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November 20, 2023

U.S. Census Bureau
4600 Silver Hill Road
Washington, DC 20233

**Re: Opposition to Proposed Rule on “American Community Survey SOGI Test”
Docket Number USBC-2023-0007
88 Federal Register 64404**

Director Robert L. Santos:

As a civil liberties organization committed to safeguarding the privacy and free speech rights of all citizens, The Rutherford Institute¹ strongly opposes the U.S. Census Bureau’s attempts through the American Community Survey to force individuals to disclose to the government some of the most intimate details about their lives and their sexuality.²

The makers of our Constitution...conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.³

The Census Bureau conducting such a broad warrantless search and using threats of punishment to compel people to answer the questions in the American Community Survey is a violation of both the First and Fourth Amendments to the U.S. