewhat uncertain, because it is

12   uncertainty with respect to the discretionary

13   part of what the Census Bureau does; namely,

14   collect extra information.

15   The core function of the census, not

16   of the Census Bureau in all its actions, but of

17   -- on the census form --

18   JUSTICE KAVANAUGH: But the -- the

19   United Nations recommends that countries ask a

20   citizenship question on the census. And a

21   number of other countries do it. Spain,

22   Germany, Canada, Australia, Ireland, Mexico ask

23   a citizenship question.

24   And the United States has asked a

25   citizenship question, as you know, in one form

 1   or another since 1820, excluding 1840, and,

 2   again, long form at times, in more recent

 3   times, and then on the ACS since 2005.

 4   The question is, does that

 5   international practice, that U.N.

 6   recommendation, that historical practice in the

 7   United States, affect how we should look at the

 8   inclusion of a citizenship question in this

 9   case?

10   MS. UNDERWOOD: The same guidance from

11   the U.N. also says to be careful to test

12   questions to make sure they don't interfere

13   with the enumeration. It says you need to make

14   a judgment in context. It may be that those

15   countries either haven't examined or don't have

16   the problem that has been identified -- the

17   problem of depressing the enumeration that the

18   United States has.

19   It's certainly something to look at,

20   but --

21   JUSTICE KAVANAUGH: But you agree it's

22   very -- it's a very common question

23   internationally?

24   MS. UNDERWOOD: Well, it is certainly

25   useful information for a country to have. And

1   I'm not suggesting at all that that information

2   shouldn't be collected.

3   The question is whether it should be

4   collected on the very instrument that is --

5   whose principal function is to count the

6   population, when we have such strong evidence

7   that it will depress that count, make it less

8   accurate, and make it less accurate in a --

9   CHIEF JUSTICE ROBERTS: Well, the

10   principal purpose -- you're -- you're right,

11   the principal purpose is to count the

12   population, but we've had demographic questions

13   on the census -- I don't know how far back,

14   but, certainly, it's quite common.

15   MS. UNDERWOOD: That's -- that's

16   correct, but we have no evidence about --

17   CHIEF JUSTICE ROBERTS: Sex, age,

18   things like that. You go back and it looks --

19   you know, do you -- do you own your house? Do

20   you own a radio? I mean, the questions go

21   quite beyond how many people there are.

22   MS. UNDERWOOD: Well, I'd like to say

23   two things about that. We have no comparable

24   evidence about any of those other questions

25   that they depress the count in this substantial

1   a way and in this disproportionate a way

2   because, as this Court said in Wisconsin,

3   distributive accuracy is even more important

4   for the census.

5   JUSTICE ALITO: Well, the -- the --

6   the response rate is very important, so can I

7   ask you a question about that?

8   A lot of your argument and a lot of

9   the district court's argument seems to hinge on

10   this prediction that there will be 5.1 percent

11   fewer responses if the citizenship question is

12   included on the census.

13   But that seems -- that is based, as I

14   understand it, on the fact that non-citizens

15   are somewhat less likely to complete the ACS,

16   which includes the citizenship question, than

17   are citizens. Am I right in understanding

18   that? That's fundamentally where that comes

19   from?

20   MS. UNDERWOOD: It's not about not

21   completing. It's about not -- I mean, it's not

22   about skipping questions on a form.

23   JUSTICE ALITO: Not -- not responding.

24   MS. UNDERWOOD: It's about not -- not

25   responding. Yes.

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 1              JUSTICE ALITO:  That's correct.  Okay.

 2    They're somewhat less likely to respond to the

 3    ACS than are -- than are --

 4              MS. UNDERWOOD:  It's the ACS in one

 5    study and the long form in another.

 6              JUSTICE ALITO:  Okay.  But what jumps

 7    out is the fact that citizens and non-citizens

 8    differ in a lot of respects other than

 9    citizenship.  They differ in socioeconomic

10    status.  They differ in education.  They differ

11    in language ability.

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

13    of a statistician to wonder about the

14    legitimacy of concluding that there's going to

15    be a 5.1 percent lower response rate because of

16    this one factor.  But maybe there's something

17    more there.

18              So what -- what does that analysis

19    miss?

20              MS. UNDERWOOD:  The strong -- well, a

21    couple of things.  The strong empirical

22    evidence that is the basis for that judgment,

23    which, by the way, has not been contested by

24    the government, the government has other things

25    to say but does not contest this decline --
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 1                    JUSTICE ALITO:  I thought they did,
 2      but, in any event, go ahead.
 3                    MS. UNDERWOOD:  I'll come back to that
 4      -- is a -- is a retrospective review of
 5      comparing in one case for 2010 the short-form
 6      census and the ACS, and in 2000, it was to
 7      compare the short form and the long-form
 8      census.
 9                    It's a comparable comparison.  In each
10      case, the longer one had a citizenship question
11      on it.
12                    In each case, everyone, population
13      groups notwithstanding, there was a decline
14      from the short form to the long form.  But
15      there was a much greater decline among
16      Hispanics and non-citizens.
17                    JUSTICE GORSUCH:  But, counsel, isn't
18      -- doesn't Justice Alito have a point to the
19      extent that there could be multiple reasons why
20      individuals don't complete the form?
21                    MS. UNDERWOOD:  Well, the lay --
22                    JUSTICE GORSUCH:  And we haven't --
23                    MS. UNDERWOOD:  I'm sorry, go ahead.
24                    JUSTICE GORSUCH:  Plenty of
25      interrupting.  But we don't have any evidence
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1 disaggregating the reasons why the forms are

2 left uncompleted. What do we do with that?

