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EPN Comments on
Decennial Census of the Population of Americans; Proposed Residence Criteria and Proposed Regulations for Demographic Questions
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The Environmental Protection Network (EPN) harnesses the expertise of more than 800 former Environmental Protection Agency (EPA) career staff and confirmation-level appointees from Democratic and Republican administrations to provide the unique perspective of former regulators and scientists with decades of historical knowledge and subject matter expertise.

Introduction

On September 10th, 2026, the Census Bureau proposed to add two new parts to the Code of Federal Regulations (CFR) governing the decennial census of population and housing. The first part aims to modify the criteria used to determine a person's "usual residence." The second part aims to restrict demographic information gathered on questionnaires used in the census. The Census Bureau claims these changes are needed to meet its "Constitutional mandate to count for apportionment the 'whole number of persons in each State' based on the concept of 'usual residence'—a process that factors in an element of allegiance but otherwise should be colorblind and not be distorted in any way by questions about immaterial personal characteristics."[1]

The Census Bureau's ill-conceived, illegal proposal does not stem from sound statistical science and practices. Other commenters will address the legal and policy flaws of this proposal in far greater detail, though we note some key points here. However, EPN adds these comments with a particular focus on the importance of consistent, high-quality demographic information provided by the decennial census to the efficient, effective, and strategic implementation of federal environmental and civil rights law. The proposal would negatively impact the capacity of EPA and its partners, as well as that of other federal administrative agencies responsible for protecting environmental and human health.

Because of its legal and policy flaws, as well as its adverse impact on the capacity of federal administrative agencies to achieve their missions, EPN urges the Census Bureau to withdraw the proposal.

A. Proposed Residence Criteria

Exclusion of Noncitizens

Aside from the negative impacts on effective administration of agency programs, the proposal is beyond the Census Bureau's statutory authority. In fact, it violates the U.S. Constitution. Actions designed to draw a distinction between citizens and noncitizens run afoul of the express language of the Constitution. Article I, Section 2, Clause 3, is called the Enumeration Clause or the

[1] Decennial Census of the Population of Americans; Proposed Residence Criteria and Proposed Regulations for Demographic Questions, 91 FR 57524 (Proposed September 10, 2026), https://www.federalregister.gov/d/2026-18481.

Census Clause. This Article makes it a federal function to enumerate the populations within states and to adjust political representation, apportionment, or allocation of federal funds and taxes based on the results of such an enumeration.

With the adoption of Section 2 of the Fourteenth Amendment, the concept of equal representation was clarified as follows:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.[2]

In other words, the plain language of the Enumeration Clause requires the actual counting of all persons living in the United States. Yet those seeking to change the census by including questions about "usual residence" attempt to suggest that this clear and explicit Constitutional language is somehow vague or unclear. Despite this strange legal posture, the proposal does not offer any legal analysis to support such an interpretation. Nor does it assess how the proposed changes may negatively impact the response rate, thereby resulting in potential undercounting of the population and inaccuracy of the census. Without such fact-based and reasoned deliberation, there is insufficient evidence to demonstrate that the proposed action is reasonably necessary to ensure the accuracy of the tabulation of the population by state. A rational decisionmaker would not take such poorly-informed action based on such insufficient legal reasoning. This raises significant doubt that the Census Bureau has complied with the Administrative Procedures Act (APA) in offering this proposal.

Additionally, such action runs afoul of federal statutory law. For example, Title VI of the Civil Rights Act of 1964 states that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." The Supreme Court has determined that the term "person" as used in Title VI, consistent with challenges brought under the Fifth and Fourteenth Amendments, applies to all individuals within the United States including undocumented individuals.[3] Accordingly, any proposal to reframe the focus of the census as a tool to distinguish between citizens and noncitizens violates the express language in Title VI and the explicit prohibition against discriminating against any person, including undocumented individuals.

Census Enumeration Period

Aware that it failed to achieve the desired outcome of this proposal in 2020 when it focused on "citizen" versus "illegal alien,"[4] the Administration now attempts to draw a distinction based on a period of "usual residency." This proposal must fail because it is not based on any explicit Constitutional or statutory language. Rather, it violates the plain language of the Constitution and multiple federal laws, as noted above.

