



TEXAS A&M UNIVERSITY

School of Law

## TAMU Law Answers Webinars

### LATINX CIVIL RIGHTS Webinar Series

# “WHO COUNTS?: THE CENSUS, REAPPORTIONMENT, & REDISTRICTING IN THE LATINX COMMUNITY”

Presented September 15, 2020

#### Panelists:

- Thomas A. Saenz, President and General Counsel, MALDEF
- Terry Ao Minnis, Senior Director of Census and Voting Programs, Asian Americans Advancing Justice
- Moderator: Leticia Saucedo, Martin Luther King Jr. Professor of Law, UC Davis School of Law

*While the panelists are attorneys, they will be discussing the law generally, and nothing in the webinar should be considered as legal advice. Attendees should consult their own legal advisor to address their own unique circumstances.*

TRANSCRIPT of webinar video [<https://youtu.be/wois43vIVv8>]:

- OK. Welcome, everyone. Today's Latinx Civil Rights webinar series topic is "Who counts? The census reapportionment and redistricting in the Latinx community." My name Leticia Saucedo. I'm a professor of law at UC Davis School of Law.

I am working with the Network for Justice, which is an outgrowth of the American Bar Foundation's Future of Latinos project. And its aim is to bring together the various parts of the legal community and the legal profession, from law students to private and public defenders-- I mean practitioners to law schools to work on issues most important to Latino communities. We work on issues including education, economic opportunity, immigration, and voting rights. And today's webinar brings together two eminent attorneys working on census and voting rights litigation today. I am going to wait a couple more seconds to see if other folks join us before I introduce them.

So we have Thomas Saenz, who is the president and general counsel of the Mexican-American Legal Defense and Educational Fund. He leads the organization in pursuing litigation, policy, advocacy, and community education to promote the civil rights of all Latinos living in the United States in the areas of education, employment, immigrants' rights, and voting rights.

Mr. Saenz rejoined MALDEF in August of 2009 after four years on Los Angeles mayor Antonio Villaraigosa's executive team. He previously spent 12 years at MALDEF practicing civil rights law, including four years as litigation director. He served as lead counsel for MALDEF in numerous cases, including challenges to California's Proposition 187, California Proposition 227, and California congressional redistricting.

In 2016, Science argued before the U.S. Supreme Court in the *United States v. Texas* representing interveners defending the Obama administration's deferred action initiatives. Mr. Saenz graduated from Yale College and Yale Law School. He clerked for two federal judges before initially joining MALDEF in 1993.

And then we also have with us Terry Ao Minnis, who is the senior director of census and voting programs for Asian Americans Advancing Justice. Mrs. Minnis was part of the litigation team in *LUPE v. Ross* that challenged the administration's attempted addition of a citizenship question to the 2020 decennial census. That team, including Mrs. Minnis, went back to court in *LUPE v. Ross II* to challenge the administration's plan to collect and provide incomplete citizenship data to the states for purposes of redistricting, the subsequent presidential memo seeking to exclude undocumented immigrants from the constitutionally mandated apportionment, and the Census Bureau's announced plan to end the counting of nonresponsive individuals a month earlier than scheduled as an unconstitutional and racially discriminatory scheme intended to deprive Latinos, Asian-Americans, and non-citizens of equal protection.

Mrs. Minnis' experience on the census spans two decades, having served as a leading authority on census campaigns in 2010 and in 2020. She currently co-chairs the leadership conference on Civil and Human Rights Census Task Force. She's a widely respected authority on voting rights as well. She was one of the key leaders in the campaigns to reauthorize the Voting Rights Act in 2006 as well as to address the Supreme Court's decision in *Shelby County v. Holder*.

She's published several articles and book chapters and has been counsel on numerous amicus briefs filed before the Supreme Court on voting rights cases, including *Shelby County v. Holder*. Appointed to the American Bar Association's standing committee on elections in 2020, Mrs. Minnis was named one of the four living 2020 National Women's History Alliance honorees. She's one of NOW'S 100 Sisters of Suffrage as part of their celebration of the centennial anniversary of the passage of the 19th Amendment. Mrs. Minnis received her JD from American University Washington College of Law and her bachelor's degree in economics at the University of Chicago.

Welcome to both of you. We have lots to talk about today. And so I'm going to take the moderator's privilege and ask a few questions before I hand it over to our audience for questions. Audience, if you do have questions as our speakers are doing their presentations, I welcome you

to add your questions to the chat. And we will ask questions from the chat at the end of our discussion.

You can also use your Raise Hand function when we get to the Q&A section. OK. So let's get started. Tom and Terry, tell us about your organizations and why voting rights and census issues are important to your constituencies. Tom, do you want to start?

- Sure. Although I have to tell you, I'm feeling a little intimidated by my colleague's introduction [INAUDIBLE].

- I'm sorry. I did your shorter introduction and her long one. Sorry.

- As all of you are by the many accolades and recognition, qualifications that she has. But we both work on census and voting rights because it's so important to our communities. For MALDEF, the Latino community's experience since the 1980 census has been that each census creates new opportunities to create districts, congressional and state legislative, and at the local level on city councils and school boards, but opportunities to create districts that will allow the Latino community to elect a candidate of choice.

Now that's critically important, because we continue to see across the country racially polarized voting where the Latino community has different views expressed by voting than then non-Latino community, usually the white majority. That means you have to create districts that create an opportunity for the Latino community to elect candidates of choice. And that follows every census. When every census shows continued growth and dispersion of the Latino community across the United States, it creates new opportunities in that way.

Now the reason voting has been important to MALDEF from its very founding in 1968, some 52 years ago, is because voting is so foundational to every other issue of concern to communities like the Latino community. With the right to vote, you can have representation and views heard in the corridors of policymaking from Washington, DC around the country. And that means an ability to influence policies, whatever the area of concern, whether that's education or employment, or economic opportunity, or housing, or transportation, you name it. Ensuring that folks have the right to vote, and that that right to vote is respected, and that their votes count means that we can ensure that laws in the future are shaped to really respect and attend to the specific needs of the Latino community.

So this is a particularly important year, this year of census collection. But also it is the year right before every state and every locality will do their redistricting, their redrawing of the lines used for Congress legislature and local bodies. So this is really the most important time of the decade because of the census and because of redistricting. And that means voting rights also at a premium, not just because of the importance of the November election in this particular year, but because this is a year that may shape our politics for the next decade.

- Great. And we'll get into a lot of those issues throughout the hour. Terry?

- Thank you, first of all. Thank you for inviting me to be a part of this. I am certainly honored to be on this stage, if you will, with you all today. And I just wanted to provide a little information about my organization, as folks may be less familiar with [Asian Americans Advancing Justice](#), AAJC. We were founded in 1991. We are a 501(c)(3) located in Washington, DC. And our mission is to advance and protect the human and civil rights of Asian-Americans and to build a fair and equitable society for all.

I am going to piggyback on everything that Tom said about why census and voting are important for our community. But I did also want to flag a couple of additional issues for Asian-American. And that is really the reason why we have a permanent census program, because census data feeds into apportionment redistricting, as we will be talking about in a little bit, but also to funding formulas that dictates how \$1.5 trillion are allocated from the federal government to states on an annual basis.

Of course, census data also is the bedrock or the basis for a lot of policy and planning decisions that are made. And for Asian-Americans, the census really represents the only national comprehensive set of data we have, just aggregated across our different subgroups.

We know that there is a persistent stereotype about Asian-Americans that we are monolithic, that we're all the same, that we experience no problems or issues. We don't face any discrimination, et cetera, et cetera. And it's really important that we have access to data that shows how our community fares in this country, because we know that, across different subgroups, we are very diverse.

We have so many different cultures, so many different communities, so many different languages. And we have so many different experience, a lot of it driven by a lot of the racist immigration policies of this country of how our different communities were actually able to come and immigrate to this country. So for those reasons, census data, and the census program, and how a census is taken has been very critical to the mission of Advancing Justice, AAJC.

On the voting side, for exactly all the reasons that Tom had mentioned, we work hard to ensure that our community members are able to vote. I would note that there is a consistent and continued gap that we see in voter participation between eligible Asian-Americans as compared to white voters. The gap is about 15% to 20% every election for both voter registration and voter turnout. And so a lot of our work is focused on breaking down barriers.

We of course have a large interest in language access for our community members as a highly immigrant population. And where we have three out of four Asian-Americans who speak a language other than English at home, we know that language is a big barrier and contributes to that continuing gap in voter participation. So we definitely focus our voting work on fighting back against voting discrimination, breaking down barriers, improving processes, but as also Tom mentioned, and particularly in the upcoming year, this being of particular importance redistricting and making sure our community is able to have its voice heard.

- Excellent. Excellent. Lots of great work going on here. So let's start to dig in. I'm going to cue a couple of polls just because I want to start making it a little bit interactive for our audience. If

you can launch the polls, Kirsten, we just want to know who you are and where you're from to give our speakers a little bit of a sense of who's in the audience. So we'll just give you a couple of seconds to fill out your polls.

And I'll ask the first question as we do this. And then after the first question, we can get a sense of who our audience is. So starting with the census, it's quite politicized, it seems. So I want you to describe the politicization of the census collection process, both its truncation at the collection stage and what we think is going to happen at the post collection stage.

- Well, first, I think it's important to note that the census is a constitutional requirement. Our constitution actually requires an actual enumeration of the population every 10 years. So this is a process that we are constitutionally obligated to engage in. Beyond that, because the very first use of the census data is to reapportion, to redistribute the 435 seats in the House of Representatives, and the very next use of census data is to redraw our political district lines, you can imagine that there's always a political element to the conduct of the census. It really does make a difference for what kind of representation people receive for the succeeding decade.

So the census has always been political. But what we really have seen with this census is a complete change in that politicization to an extreme degree where virtually every aspect of census collection, the data that's being collected, how it's collected, how it's been put together and distributed to the public for use first in reapportionment, and then redistricting, and then after that for purposes of funding and the other reasons that we conduct the census.

But we have seen with this administration, as in so many other ways, a complete violation of political norms that previously would have limited the extent to which political decision making drives what the Census Bureau, a professional bureau that is run and staffed by folks who are committed to the science of conducting as accurate a census as possible, but really taking every decision made in the bureau and subjecting it to a political lens.