3   I mean, normally, we'd have a

4 regression analysis that would disaggregate the

5 potential causes and identify to a 95th

6 percentile degree of certainty what the reason

7 is that persons are not filling out this form

8 and we could attribute it to this question.

9   We don't have anything like that here.

10 So what are we supposed to do about that?

11   MS. UNDERWOOD: Well, I think -- I

12 think there are a few things to say.

13   JUSTICE GORSUCH: And -- and -- and --

14   MS. UNDERWOOD: Well --

15   JUSTICE GORSUCH: -- and let me just

16 throw in one other question. I know your

17 light's on, but I really wanted to get it to

18 you and I'm sorry we haven't gotten there.

19   And that is, what do we do also -- and

20 it's totally different, so I'm really sorry --

21 what do we do with the fact that, as I

22 understand it, some of the Respondents and

23 other people in litigation have complained when

24 -- when folks have relied on the ACS to

25 extrapolate citizenship for purposes of

 1   redistricting and, in fact, argued that we

 2   should rely only on actual census data?

 3   And I understand Respondents have made

 4   that argument in litigation. So what do we do

 5   with that?

 6   MS. UNDERWOOD: There are a lot of

 7   complaints about the ACS. The Census Bureau's

 8   proposal to use administrative records solves

 9   most of them. It's not a question of just the

10   ACS, which is a survey about which there have

11   been many complaints, and the -- putting the

12   question on the census.

13   The Census Bureau is -- they are data

14   experts. There are many ways of trying to

15   collect data. The question in this case is

16   whether doing it on the census form is

17   warranted, even though it causes such a harm to

18   the count.

19   JUSTICE SOTOMAYOR: I thought that --

20   MS. UNDERWOOD: Now that brings us

21   back --

22   JUSTICE SOTOMAYOR: -- Dr. Abowd's

23   testimony, or at least the letter, somewhere I

24   read, that they controlled for the -- for all

25   of the other reasons that Justice Gorsuch was

     1   mentioning as reasons why people would not

     2   complete?

     3   MS. UNDERWOOD: Well, they certainly

     4   controlled for the length of the form. That

     5   was the -- that was the --

     6   JUSTICE BREYER: Well, not just that.

     7   On page 110 --

     8   MS. UNDERWOOD: Yes. Yes.

     9   JUSTICE BREYER: -- of the Joint

    10   Appendix, it says whether the response --

    11   dah-dah-dah -- that they're much greater. It

    12   says in comparable rates for other demographic

    13   variables, like sex, birth date --

    14   MS. UNDERWOOD: Yes.

    15   JUSTICE BREYER: -- age, race,

    16   ethnicity. So I thought that that was an

    17   effort to control for the things that Justice

    18   Alito --

    19   MS. UNDERWOOD: It --

    20   JUSTICE BREYER: -- mentioned insofar

    21   as their relevance.

    22   MS. UNDERWOOD: It was. The -- the

    23   only limitation on it was that they had to deal

    24   with data that already existed. Dr. Abowd

    25   wanted to do a random controlled test of this

1   question and wasn't permitted to do so.

2   JUSTICE ALITO: But that's not --

3   that's a -- that's a different issue, isn't it,

4   what Justice Breyer mentioned?

5   JUSTICE GORSUCH: Yeah. It's totally

6   different, yeah.

7   JUSTICE ALITO: It's -- it's -- it's

8   the decline in the response rate based on those

9   variables, but not -- it doesn't -- it doesn't,

10   as Justice Gorsuch says, disaggregate the many

11   factors that could explain a decline when

12   you're distinguishing between citizens and

13   non-citizens.

14   MS. UNDERWOOD: Well, it did try to

15   control for other properties that citizens have

16   --

17   JUSTICE GORSUCH: But we don't --

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

19   JUSTICE KAGAN: Am -- am I right --

20   MS. UNDERWOOD: -- have --

21   JUSTICE KAGAN: -- that there --

22   JUSTICE GORSUCH: It's fair to say we

23   don't have this isolated, though, isn't it?

24   MS. UNDERWOOD: They did their best.

25   JUSTICE GORSUCH: They did their best.

         1   MS. UNDERWOOD: There is some degree

         2   of isolation, enough to enable them to believe

         3   that they had isolated the factors that people

         4   thought of as plausible.

         5   JUSTICE BREYER: Yeah, I mean --

         6   JUSTICE KAGAN: Would it be right to

         7   say --

         8   JUSTICE BREYER: -- there are a

         9   million factors.