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[2] U.S. Const. amend XIV, § 2

[3] Plyler v. Doe, 457 U.S. 202, 210-211 (1982); Mathews v. Diaz, 426 U.S. 67, 77 (1976).

[4] Department of Commerce v. New York, 588 U.S. 752 (2019) (Supreme Court Opinion). Available at https://www.supremecourt.gov/opinions/18pdf/18-966_bq7c.pdf.

Even if the proposal were legal, it uses vague, confusing, and undefined language. This makes it impossible to implement and enforce in ways that ensure the accuracy of the population count. Therefore, this change would significantly and directly weaken the Census Bureau's capacity to accomplish its core mission: "to serve as the nation's leading provider of quality data about its people and economy."[5]

This failure would have direct, real-world, and negative impacts even if it were efficiently, consistently, and sufficiently implemented and enforced. Due to current economic realities, it is not unheard of for people to no longer have one single state of residency for an extended period of months as they travel to find work where they can. Yet, nothing in this proposal reflects how this proposal may intersect with the need to have Service Based Enumerations (SBEs) or Enumerations at Transitory Locations (ETLs). For example, a long-haul trucker delivering agricultural goods across the country may not have a permanent address and may not always use the same SBE or ETL in a given state during a defined period of time; therefore, they would not be counted under this proposal and not afforded equal representation. For these reasons, the proposal is not workable.

B. Proposed Restrictions on the Inclusion of Certain Demographic Questions in the Decennial Census Operation

Exclusion of Race and Ethnicity Data

The Secretary of Commerce must "take a decennial census of population . . . in such form and content as he may determine," and then must report to the President "[t]he tabulation of total population by States" under the census "as required for the apportionment."[6] The President in turn must transmit to Congress a "statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained" under the census.[7]

Why make these changes and incur the significant costs to taxpayers that would be involved in implementing them? The Census Bureau's proposal does not identify any court decisions challenging the collection of race, ethnicity, color, national origin, sex, age, disability, or sexual orientation data requested in the census. There is no evident legal rationale for making the proposed changes now.

And just because Congress has not fully delineated[8] the types of data that the Commerce Secretary may collect, this does not give the Census Bureau unlimited authority to determine what data to collect. It must offer some basis in law or policy for making these changes.

The first contention raised in the proposed rule is that there is a risk of a breach of privacy. The second, related contention is that concern about providing such "sensitive" information may result in fewer people filling out a census. The Census Bureau fails to explain why it is not competent to protect privacy without the proposed changes, or why it has suddenly become less trustworthy in its handling of this information despite collecting some of it since the census' inception in 1790.[9] It

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[5] See https://www.census.gov/about/what.html.

[6] §141(b)

[7] 46 Stat. 26, 2 U. S. C. §2a(a).

[8] 13 U. S. C. §141(a)

[9] Drishti Pillai and Samantha Artiga, *Proposed Changes to Demographic Data Collection in the Census Could Impact Efforts to Address Health and Health Care Disparities*. September 25, 2026. Available at

claims (without any supporting evidence) that it lacks the capacity to disaggregate data from the identity of the person submitting a form. It does not identify a single instance of the Census Bureau or the Department of Commerce being found to have violated their duty under 13 U.S.C. 9(a)(2) to protect information that is collected through the census. Given the lack of such evidence, serious questions are raised about whether there is a rational basis to take the proposed action.

The third contention raised in the proposed rule is questioning the utility of race, ethnicity, and sexual orientation data. Yet, the Administration has not cited any Supreme Court decision that precludes or prohibits the gathering of such data. Indeed, they could not because there is none. The Fifth and Fourteenth Amendments essentially require the federal government and the states to provide equal protection of laws to all persons in their jurisdiction. Further, the Civil Rights Acts (Title VI, Title VII, Title VIII and Title IX), the Age Discrimination in Employment Act, the Rehabilitation Act, and the Americans with Disabilities Act still collectively prohibit discrimination based on race, color, national origin, age, sex, and disability. The Supreme Court has not issued any decisions saying it is illegal, unuseful or there is no utility for the federal government to continue gathering data about race, sex, national origin, age or disability status. Instead, while the Administration may want to snidely amplify a conceit that "race is a construct," it is simultaneously advancing claims that white men and Asians are being discriminated against,[10] which seems inconsistent with a claim that such demographic data lacks utility. For these reasons, the proposal fails to include any evidence demonstrating that it is reasonably related to ensuring the accuracy of the census.