The latest manifestation of that is what you mentioned, Leticia. And that is the decision after the Census Bureau's professionals had told all of us that because of the pandemic and the inability to get out into the communities with enumerators on the usual timeline, they needed to delay the collection of data and allow the collection of household census forms to continue through the end of October and then to extend the period after the data is collected to put it all together, to double check its accuracy, to supplement where it needed to be supplement.

The data of putting together all of that, the time of putting all that together also needed to be extended according to the Census Bureau professionals. But most recently, we have seen the Trump administration change that decision and very late decide to cut a month off of that period of collecting data, to end it at the end of this month, September 30th, and also to rush the post-enumeration processes to supplement, to ensure accuracy, quality control, and to compile all the data.

That truncation and rush to produce the data is almost certainly going to result in disparate impacts. It's going to affect mostly the hardest to count communities. And that includes the Latino community, the immigrant community, low socioeconomic status communities, often

rural communities, other minority communities. These are the communities that will be most harmed by this latest politically driven decision to truncate the census effort.

- Terry, do you want to add anything?

- Sure. And I think Tom is definitely right with the recent and increasing politicization and monkeying around, as I like to call it, by this administration in the census. But I do want to flag that this, to a certain extent, had started even years ago.

One area in which the administration sort of came in and politicized the process that had been well underway throughout the decade was around the OMB efforts to revise their standards around the collection and reporting of racial and ethnic data. And this was really to help support an effort by the Census Bureau that started actually in 2010 to modernize the way they ask about race and ethnicity on the census form.

As I mentioned, throughout the decade, we had all been working together to try to inform the bureau on its efforts to modernize. And we're moving in a direction that seemed to be both exciting, modern, and really speaking to the times and the way people really view race and ethnicity. So a couple of new innovations that the bureau was looking at was to actually no longer have two separate race and ethnicity questions but rather to have one combined question that just asked people what their race and ethnicity was.

And then it would have allowed a response option that would have included the current racial groups as well as adding Latino as an option within that combined question. And it actually would have also added a Middle Eastern North African response option, as currently under OMB guidelines, people who are Middle Eastern North African are supposed to check the white box for race. And we just know that people don't necessarily resonate with the way these categories were defined many decades ago.

And so that was an area where OMB was moving forward. The Census Bureau was moving forward. And all of a sudden, it just sort of stopped in its tracks. And all work ended. And there was no movement. And therefore the Census Bureau wasn't able to make that change. Now that was sort of a soft, I guess, touch by the administration.

But the next bigger touch, if you will, was actually around the efforts to add a citizenship question to the decennial census form. And with that, there was a lot of litigation around that. And we were successful in getting that removed. But unfortunately, the fight didn't end there. And we know that-- and we'll talk about that a little bit more later on.

But I did want to flag-- the only other thing I wanted to flag was this administration actually created three new positions, political positions, at the last minute at the Census Bureau. We have three new political appointees, including a new deputy director for policy and a new deputy director for data. This all happened this year. We're talking in 2020 all of a sudden we have two new deputy directors whereas before there was only one.

And so having political appointees with big responsibilities at the deputy director level at the bureau, which by the way has always been a career position, is unprecedented and is raising serious concerns among stakeholders. Additionally, the fact that the people that they appointed to these positions are not people that really have the background or expertise for leading these positions or working necessarily with census or with statistics overall. And so that's another way in which we've seen this administration really politicize something that has historically been a very nonpartisan bipartisan effort in this country.

- So have you seen anything that's come out of these deputy directors yet? Do we have any sense of why they're there?

- I would say we only have rumors at this point. It's quite clear that when you take folks who are not qualified and are not career folks, as Terry described, and put them in those positions, they're clearly designed to engage in mischief. How that mischief plays out, we may not know until much later in the process, because so much of what the Census Bureau is doing today is about its tactics in completing the count, whether that's at the end of September or, if litigation including the litigation that our two organizations are engaged in to prevent that truncation of the collection effort, the end of October if we succeed.

But all of that as well as decisions about how to process the data that's been received from the households, whether or to depart from what's been done in the past, whether to depart from what the bureau has already indicated publicly it will engage in-- we've seen that with this administration-- is really when we're going to see indications of the mischief that these positions might attempt to create.

- So let's talk about a little bit about the substance of the data. Right. How are privacy obligations affecting the Census Bureau's approach to the count this year? Terry?

- So I will start with just this idea that the census responses and census data are confidential and protected by law, strongest protections in law, in fact, title 13. And this has driven the Census Bureau to take steps over the decades to ensure that the responses they receive are protected from being able to identify people. Right.

And so in previous censuses, this might include-- let's say you have a block and there is only one Asian family. And I'm the only Asian person there or my family is the only Asian family. So if you had a response that was clearly indicated that that this is the response from the Asian household in that block, that would make it very clear who the respondent was. And so in previous censuses, one tactic they might have taken was to swap me and my family out of that block and replace it and put me somewhere else so that I'm still counted but that it's a little bit less clear that this response is mine.

So what the bureau has found is that over the decades, and certainly over the last decade, we've seen an increased advancement in computing technology, in the powers that computers can run algorithms and processes. And we've also seen an increase in the availability of third party data. And so when you combine those two things, it has raised questions within the bureau about how

well they're able to protect data and a belief by the bureau that the processes that they had used previously would not suffice to keep people's data protected at the same level.