        10   MS. UNDERWOOD: Yes.

        11   JUSTICE BREYER: There's pet dogs, you

        12   know.

        13   MS. UNDERWOOD: Yes.

        14   JUSTICE BREYER: I mean, there are

        15   cats. And -- and so, if, in fact, there were

        16   some factors that are relevant which were not

        17   in the data because they only controlled for

        18   six other factors instead of 600, I would

        19   expect somewhere in this record someone to have

        20   written that there were these other factors

        21   that also should have been controlled for.

        22   I know what you're going to say,

        23   unless I'm wrong, you better not tell me that I

        24   am right if I'm not. But I could not --

        25   (Laughter.)

1   JUSTICE BREYER: -- find any such

2   place in the record.

3   MS. UNDERWOOD: Nobody proposed, that

4   I know of, proposed factors that might be

5   alternative explanations that should have been

6   tested for.

7   JUSTICE KAGAN: And -- and would it be

8   right to say, General, that it was the Census

9   Bureau's conclusion, a bureau full of

10   statisticians --

11   MS. UNDERWOOD: Yes.

12   JUSTICE KAGAN: -- that it was the

13   citizen -- citizenship question that was

14   driving the differential response rates?

15   MS. UNDERWOOD: That is -- that is

16   correct.   I do want to make --

17   CHIEF JUSTICE ROBERTS: Are there

18   other -- are there other questions on the

19   census for which the administrative records

20   provide more accurate information?

21   MS. UNDERWOOD: There is nothing in

22   the record about that.

23   CHIEF JUSTICE ROBERTS: Well, then I

24   don't want to hear about it.

25   MS. UNDERWOOD: Okay.   Okay.

1   JUSTICE SOTOMAYOR: Could you answer

2   the General's point that, if you rely on 6(c),

3   then you shouldn't be even asking this on the

4   ACS form?

5   MS. UNDERWOOD: No. The -- for one

6   thing, in order to do modeling, in order to do

7   sampling, they need some survey data to compare

8   it to. And so some judgments can be made, and

9   the judgment might be made that the ACS or some

10   questionnaire that doesn't involve harm to the

11   count that is sampling or -- or some other form

12   of -- less -- less than universal questioning,

13   that testing questions on that kind of

14   instrument is the way to do it. But --

15   CHIEF JUSTICE ROBERTS: Thank you.

16   Thank you, General.

17   Mr. Ho.

18   ORAL ARGUMENT OF DALE E. HO

19   ON BEHALF OF RESPONDENTS NEW YORK

20   IMMIGRATION COALITION, ET AL.

21   MR. HO: Mr. Chief Justice, and may it

22   please the Court:

23   The Secretary's decision rested

24   primarily on one assertion, that it would

25   improve the accuracy of citizenship data

1   provided to the Department of Justice.

2   But the administrative record revealed

3   precisely the opposite, that it would make that

4   data less accurate and, thus, harm the

5   Secretary's stated purpose of Voting Rights Act

6   enforcement.

7   And the Secretary's explanation for

8   his decision misstated the evidence in the

9   record in three critical respects.

10   First, the Secretary asserted that

11   adding the question would maximize the Census

12   Bureau's ability to use administrative records

13   on citizenship. But the government has

14   conceded that that was not true.

15   At page 32 of their brief, they

16   acknowledge that, if the question is added, the

17   number of people who can be matched to these

18   administrative records, the most accurate

19   information that we have on citizenship, will

20   fall by one million.

21   Second, the Secretary asserted that

22   adding the question would improve the bureau's

23   imputation of citizenship for people who lack

24   -- for people for whom the government lacks any

25   such records.

1   But the government has conceded that

2   that was not true either. At page 34 of their

3   opening brief, they acknowledge that the Census

4   Bureau determined that if the question is

5   added, the imputation process will become less

6   accurate.

7   And here's why: The accuracy of

8   imputation depends upon the accuracy of

9   existing data. Federal administrative records

10   are based on a person's legal documents of

11   their citizenship and, thus, are quite accurate

12   and reliable for this purpose.

13   But the citizenship question is not.

14   The evidence shows that non-citizens respond to

15   the question inaccurately one-third of the

16   time. So, if the question is used, the data

17   that's used for imputation will be contaminated

18   by those incorrect responses, making the output

19   of the imputation process less accurate, making

20   the data less accurate, and, again, harming the

21   Secretary's stated purpose of improving the

22   accuracy of citizenship information.

23   The Secretary misstated the evidence

24   in a third respect. He asserted that adding

25   the question would fill in the gaps in 22

1   million -- for 22 million people in

2   administrative records on citizenship. But the

3   Census Bureau concluded specifically, on the

4   last page of their March 1 memo in the

5   administrative record, that the Secretary's

6   decision will not solve that problem.

7   And the reason is, again, because

8   responses to the question are highly

9   inaccurate, whereas the imputation process,

10   based solely on -- on administrative records,

11   would be more accurate. That's reflected in

12   the Census Bureau's bottom-line conclusion in

13   its March 1 memo, and it's reflected in the

14   testimony of Dr. Abowd on that trial.