Moreover, in complying with our Fifth Amendment obligations to provide equal access to all, EPA's knowledge of which populations are limited English proficient allows it to provide timely and accurate information.

As importantly, there are federal statutes expressly requiring that such information be gathered as part of the decisionmaking, to support efficient and evidence-based implementation of important federal programs. See the following section, covering impacts on federal funding.

Impacts on Federal Funding and Program Performance

The proposed changes will have negative impacts on environmental protection program performance and ability to meet statutory responsibilities. One significant area of impact is on allocations of funding for environmental protection programs. These allocations will be distorted and the quality of decisions about how to allocate would be degraded by excluding alleged non-citizens from census calculations, and by limitations on collection of information regarding race and other demographic characteristics.

Examples of impacted EPA grant programs include:

Drinking Water State Revolving Funds (SRF) authorized by Section 1452 of the Safe Drinking Water Act.[11]

https://www.kff.org/racial-equity-and-health-policy/proposed-changes-to-demographic-data-collection-in-the-census-could-impact-efforts-to-address-health-and-health-care-disparities/.

[10] See https://www.justice.gov/crt/media/1460556/dl

[11] 42 U.S.C. § 300j-12 - State revolving loan funds

The Drinking Water SRFs is one of the largest EPA grant programs funded through annual State and Tribal Assistance Grant (STAG) appropriations. Under 42 U.S.C. 300j-12(a)(1)(D) and (h), as implemented in 40 CFR 35.3515, EPA requires that states conduct needs surveys every four years to determine funding allocations for the Drinking Water SRF program. Population data derived from the census is typically a component of these surveys.

Clean Air Act (CAA) Section 105 Grants[12]

Under 42 U.S.C. 7405(b)(1), as implemented at 40 CFR 35.143(a), EPA must consider population when developing the allocation formula for CAA 105 grants. CAA 105 grants are granted to states and local air pollution control agencies for air pollution planning and control programs and are funded through annual STAG appropriations.

Clean Water Act (CWA) Section 106 Grants[13]

EPA provides grants to states for water pollution prevention programs authorized by Section 106 of the CWA and funded through annual STAG appropriations. Under 33 U.S.C. 1256(b) EPA must promulgate regulations establishing the CWA 106 funding allocation formula based on the extent of each State's water pollution problem. Population of urbanized areas is one of the factors EPA considers when allocating for CWA 106 funding as indicated in 40 CFR 35.162.

Safe Drinking Water Act (SDWA) Section 1443 Grants[14]

EPA provides grants to states for public water system supervision programs under Section 1443 of the SDWA funded through annual STAG appropriations. Under 42 U.S.C. 300j-2(a)(4) as implemented at 40 CFR 35.172(a), EPA must consider population when developing the allocation formula for SDWA 1443 grants.

Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) Section 23 Grants[15]

EPA provides grants to states for pesticide enforcement under Section 23 of FIFRA, 7 U.S.C. 136u, funded through annual STAG appropriations. EPA regulations at 40 CFR 35.232 require that the Agency consider state population in allocating FIFRA 23 pesticide enforcement funds.

Comprehensive Environmental Response Compensation and Liability Act (CERCLA) Section 104(k) Grants[16]

Brownfields grants authorized by Section 104(k) of CERCLA. Under 42 U.S.C. 9604(k)(6)(C), Congressionally specified ranking factors for Brownfields grant competitions require that EPA consider:

> (vi)The extent to which a grant would meet the needs of a community that has an inability to draw on other sources of

[12] 42 U.S.C. 7405(b)(1)
[13] 33 U.S.C. 1256(b)
[14] 42 U.S.C. 300j-2(a)(4)
[15] 7 U.S.C. 136u
[16] 42 U.S.C. 9604(k)(6)(C)

> funding for environmental remediation and subsequent redevelopment of the area in which a brownfield site is located because of the small population or low income of the community.
> . . .
>
> (viii)The extent to which a grant will further the fair distribution of funding between urban and nonurban areas.
> . . .
>
> (x)The extent to which a grant would address or facilitate the identification and reduction of threats to the health or welfare of children, pregnant women, minority or low-income communities, or other sensitive populations.