So the bureau has been looking at a new way to approach keeping data protected. This is through what they call their disclosure avoidance system. And one of the major features of this would be utilizing a mathematical process called differential privacy. And I'm really getting out of my depth right now. But I'll be able to give a very high level discussion, because this is mathematically based. And the idea is to inject noise into the data somehow, so sort of making it fuzzy, if you will, but doing it across the board across all the data so that data are protected but you can also say with precision what that impact would be.

Now I will note that there are a lot of questions, a lot of concerns about this new approach. Part of it, I think, has been the engagement of the public and of interest to stakeholders. So it's not the best. You know, I believe the bureau tried. But I think there were different ways that it could have been approached that I think would have been a little more fruitful.

And so now we find ourselves coming towards the end, coming to a time where we need to produce data and still a lot of questions and concerns around this idea of differential privacy and how the Census Bureau is going to make sure their disclosure avoidance system works and works well, not just to keep confidential the data but also to ensure that the data they do produce are actually usable by community groups and for purposes like redistricting.

And right before I pass it to Tom, I just wanted to flag we also know that one of the impacts of the truncation that Tom discussed was that staff that were supposed to be working on a bunch of different aspects of the census count, most of them have been pulled off of their other tasks to try to get the census count done or the apportionment numbers done by the end of the year. And that is definitely wrecking havoc across the board.

- Great work. Tom.

- So let me just highlight what you're hearing about now is the next big issue for the census. And it has not received the level of publicity, or consideration, or policy discussion of the other aspects of the census that we have discussed. And this is going to become a major issue.

So let me reiterate what we're talking about here. You start from the premise that confidentiality is always a major concern for those who are filling out their census form. That was particularly heightened, I would say, in this particular census for a couple of reasons. It starts with this is our first digital census where the vast majority of households never received a paper questionnaire. Instead, they received a letter or a postcard. And it directed them to go online and to fill out the form there, whether through a smartphone, or to a desktop, or through a tablet computer, or to get on the phone and to fill out the form, if you will, by talking to someone at the bureau to put the information into the computer for you.

So we had a digital census at the same time that we experienced cybersecurity threats from our elections to consumer matters on an almost weekly basis. And so there were always going to be



heightened concerns. You add to that the citizenship question that Terry talked about, the attempt by this administration to add at the very last minute without testing it -- a citizenship question.

We now know, from evidence amassed in the lawsuit that MALDEF and AAJC together pursued against the citizenship question, we now know that the sole purpose of adding that question was to deter participation by the Latino community and the Asian-American communities-- deter it by raising fears that there would be data about citizenship available to be misused in violation of those confidentiality protections by this administration against the folks who fill out the census forms. So you had that fear and threat as well.

So in the background of all of that, the Census Bureau decided that it had to change its disclosure avoidance system, or DAS, as Terry has described it. And that means, as Terry has explained, that they will not swap data anymore. Instead, they will introduce noise. And to be clear, introducing noise means that the census bureau intends to introduce false data to its set of data before it releases the data set.

Now it will not do this with respect to the apportionment count, which is the first data to be revealed by the Census Bureau. And that's how we assign the 435 seats in the House of Representatives. That will not have noise introduced to it. But everything else, including the [PL94-171](#) data, which is released in 2021, and that's the data that's used to redraw our district lines for Congress, for state legislatures, for local bodies, that data and every other data release will be affected by this introduction of false data or noise.

Now all of this is being done, as you've heard, because the bureau believes that it is obligated by the protections, the statutory protections on confidentiality of census data, to inject false data in order to predict household data from being extrapolated through use of the census data set coupled with third party commercial data sets.

I want to reiterate that. This is not about the Census Bureau or anybody associated with the Census Bureau actually releasing, advertently or inadvertently, household forms. That's not what we're talking about. Nobody's violating confidentiality in that way. Nobody is turning data over to another body like DHS, or the Department of Justice, or the IRS. That's not what we're talking about.

We're talking about the Census Bureau concluding that you could, with available tools, extrapolate specific data about a household based on taking census data sets and overlaying available commercial third party data sets, because, as we all know, we now provide so much data to third parties, they can create their own data sets. And so the bureau has concluded it has to introduce this false data or noise. The problem is false data creates problems of its own. So from the perspective of voting rights lawyers, our biggest concern is that false data does mean that, particularly at a local level, we could see districts that could be drawn as majority minority no longer appear to be majority minority.

So we could see a district in the city of Los Angeles that we think could be a majority Latino district, but, because of the introduction of false data, no longer appears to be a majority Latino district. It moves from being majority Latino to being heavily minority Latino. And that has

implications for what you can do in the redistricting process. So it is this battle between accuracy of data and protection of household data from being extrapolated by third parties.

This, I would be willing to bet a significant amount of money, will end up in court, because whether the statute protecting confidentiality requires the introduction of false data is an open question. The bureau has reached that conclusion, but it's an open question that has not been resolved by either Congress, which could resolve the issue, or by the court system. So if Congress doesn't weigh in on differential privacy, you can bet that those who value the accuracy of data more highly than the bureau does as it performs this balance between accuracy and confidentiality, they will take the issue to court.