15   JUSTICE ALITO: But this takes us

16   back, does it not, if I'm following your

17   argument, to the 22.6 million people who will

18   answer the citizenship question but as to whom

19   there aren't administrative records? That's

20   what you're talking about?

21   MR. HO: Yes, Justice Alito.

22   JUSTICE ALITO: Okay. And so then

23   this is territory that we've -- we've covered,

24   but, if the Secretary is told here's the error

25   rate that we can expect for those who answer

1   the citizenship question, and on the other

2   hand, we have this model and we can't tell you

3   how accurate it is, but trust us, it's going to

4   be better, is it arbitrary and capricious for

5   the Secretary to say, I don't want to go with

6   this model because I don't know what the

7   accuracy of that is?

8   MR. HO: Justice Alito, respectfully,

9   I think the Census Bureau said a little bit

10   more than trust us. What the Census Bureau

11   said was we can develop a highly accurate model

12   for this that's going to be better than getting

13   the question wrong one-third of the time, which

14   is what --

15   JUSTICE ALITO: Yeah, well, they said,

16   in our opinion, this would be better, but they

17   can't quantify it. They -- they don't provide

18   a specific number; they don't even provide a

19   range. Am I right on that?

20   MR. HO: They do say that it would be

21   more accurate than responses to the citizenship

22   question, which they do quantify as being

23   incorrect one-third of the time for

24   non-citizens. And if I could get back to --

25   CHIEF JUSTICE ROBERTS: But it is a --

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

2   CHIEF JUSTICE ROBERTS: Go -- go

3   ahead.

4   MR. HO: Oh, I'm sorry. Justice

5   Kavanaugh's question earlier about whether or

6   not that can help with Voting Rights Act

7   enforcement, it can't. And -- and here's why:

8   Citizenship data matters in the Voting Rights

9   Act.

10   CHIEF JUSTICE ROBERTS: I'm sorry,

11   just to -- what can't?

12   MR. HO: I'm sorry.

13   CHIEF JUSTICE ROBERTS: I lost sight

14   of the "it" in your answer.

15   MR. HO: The Secretary's question,

16   Mr. Chief -- the Secretary's decision,

17   Mr. Chief Justice. And responses --

18   CHIEF JUSTICE ROBERTS: I thought you

19   were talking about whether it's helpful with

20   respect to the voting rights information.

21   MR. HO: That's right. Adding a

22   citizenship question to the census, I'm sorry,

23   is not helpful for Voting Rights Act purposes

24   because responses to the question are

25   inaccurate so frequently for non-citizens.

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 1      Citizenship matters in the Voting Rights Act
 2      context when you're dealing with a population
 3      in which there's a large number of
 4      non-citizens.
 5               The VRA requires the drawing of
 6      districts in which minority voters constitute a
 7      majority sometimes under some circumstances.
 8      Now, under normal circumstances, voting age
 9      population data will be sufficient for that
10      purpose if citizenship rates are high.
11               But, if the minority group has
12      relatively low citizenship rates, for example,
13      as is the case with Hispanic populations in
14      some circumstances, then you need citizenship
15      data to make sure that you're drawing a
16      district in which minority voters are, in fact,
17      a majority of the population.
18               And data that's wrong one-third of the
19      -- the time with respect to non-citizens just
20      doesn't help you draw districts --
21               JUSTICE GORSUCH:  Well, when we --
22               MR. HO:   -- at that granular
23      block-by-block level.
24               JUSTICE GORSUCH:  Well, when we talk
25      about the block-by-block level, one of the
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1   complaints that we've heard from the other side

2   is that the data that we rely on from the ACS

3   is at too high a level and that the census goes

4   down to a more granular level.

5   And, in fact, some of the states who

6   are now Respondents before us have in

7   litigation, including in this Court, argued

8   that ACS data should not be relied upon for

9   purposes of citizenship or other purposes, that

10   the census data is more accurate.

11   What do we do about that? It seems to

12   me like you kind of put the government in a bit

13   of a Catch 22. You say they shouldn't use the

14   census, except for in later litigation when

15   they have to use the census.

16   MR. HO: Justice Gorsuch, let me say

17   two things in response to that. The first is

18   that, to the extent that more granular

19   citizenship data were, in fact, necessary for

20   Voting Rights Act enforcement purposes, and we,

21   I think, set forth a number of reasons in our

22   brief why that's not, in fact, the case, but

23   just assuming that it is, the --

24   JUSTICE GORSUCH: Well, we -- we know

25   states have argued this, including some of the

1   Respondents before us. So I'm -- you know, it

2   is a thing.

3   MR. HO: Okay, that -- that's fair.

4   But what the Census Bureau recommended was that

5   it could develop that block-level data either

6   with existing ACS data or using administrative

7   records and that that would be, in fact, the

8   best and most accurate way to do that. And --

9   JUSTICE GORSUCH: So -- so the states

10   that said previously that wasn't enough now are

11   going in all future litigation to bind

12   themselves to accept that it is enough?

13   MR. HO: Well --

14   JUSTICE GORSUCH: Are you prepared to

15   say that?