Brownfields Notices of Funding Opportunity[17] require that applicants provide overall population as well as census tract level data when addressing these factors.

Citizenship status is irrelevant when using population data from the census in determining the extent and effect of pollution on an area for the purposes of allocating funds for State continuing environmental program grants. Further, excluding race from census data collection will inhibit EPA's ability to comply with Congressional direction to consider whether a proposed Brownfields grant would identify and reduce threats to the health or welfare of the aforementioned "minority or low-income communities." While EPN has not conducted research into the impacts of the above described ideologically-driven efforts to hobble the use of census data to allocate funding for grant programs administered by agencies other than EPA, similar concerns undoubtedly apply to these programs as well. Detailed demographic data helps agencies and organizations to direct not only funding, but other services, mitigation measures, and outreach efforts to communities with the greatest needs so that no community is left behind.

More broadly, the ill-conceived abandonment of data collection directly undermines EPA program performance in every area where it is important to understand patterns of environmental and human health risk—including cumulative and disparate impacts. Decades of federal environmental policy on measuring and naming environmental injustices can be formally erased by an executive order rescinding previous executive orders. But such arbitrary action cannot erase the extensive body of scientific evidence and lived experience proving the simple, factual reality of disparate and cumulative environmental health impacts. This proposal would obscure important evidence, only undermining EPA's capacity to protect human health based on sound science and the rule of law (whether or not "environmental justice" is a matter of federal policy).

Having as much demographic data as possible, especially where it is longitudinal and available at a high level of geographic resolution, is important for identifying and addressing disproportionate and cumulative impacts because it helps reveal whether specific populations experience higher levels of environmental, health, economic, or social impacts than others. Without geospatial analysis of this data, significant inequities may remain hidden within overall population averages.

[17] See Office of Brownfields and Land Revitalization FY27 Brownfields Job Training Grants. Available at https://acrobat.adobe.com/id/urn:aaid:sc:US:42a0ba48-8b9f-490b-99e6-491e66aef77c.

Communities often face multiple overlapping stressors, such as pollution, poverty, limited healthcare access, housing insecurity, or climate risks. Demographic information helps EPA, alongside other policymakers and researchers, understand how these determinants of health combine and compound one another for particular populations, and guide solutions in the most efficient ways possible. Lacking comprehensive and nationally-consistent socio-demographic data will erode the base of evidence upon which good policies are built, not only at the federal level, but where state, Tribal, and local governments have relied on this data for decades. Decisions made in the absence of such basic and fundamental information run the risk of being ill-conceived, indefensible, and wasteful. Decision-makers need reliable data to assess potential impacts of projects, policies, and regulations. Demographic information helps EPA programs evaluate whether a proposed action could disproportionately burden certain populations.

C. EPN Recommendations

The Census Bureau's proposal is deeply flawed, ideologically-driven, and illegal. Aside from the clear legal flaws of the proposal, it also deeply limits EPA's ability to gather high quality data necessary to fulfill its mission of protecting human health and the environment. The proposal would further affect the ability of other federal administrative agencies to achieve their missions. As a result, EPN urges the Census Bureau to withdraw the proposal.

EPN also would like to elevate the recommendations and comments to the U.S. Census Bureau from the Independent Census Scientific Advisory Committee,[18] which encourage the Census Bureau to, among other things, refrain from making revisions to census data collection that exclude individuals who are not U.S. citizens or permanent residents and demographic characteristics such as race to avoid conflicts with existing Constitutional and statutory requirements.

[18] Recommendations and Comments to the US Census Bureau from the Independent Census Scientific Advisory Committee (I-CSAC) Fall 2026 Meeting. September 17, 2026. Available at https://static1.squarespace.com/static/6890d038372a532ebb7b32a2/t/6aad61c5ce838b0c5eb1da85/1789747653646/ICSAC+Fall+2026+Recommendations+to+the+Census+Bureau.pdf