And of course, overriding all of this, as I said, is this constitutional imperative that, for at least certain purposes, we engage in enumeration of the population. That constitutional imperative overrides even the statute protecting confidentiality. That's why the bureau will not introduce any noise in the count that's used for apportionment, because, constitutionally, it would not be permitted. But there are issues short of that where noise or false data is introduced for redistricting, for the distribution of federal funding. And those issues, I guarantee you, will end up in court.

- So let me ask a clarifying question. Is that a done deal? Has the Census Bureau decided that this is the way that they're going to address the numbers that come out for redistricting or is that something that's still, I don't know, up in the air, subject to change?

- So the bureau itself has decided that this is their new disclosure avoidance system. That is differential privacy, which involves the introduction of noise. What they have not yet decided is how that noise or false data is to be distributed among the bureau's data sets.

So they're currently going through a process. First of all, determining what will be invariant, what will not change beyond the statewide population, total population numbers for purposes of apportionment. That they've already concluded for constitutional reasons must be invariant. But they have various other data points that they will make invariant. They will not introduce false data.

And then how they introduce false data among the other data sets is what they are going through a process with public input, perhaps insufficient as Terry has correctly indicated. But with public input they're trying to determine what are the most important uses of census data and how should we then allocate a privacy loss budget. Distribute that privacy loss budget means you get more accuracy in certain data sets.

How do we distribute that privacy rights budget among the various data sets which then implicate the uses and the importance of the uses of census data? So it's still very much something in progress. But the overall decision to use this new disclosure avoidance system has been made by the bureau. That can be overridden, obviously, by the courts but also by Congress.

- OK. Good. So let's move on to apportionment. How is all this related to apportionment then? Terry?

- So I think I'll take one piece of that, which is sort of around the politicization concerns around the apportionment count. And I will leave for Tom to talk about the litigation around apportionment. And of course, Tom already laid out what it is, why it is, why the census is taken for all of that. But I will note that there have been concerns, I think, for a while that perhaps this administration may not follow the precedent that has been set over the decades about how the apportionment process occurs. Right.

And so historically, the Census Bureau would produce the numbers and transmit. And so I will just note these couple of data points. One, since 1950, the public announcement of the apportionment numbers has always occurred on the same day as the transmittal of the numbers to the president. Right. So it goes Census Bureau and the Commerce Department to the president. And then the president will have to turn that over to Congress.

And so since 1950, as I just mentioned, the public announcement of the apportionment numbers occurs on the same day as it's being transmitted from Commerce to the president. And this announcement over the last 50 years has taken place in a press briefing, has been very public, and fully transparent, if it were. In recent history, the White House has transmitted the numbers from Commerce to Congress within a day of receiving it. Oh, I'm sorry, within a day of Congress reconvening.

And then in the last nine decades, the apportionment process has been overseen by four Republicans and five Democratic administrations. And all have announced the numbers to the public. And all have met the statutory deadlines for transmitting the data to the president and then to Congress. And part of this is to set up this idea of understanding what is supposed to take place so that if things don't fall within those parameters, then we would know that something was amiss and could potentially do further investigation into that.

Now I think a lot of that work happened earlier prior to the introduction of the presidential memo, and I think that sort of laid bare what everyone was sort of concerned about or thinking about. But I think also still important for us to keep an eye on how these things and how the processes should work, not just because of keeping-- really to keep accountable all the different actors and players and to also understand where mitigating actions may lie. And with that, Tom, I'll--

- So clarify for our audience really quickly what do you mean by the presidential memo. Tom, do you want to-- or Tom--

- Yeah.

- So the presidential memo is a memo that Donald Trump released several weeks ago [<https://www.whitehouse.gov/presidential-actions/memorandum-excluding-illegal-aliens-apportionment-base-following-2020-census/>] that basically directed the Census Bureau to provide him with apportionment numbers, then back out or subtract an estimate of the undocumented population of each state, essentially asking that the undocumented population be discounted entirely in determining how we redistribute the seats in the 435 seats in the House of Representatives.

To understand this issue, I want to go back in history. So the apportionment clause, which appears next to the enumeration clause, the clause that requires us to take the census every 10 years, the apportionment clause is the locus in our constitution of one of the most racist abominations of our initial constitution when adopted in 1781. And that is the inclusion of the three-fifths rule.

The three-fifths rule decided that African-American slaves would not-- though they would be counted in the census, when making the determination of how to redistribute the seats in the House of Representatives, that they would only count each as 3/5ths of a person. Now that abomination, the three-fifths clause, was removed by the 14th Amendment after the Civil War. So in many ways, the Civil War was about removing-- not only ending slavery but removing that abomination that treated African-American slaves as less than a full person.

So you have to take, I think, Donald Trump's memorandum in the context of that history as a tremendous step backwards, or an attempt to step backwards. His memo would treat undocumented immigrants, though residing in the United States, as zero-fifths of a person. Takes us back to that abomination, seeking to treat people as not people in this country. And that is the major constitutional objection that's being played out in court.

Now as I indicated, you'd have to go back to, like I said, 1781. That was, of course, a mistake. 1788 when the Constitution was adopted, to have that kind of an abominable treatment of a person. But effectively, what the Trump administration and others, as I'll explain, they contend that, in fact, under our constitution, you are not a person if you are not here in lawful immigration status. And that is what is behind the Trump memo. And it's what's behind litigation that was actually filed in 2018 by the State of Alabama and one of Alabama's Congress members, Mo Brooks.