16   MR. HO: -- Justice Gorsuch, we've

17   never taken -- our clients have never taken

18   that position, and I -- I'm not aware of my

19   organization ever taking that position in

20   litigation.

21   JUSTICE GORSUCH: And how -- how about

22   the underreporting or the folks who stop and

23   break off answering the long form and -- and

24   we're asked to believe that that's solely

25   attributable to this question? We have a whole

1   bunch of states that say that, in fact, the

2   break-off rate because of that question, at

3   that question, is something like 0.36 percent.

4   MR. HO: Well --

5   JUSTICE GORSUCH: So that it's very

6   difficult to understand why that question would

7   be the cause of people stopping answering,

8   whereas another possible explanation that

9   hasn't been explored, as I understand it at

10   least, is the length of the form itself may

11   deter those with less means and less time to

12   fill them out, just as simple as that, and we

13   don't know.

14   And what do we do with the fact that

15   we don't know?

16   MR. HO: Justice Gorsuch, the Census

17   Bureau's conclusion was that the most likely

18   explanation was the citizenship question. The

19   only difference in that comparative estimate

20   was the presence of a non-citizen in a

21   household, and citizenship is obviously the

22   most salient question that goes to the

23   difference between those two populations.

24   And the number on the break-off rates

25   for the Internet ACS survey, which I believe

         1   Your Honor was referring to, they showed that

         2   Hispanics were actually eight times as likely

         3   to break off in responding to the ACS upon

         4   encountering the citizenship question.

         5   Now, by contrast, there isn't a shred

         6   of evidence in the administrative record that

         7   suggests that this question will not have the

         8   effect of harming response rates or will

         9   actually improve the citizenship data provided

        10   to the Department of Justice.

        11   But if I could make one other point in

        12   response to your earlier question, Justice

        13   Gorsuch, adding the citizenship question

        14   doesn't even solve that granularity problem

        15   that you referenced, and here's why: Because

        16   the Census Bureau can only produce estimates of

        17   citizenship at the block level. The government

        18   has now conceded that on page 18 of their reply

        19   brief, which is quite remarkable, because the

        20   government's rationale for asking this question

        21   has been to provide a full count of

        22   citizenship.

        23   And because of the Census Bureau's

        24   disclosure avoidance protocols, it actually

        25   can't do that at the block level. It

1   undermines the whole rationale for adding this

2   question, and the Secretary didn't even address

3   it in his decisional memo, which renders his

4   decision arbitrary and capricious under State

5   Farm.

6   JUSTICE KAVANAUGH: It seems to me --

7   JUSTICE KAGAN: So --

8   JUSTICE KAVANAUGH: Go ahead.

9   JUSTICE KAGAN: -- I was just -- what

10   is the "it" in that sentence? What did the

11   Secretary not address?

12   MR. HO: He did not address the fact

13   that because of the bureau's disclosure

14   avoidance protocols, it can only provide

15   estimates of citizenship at the block level.

16   If I could, let me explain why. The

17   statute requires the Census Bureau not to

18   disclose information that could result in the

19   identification of a person's census responses.

20   If you have 100 people living on a block and

21   the Census Bureau says, well, there are 100

22   citizens there, you will have necessarily

23   identified all of their census responses.

24   So what the bureau does is it alters

25   demographic totals for census blocks before

```
1       publishing them.  That means that that data is
2       an approximation, it's an estimate, just like
3       the ACS data that the Department of Justice
4       currently relies on.  And here's what's
5       critical.
6                JUSTICE ALITO:  Well, this is -- this
7       gets really, really technical, but -- well, and
8       your -- I'm sorry.
9                CHIEF JUSTICE ROBERTS:  No, go ahead.
10               JUSTICE ALITO:  That's -- that's fine.
11               CHIEF JUSTICE ROBERTS:  Okay.  Thank
12      you, counsel.
13               MR. HO:  Thank you, Your Honors.
14               CHIEF JUSTICE ROBERTS:  Mr. Letter.
15                 ORAL ARGUMENT OF DOUGLAS N. LETTER
16             ON BEHALF OF THE UNITED STATES HOUSE OF
17                 REPRESENTATIVES, AS AMICUS CURIAE,
18                   IN SUPPORT OF THE RESPONDENTS
19               MR. LETTER:  Mr. Chief Justice, and
20      may it please the Court:
21               I just want to say right upfront the
22      Speaker of the House wishes to thank the
23      Justices for their courtesy in hearing from the
24      House today.
25               CHIEF JUSTICE ROBERTS:  Tell her she's
```

1   welcome.

2   (Laughter.)

3   MR. LETTER: Thank you.   I'll pass

4   that along to her, Mr. Chief Justice.

5   I want to hit just a couple of points,

6   but one of the ones I want to hit right upfront

7   is something that -- that General Underwood

8   said and I think bears some emphasis, which is

9   the -- remember that the -- the census that

10   we're talking about here is the decennial

11   census provided for in the Constitution, of

12   utmost importance to the House of

13   Representatives.

14   That provision obviously is the ground

15   -- has to be the grounding for the statute that

16   is being applied here.   And so anything that

17   undermines the accuracy of the actual

18   enumeration is immediately a problem.

19   So there's been a lot of discussion

20   here, quite properly, because of the way this

21   case has been briefed, about will this help the

22   Justice Department and the Voting Rights Act,

23   et cetera.   And that may be a very important

24   point, but it is not why the Census Bureau

25   carries out an actual enumeration, which goes

         1   to the apportionment of representatives among

         2   the states and then distribution within the

         3   states.

         4   So, if there is something that

         5   undermines the accuracy of that count, even if

         6   it's important for other reasons, that is both

         7   a statutory violation and, therefore, a

         8   violation of the Administrative Procedure Act,

         9   and a constitutional violation.

        10   Now this Court does not have to reach

        11   the constitutional question because it is a

        12   statutory violation. I --

        13   JUSTICE ALITO: But do you think that

        14   any decrease in the actual count, if -- if you

        15   add any question beyond counting people, and

        16   that decreases the actual count to any degree,

        17   then that additional question is improper?

        18   MR. LETTER: Justice Alito, I -- I'm

        19   sure that -- that the Court would find there's

        20   a de minimis exception. There's no -- no doubt

        21   about that. So where this Court would draw

        22   that line, I don't know.

        23   What I -- I can tell you, and I'm --

        24   I'm sure you know this, but I'll just -- from

        25   the -- this Court said in the Wisconsin case

```
 1      that -- a question there was could a

 2      statistical adjustment be made, and this Court

 3      set the standard of what actual enumeration

 4      means and it says "a reasonable relationship to

 5      the accomplishment of an actual enumeration."

 6              And this discussion about the

 7      importance of voting rights data obviously does

 8      not bear a reasonable relationship to the

 9      accomplishment of an actual --

10              JUSTICE GORSUCH:  Mr. Letter, I'm sure

11      you've given this some thought, but -- I know

12      you have.

13              In terms of assessing what a

14      reasonable relationship is, what do we do with

15      the history and the fact that this question has

16      been on for what a long time was the only form

17      in the census through almost all of our

18      history, and it continues to be asked today in

19      the long form or in the ACS.

20              It's not like this question or anybody

21      in the room is suggesting that the question is

22      improper to ask in some way, shape, or form.

23              And what we do as well with the

24      evidence of practice around the world and

25      virtually every English-speaking country and a
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 1    great many others besides ask this question in

 2    their censuses?  So I'm sure you've given

 3    consideration -- thought -- thoughtful

 4    consideration to those questions.

 5              MR. LETTER:  Absolutely, Your Honor,

 6    although I can tell that you also have.

 7              First of all, I don't know if the

 8    other countries that are listed, for instance,

 9    in the -- the U.N. recommendations have an

10    actual Enumeration Clause written into their

11    constitution that is of paramount importance.

12    So I'm not sure that, when -- when the U.N.

13    made that recommendation, that that matters for

14    the United States.

15              Second, Your Honor, the -- if -- there

16    -- there are other factors that would undermine

17    actual enumeration.

18              There is no evidence in the record

19    here.  As the Chief Justice pointed out, we're

20    dealing with a record here.  It may be that

21    some people find questions about gender now

22    offensive or maybe in the future that will be

23    deemed offensive and that would undermine the

24    accuracy of the -- of the actual enumeration.

25    We don't have any evidence on that.
```

1   What we do know, Your Honor, as you've

2   quite correctly pointed out, we have a history

3   of this, but what we do know now is the experts

4   right now say that this question, if it is put

5   on the -- the form, which, remember, is the

6   only form right now for the actual enumeration,

7   that will cause -- that will make the

8   undercount worse.

9   JUSTICE GINSBURG: Mr. Letter, the --

10   Congress has the primary control over what the

11   census will be, not the executive, and Congress

12   has been alerted to this citizenship question

13   for some time, and it has done nothing about

14   it.

15   So one question is, who should decide?

16   Congress is silent. Should the Court then step

17   in?

18   MR. LETTER: It's a very fair

19   question, Your Honor. Two responses.

20   One, I think that this is a very

21   ironic point for General Francisco to be

22   making. He has said -- he's emphasized in his

23   brief Congress knows about this, Congress

24   should do something. This -- the Court can

25   take judicial notice of this because it's in

1   the public record.

2   The Secretary of Commerce has been

3   called before Congress to explain what he did

4   here, and Assistant Attorney General Gore, the

5   one, you know, about the -- the author of the

6   -- the request by the Justice Department, has

7   been called to Congress.

8   They have been declining to answer.

9   They're not giving Congress the information it

10   requests because they say there's litigation

11   going on. And, I repeat, this is a matter of

12   public record.

13   So it's ironic for General Francisco

14   to be saying: This is for Congress. Well, if

15   that's for Congress, obviously, the House needs

16   the information. And yet we're being told we

17   can't have the information because it's --

18   because it's only for you.

19   CHIEF JUSTICE ROBERTS: I thought all

20   the information available, as I understand it,

21   leads to only one answer, and so why isn't that

22   answer sufficient for them to take whatever

23   action they consider appropriate?