And in that 2018 case, filed then, still pending today, the State of Alabama argues that not only does the Trump administration have an option, but that it's legally obligated, constitutionally obligated to subtract the undocumented population before sending the apportionment data to the House of Representatives. Again, that really is based on the theory that if you're undocumented, you're not a person for purposes of our constitution.

That's despite precedent including, the very, well hopefully, increasingly well-known precedent in *Plyler v. Doe*, a 1982 decision dealing with undocumented students where the Supreme Court concluded that, in fact, undocumented immigrants are persons for purposes of the 14th Amendment. And remember, that's where the current apportionment clause lies. Because it amended the three-fifths rule out, the current apportionment clause in our constitution is in the 14th Amendment where the Supreme Court long ago, in 1982, decided that whether or not you are undocumented, you are still a person for purposes of the 14th Amendment.

That Alabama litigation was being defended by the Trump administration. Now MALDEF and others didn't trust the Trump administration to put up a vigorous defense against Alabama's contention, that distrust now borne out by Trump's own memo several weeks ago, so we intervened. But MALDEF, also anticipating that the Trump administration might on its own attempt to voluntarily do this, as it did with this memo, we filed a cross claim. And that cross

claim is still pending against the federal government. [see <https://www.maldef.org/2020/08/a-timeline-of-alabamas-attempt-to-leave-undocumented-immigrants-out-of-the-census/>]

And it alleges that you are not permitted by the Constitution to treat undocumented immigrants as anything other than a person for purposes of reapportionment for 435 seats in the House of Representatives. Now the memo itself has occasioned other litigation, including litigation brought by MALDEF and the AAJC, but other litigation around the country challenging the attempt to discount undocumented immigrants to zero-fifths of a person for purposes of congressional reapportionment.

- I feel assault on all fronts. How do you keep up? There is one last area that I do want to touch on before we let you go and that is redistricting. And so we've talked about the census and what's going on with the census. We've talked about apportionment. And now I want you to address redistricting for a bit. How is it affected by the Trump administration's various directives and by activity that you are working on at the state level? Tom, why don't you start?

- So that citizenship question that the administration attempted to add, in an effort to reduce the count of Latino and Asian-American populations in this country, ultimately ended up in a loss for the Trump administration at the Supreme Court when, a year ago, the Supreme Court majority held that Commerce Secretary Wilbur Ross-- and ever since this occurred, I have vowed to refer to him as Lying Wilbur, and I do that because Wilbur Ross, according to a majority of the U.S. Supreme Court, lied to Congress and the public about the reason that he was adding the citizenship question. So Lying Wilbur still in our cabinet despite a majority of U.S. Supreme Court having concluded that he lied, and unlawfully, to the public and the Congress about this issue.

But after that loss, the Trump administration sought, initially through a presidential tweet, indicating that it would try to come up with another public reason for hiding the citizenship question to get it added once more to the 2020 census. Now ultimately, the president was convinced not to do that, I think primarily because his lawyers convinced him that he would face an embarrassment in the MALDEF AAJC suit that still had a pending racial intent claim ready to go to trial.

So he dropped his attempt to add a citizenship question. But he issued an executive order the very same day. And by that executive order [<https://www.whitehouse.gov/presidential-actions/executive-order-collecting-information-citizenship-status-connection-decennial-census/>], he directed the Census Bureau to use state and federal records to put together a database of U.S. citizens down to the block level across the country. The sole purpose of creating such a database, whether done through the census itself or by the Bureau through using administrative records as directed by the executive order, the sole reason to do that is to enable states or other jurisdictions that may want to do so to equalize their districts based on voter population rather than total population.

Now we have a constitutional imperative in the so-called one person, one vote mandate to equalize districts roughly equal when we redraw them. That's, in fact, why we redraw the districts, not just because you might have more congressional districts if you were a state that has

gained relatively more population, like Texas, or less congressional districts if you happen to lose a congressional seat. Then you'd have to redraw the lines.

But in addition, even if you keep the same number of congressional representatives, even if you, as you do generally, have the same number of legislative seats to draw, the one person, one vote mandate means you have to roughly equalize the population. So we redraw them when there's a new census. We have always redrawn those districts based on total population.

There was an effort by right wing forces over a number of years to attempt to get that changed by arguing that one person, one vote meant you had to equalize population between state legislative districts, for example, based on voter population, not total population.

Now that failed before the U.S. Supreme Court in a case called *Evenwel v. Abbott* in which the Supreme Court, big majority. It was actually unanimous. But six justices joined a very persuasive opinion by Justice Ginsburg that explained why we have traditionally used total population and should continue to use total population.

But the basis of the case meant that technically, the Supreme Court, despite that very persuasive six-justice opinion, had not actually ruled on whether a state or other jurisdiction couldn't voluntarily choose to use something other than total population to equalize districts. All the Supreme Court had decided was that you were not constitutionally mandated to use voter population. It was permissible to use total population to equalize districts.

So now we have the administration trying to create a data set that would allow some jurisdiction to test that question left open by the *Evenwel* case. Can you, are you permitted to equalize the size of districts based on voter population rather than total population?

That's what the executive order does. And that's why MALDEF and AAJC have since the executive order was issued been in litigation in Maryland federal court to attempt to prevent the creation of that citizen database and certainly to prevent it being sent to jurisdictions that might choose to use it to equalize their districts based on voter population rather than total population. And Terry can explain how this is becoming true in certain jurisdictions and what the impact is because voter population is not the same as citizen population.

- Thanks, Tom. Yeah, so we do know that there are efforts as Tom said to try to make this change in a way that would be harmful to our communities. We certainly know, for example, in Missouri that there is an effort, a ballot measure that would repeal something that the voters had voted in previously on a number of different issues but including redistricting criteria.

And what's interesting about this is that as often we see with ballot measures, the true intent may not be very clear or evident in how they write about it or how they present the information. But I think for folks in Missouri and for voting rights advocates and litigators across the country, it's clear that they are setting the stage to try to push as Tom said an effort to normalize-- I guess is one way to look at it-- the idea that you can redistrict or that you should redistrict on a basis other than total population.

And so I think that is certainly one area where we need to keep an eye on. There might be a couple of other states for this redistricting go-around. But I think what's clear is that this isn't an issue that's going to go away and that it's something that we will continue to need to work on. We do know that proponents of the idea of redistricting on a basis other than total population unfortunately are very well resourced.

And if they want, they can go and have a 50-state strategy. And they have the funding to be able to go into each 50 states to try to enact some type of change if not for this redistricting cycle but certainly for the next. And I think the question will be whether and how we'll be able to match that level of activity. And so that's something I think that we'll need to keep an eye out on.

A couple of other issues I think certainly for this redistricting cycle, and that flow from all the chaos that has occurred with the pandemic and with the monkeying around as I call it of the administration with truncating the schedule and all these flip-flopping on deadlines, is that there's just a lot of chaos and confusion for people-- for folks in the states and people who are trying to prepare for the next redistricting cycle as for those who have been involved in redistricting cycles.

When it happens, when you really do have to hit the ground running, it goes really fast. And for a lot of people, there's a lot of prep work, prep work that would be normally happening during this time right now.

Now with all of the craziness and chaos with changes due to the pandemic as well as these shifting deadlines, I think you see a lot of people who would otherwise be engaging in preparing for the redistricting cycle still doing get out the count work for the census, still doing census work that would have been done by the end of July had the original schedule prepandemic been followed.

We also have the introduction as Tom mentioned at the top of the hour of the presidential election, which is of course taking a lot of resources. And let's be clear. A lot of the groups who are working on the ground on these issues are the same groups. The groups doing the census get out the count work are the same groups that would be doing the voter engagement and get out the vote efforts are also a lot of the groups that would be doing the redistricting work.

And then on top of that, you also have them needing to address the very real emergency issues that are being raised not just by the pandemic but also by natural disasters that we're seeing now, whether it's the wildfires out west or the natural disasters and the hurricanes that we're seeing coming through. So I do want to flag that there's that aspect of it as well.

- Yes, you're absolutely right. We aren't able to get into things like vote denial and vote suppression, which are the very basic forms of voting rights. And I hope to be able to invite you back so that we can have a longer discussion about that. But I promised to open this up for questions and answers. So if anyone has a question out there, please put it into the Q&A.

There is one there now that I want to ask you. And it's a more general question for the benefit of those in the audience who are emerging lawyers and for folks who are interested in helping out.

The past four years present so many legal battles on so many fronts. How do organizations like MALDEF and AAJ manage these multiple legal battles? And what can lawyers and law students do to help?

- Well, I certainly think, first of all, we have had to stretch our resources. We have had to work to be more efficient. I'll mention one aspect of that is since the *Shelby County* decision, we have put together a consortium with the help of funders of 12 of the leading voting rights-litigating nonprofit organizations in the country. That includes both AAJC and MALDEF.

And these groups try to work together to be efficient about facing many voting rights challenges, including as you mentioned perhaps teasing for a future event but issues of vote denial and voter suppression.

- And I'm serious.

- But I'd be more efficient about allocating limited resources to tackle the many problems that will come up, that have come up as a result of the absence of preclearance, which we lost in the *Shelby County* decision.

Indeed, I think it's important to point out that this redistricting round in 2021 will be the first that we undertake without the protections of preclearance where a number of jurisdictions, including most notably for the Latino community, the entire state of Arizona and the entire state of Texas, were required to seek preapproval of their voting changes. And that included how they chose to redraw their districts at state and local level for both of those states and then some parts of other states with significant Latino populations.

So we have to make decisions to be efficient. We have to make decisions that are difficult about prioritizing resources. Part of efficiency is really taking advantage where we can of pro bono assistance from lawyers who are not directly engaged on a daily basis in the nonprofit work that we do and using law students where possible to help with some of the research. That's a part of being efficient as we tackle the many issues that we face.

But we do have to make tough choices about what becomes priority. I think one of the issues that will be priority obviously for all of us is stemming from what Terry accurately described as the beginning of what could be a 50-state campaign about getting districts drawn based on voter population rather than total population.

I do want to point out that the biggest effect of that is not really on discounting noncitizens. The biggest effect of equalizing districts based on total population-- based on voter population rather than total population is actually discounting those under 18. Now, that still has a discriminatory effect on younger communities like the Latino community, like the Asian-American community because we have more children under 18 in our communities.