24   MR. LETTER: The -- I'm sorry, Chief

25   Justice.

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1              CHIEF JUSTICE ROBERTS:  Well, we've
2    been told there was no basis for the Secretary
3    to make any decision, other than the
4    recommendation that was submitted to him by the
5    bureau, because that's the evidence.  That's
6    the scientific evidence.  And so there's no
7    room for the exercise of any discretion.
8              So what information -- what more
9    information does the Congress need to address
10   the problem?
11             MR. LETTER:  We want to know what --
12   you -- you decided otherwise.  Why did you
13   decide?  As we know, his -- his -- his letter
14   provides not -- his memo provides not much
15   information.  This -- the Justices here today
16   have been asking these key questions.
17             So we want to know, what made you do
18   -- what made you decide this?  Was this just a
19   political decision?
20             JUSTICE KAVANAUGH:  Well, I thought
21   Justice Ginsburg's question went more to why
22   doesn't Congress prohibit the asking of a
23   citizenship question in the same way that
24   Congress has explicitly provided that no one
25   can be compelled to provide religious
```

1   information?

2   MR. LETTER: Right. And so that is

3   something that Congress could attempt to do,

4   yes, and that is one of the things that would

5   be -- would be asked about.

6   But, as we know, that doesn't stop

7   this Court from interpreting the statute and

8   the Constitution.

9   As we know, this Court is the final

10   word on the Constitution.

11   JUSTICE KAVANAUGH: On the -- on the

12   statute, I had one question, which is you make

13   a good first principles point about enumeration

14   being the purpose of the census.

15   But it turns out that the census, as

16   you know, has been used for lots of other

17   statistical and demographic collection purposes

18   throughout -- throughout our history.

19   So it's not just for enumeration. And

20   the statute that Congress has passed gives huge

21   discretion to the Secretary how to fill out the

22   form, what to put on the form. So how are we

23   to think about enumeration when the history and

24   the statute suggests that there is more than

25   just enumeration that's at stake here?

1   MR. LETTER: Your Honor is exactly

2   right. The -- the census information, the

3   census data, are used for all sorts of things

4   that are very important. Remember, the Census

5   Bureau does things way beyond just the

6   decennial census actual enumeration.

7   But, again, this Court was very clear,

8   and -- and, by the way, the other thing is

9   General Francisco has argued no review. This

10   Court has reviewed how the actual enumeration

11   has taken place, I think, about five times. So

12   there's clearly judicial review here.

13   JUSTICE KAVANAUGH: Well, assuming

14   there is review and assuming it's arbitrary and

15   capricious, as you know, it's deferential.

16   MR. LETTER: Yes.

17   JUSTICE KAVANAUGH: And the question I

18   think here is a policy judgment that it's more

19   important to get accurate citizenship

20   information even at the expense, potentially,

21   of a slight decrease, potentially, in response

22   rates.

23   And the question is: Given the

24   statutes, why does that judgment fall below the

25   standard of reasonableness in assessing the

```
 1    different policy considerations?

 2           MR. LETTER:  Our position is that,

 3    one, the Justice Department can get this

 4    information elsewhere, as we know.

 5           But, two, you can't undermine the

 6    accuracy of the actual enumeration in order to

 7    get information --

 8           JUSTICE KAVANAUGH:  So --

 9           MR. LETTER:  -- for the Voting Rights

10    Act.

11           JUSTICE KAVANAUGH:  -- the

12    constitutional backdrop, I think, if I'm

13    translating your argument, means that anything

14    that would undermine the enumeration is

15    impermissible and unreasonable?

16           MR. LETTER:  I believe so, Your Honor.

17    And the only thing -- the only addition I would

18    make to that is, as I said to Justice Alito,

19    undoubtedly, there's a de minimis

20    determination.

21           But, again, this Court is -- this

22    Court is the expert on the Constitution.

23           Thank you, Your Honor.

24           CHIEF JUSTICE ROBERTS:  Thank you,

25    counsel.
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1   Four minutes, General Francisco.

2   REBUTTAL ARGUMENT OF GEN. NOEL J. FRANCISCO

3   ON BEHALF OF THE PETITIONERS

4   GENERAL FRANCISCO: Mr. Chief Justice,

5   thank you. I'd like to make four points:

6   First, on the disclosure avoidance

7   protocols, we discussed those at our reply

8   brief at page 17. The bottom line is that

9   those protocols apply to all census data,

10   including on sex, on age, on race, that the

11   Department of Justice uses to construct citizen

12   voting age population.

13   It's never been a problem before.

14   There's no reason to think it'll be a problem

15   now. And I -- in fact, I think in the trial

16   record, Dr. Abowd testified how it would not be

17   a problem.

18   Second, I'd like to point Your Honors

19   to the key differences memo at page 148 of the

20   Joint Appendix, the very -- the one full

21   paragraph, the first sentence says, "The

22   relative quality of Alternative C versus

23   Alternative D will depend on the relative

24   importance of the errors in the administrative

25   data, response data, and imputations." It then

         1   goes through and discusses the various types of

         2   errors. And its final conclusion is,

         3   "Unfortunately, the Census Bureau cannot

         4   quantify the relative magnitude of the errors

         5   across the alternatives."