So discounting them would also have a particularly pronounced effect on Latino and Asian-American communities just as discounting noncitizens has. And what it would mean is devastating losses of majority Latino districts. But I would add it would mean devastating losses



in majority African-American districts around the country. And that is because our communities, our communities of color, tend to live adjacent, if not together, than adjacent to one another.

And many African-American districts nationwide are populated out with Latino or Asian-American population groups. And that means that discounting noncitizens, discounting children could also devastate the numbers of majority African-American districts we have.

So this is an assault on the really voting rights and political influence of the entire community of people of color. So we have to prioritize that, but it is not easy. We're always looking for more resources of course and financial and fellowships held by recent law graduates that don't cost organizations money, but they nonetheless provide us with important help inside of our organizations to do this critical work.

- Excellent. Terry, anything you want to add?

- The only thing I would add is a little bit more on the idea of sort of immediately what folks can do would be to help out, whether that's help be the trusted messenger for friends and families with respect to getting out the message around we still have a little bit of time left to make sure that you were counted in the census. We have the election around the corner.

So even that, the low-hanging fruit of just making sure to help get out that message because that's going to mean more coming from you than, say, someone they don't know, a national figure or even celebrities. In all of the messaging research that's been done around the census, the very clear trusted messengers were friends, families, maybe teachers, maybe doctors. But it was very much about the close-knit community.

On top of that, I would also just note for the election, volunteer, whether you can serve as a poll worker, as we all know that there are poll workers shortages. And I know it's another webinar where we can talk about these issues. But just wanting to flag that there are these opportunities to help out or volunteer with organizations who are looking to protect the vote in this upcoming election and the like, and then, of course, everything that Tom said.

- Great. OK, there's a couple more census-related questions, and then there's a research question that I want to get to. So we understand that the redistricting is happening for congressional districts state and local. Based on this year's census numbers, is there a sense of when those numbers are released to the public? I think you mentioned that that's an issue that we are waiting to hear from the Trump administration about, I suppose.

And then can you talk about how much money is really at stake with federal funding allocations for the next decade coming out of the results of the census? Terry?

- I'll start with the first question, which is the [PL94-171](#) data, which is the data that's used for redistricting distributed to each of the states so that they can redraw their district lines ordinarily would be out by the end of April. But we saw initially that professionals at the census bureau asked for a delay because of the delay in the collection census data to the end of July of 2021.

What will actually happen I would say is still up in the air. And it's largely up in the air because, of course, what may occur, depending on the outcome of the election in November is that there will be a new administration in January 2021.

So when between the spring or the summer the [PL94](#), as it's shorthand referred to, data is distributed to states is something we really don't know yet, but we will know hopefully as soon as we can in early 2021. I'll let Terry answer the other question and add to my answer.

- I'm sorry. And the second part of that question was?

- What's the real money at stake? What's the money at stake in the funding allocations?

- Oh, OK. So I think clearly, an undercount will definitely impact the money. We know historically from census to census is that there is an ongoing differential undercount that communities of color are missed more often than the white community, which means that the resources that are allocated are skewed and that communities of color do not get their fair share of resources.

So we can only expect that with how this has all played out, the high levels of distrust of the federal government that we knew even going into the citizenship question before we got to this year was going to cause a real problem, we know that there's going to be an impact. What that impact will be I think is we don't know the extent to it. And of course, it'll differ from area to area. A lot of it's going to have to do with how well people responded.

But there are some resources out there. People are interested in trying to start getting a handle on this. [CUNY has a hard-to-count map](#) that has been tracking self-response rates. And it provides some information with how plurality tracks for different communities of color have been performing. So that's one way to start getting a gauge to try to figure out what the impact may be.

And I will just flag that there are opportunities, though very limited and narrow, to work within the census operations to try to correct some of these numbers for purposes of things like federal funding but not of course for apportionment or redistricting.

- OK, so there's one final question. Can you point us to any resources on racially-polarized voting when we think about redistricting? This person's interested in knowing how much Latinos vote for the same candidates. And of course, we know that that's an important issue as we think about redistricting and redrawing the district lines.

- OK, so racially-polarized voting, which is critical to your right under the Voting Rights Act to have majority-minority districts created, is done by experts who take the composition of the voting pool in particular precincts and cross that against the voter outcomes in those precincts to arrive at conclusions about how various communities vote on issues and candidates.

So there is unfortunately not a pool of RPV data that's readily available to the public. It has to be constructed through application of these established tools from the information about the

composition, the racial composition of the voter pool in particular precincts and then the outcomes of the vote in those particular precincts.

I will point out that some states make it easier to get the data by making that information about how particular precincts vote more readily available. There will be challenges in 2020 because some of the precincts that we've seen used in the past are being consolidated into super precincts because of the pandemic.

And so the available data at a relatively more detailed level precinct by precinct may be threatened for this particular election. But unfortunately, there is no pool of readily-created RPV data available in the country.

- Which is why we need to keep supporting experts like the two of you to continue to do the important work that you do. Thank you so much for enlightening us with this webinar and with all of the information. Keep up the amazing work that you're doing.

Thank you to the audience for being here and for staying with us through the length of the webinar. Please stay tuned for our [other webinars](#) that will be coming out throughout the rest of the fall. The next one is on "[Latinx economic opportunity in the age of COVID](#)" on September 29. Thanks again. And I appreciate everything that you've done for us.