         6   Third, in terms of response rates, the

         7   administrative record shows that the Census

         8   Bureau staff believed that there would be a

         9   5.1 percent decrease in the initial response

        10   rates from adding the citizenship question.

        11   But, as Secretary Ross points out in

        12   his memorandum, that doesn't take into account

        13   follow-up operations. That's the response rate

        14   drop before follow-up operations. And it

        15   doesn't disaggregate between those who are

        16   going to be put off by the citizenship question

        17   itself, as opposed to those who are put off by

        18   the larger macro environment because they don't

        19   trust the government or don't like this

        20   particular administration.

        21   And that, I think, is one of the

        22   reasons why Dr. Abowd concluded in the

        23   testimony that Justice Breyer cited that

        24   "there's no credible quantitative evidence that

        25   the addition of a citizenship question" --

```
 1                  JUSTICE SOTOMAYOR:  I --
 2                  GENERAL FRANCISCO:   -- "will affect
 3       the accuracy of the count."  And --
 4                  JUSTICE SOTOMAYOR:   -- I thought that
 5       Dr. Abowd stated and the district court found
 6       that the follow-up process was, at best,
 7       riddled with a number of -- of -- of
 8       inadequacies and that it wouldn't be adequate
 9       enough to take care of the shortfall.
10                  GENERAL FRANCISCO:  Well, we can
11       debate about whether it would be adequate
12       enough, but in order to say that the final
13       self-response rate would drop by 5.1 percent,
14       you have to conclude that it's zero percent
15       accurate.
16                  And I don't think that there's any
17       basis in the record to conclude that it's --
18                  JUSTICE SOTOMAYOR:  So how much
19       accuracy --
20                  GENERAL FRANCISCO:   -- zero percent
21       accurate.  So --
22                  JUSTICE SOTOMAYOR:   -- would be --
23       let's assume it were 5.8 or something close to
24       it.  Is that de minimis to you?  Is that --
25                  GENERAL FRANCISCO:  Your Honor, I
```

1   think --

2   JUSTICE SOTOMAYOR: --

3   inconsequential?

4   GENERAL FRANCISCO: -- I think that

5   that is largely an impossible question to

6   answer. That is not built into the

7   Constitution itself. There's always going to

8   be a tradeoff.

9   The long-form census, for example,

10   caused a drop in self-response rates relative

11   to -- to the short form by, I believe, around

12   10 percent.

13   But my final point is one that Mr.

14   Letter alluded to, and that is under --

15   JUSTICE SOTOMAYOR: That's why you

16   keep --

17   GENERAL FRANCISCO: -- my friend's --

18   JUSTICE SOTOMAYOR: -- the short form.

19   GENERAL FRANCISCO: Right, Your Honor.

20   And under my friend's on the other side's

21   position, you are effectively empowering any

22   group in the country to knock off any question

23   on the census if they simply get together and

24   boycott it.

25   There are many people in this country

```
 1    who might find the sex question objectionable

 2    because it limits individuals to a binary

 3    choice.  If a large number of people got

 4    together in one state and said we're going to

 5    boycott the census --

 6              JUSTICE SOTOMAYOR:  General --

 7              GENERAL FRANCISCO:  -- as long as you

 8    include --

 9              JUSTICE SOTOMAYOR:  General --

10              GENERAL FRANCISCO:  -- that sex

11    question, you're effectively empowering --

12              JUSTICE SOTOMAYOR:  General, are you

13    --

14              GENERAL FRANCISCO:  -- them to knock

15    that off --

16              JUSTICE SOTOMAYOR:  -- suggesting --

17              CHIEF JUSTICE ROBERTS:  Justice

18    Sotomayor.

19              JUSTICE SOTOMAYOR:  Are you suggesting

20    -- are you suggesting that Hispanics are

21    boycotting the census, that they --

22              GENERAL FRANCISCO:  Not --

23              JUSTICE SOTOMAYOR:  Are you suggesting

24    they don't have, whether it's rational or not,

25    that they don't have a legitimate fear?
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 1          GENERAL FRANCISCO:  Not in the

 2  slightest, Your Honor.  I am suggesting that

 3  the risk --

 4          JUSTICE SOTOMAYOR:  So --

 5          GENERAL FRANCISCO:  -- of my friend's

 6  theory on the other side is that it

 7  countenances precisely that type of coordinated

 8  behavior that would empower groups to knock off

 9  any question of the census that they found to

10  be particularly objectionable.

11          Mr. Chief Justice, unless the Court

12  has further questions?

13          CHIEF JUSTICE ROBERTS:  We're all

14  done.

15          GENERAL FRANCISCO:  Thank you, Your

16  Honor.

17          CHIEF JUSTICE ROBERTS:  Thank you,

18  General.  The case is submitted.

19          (Whereupon, at 11:28 a.m., the case

20  was submitted.)

21

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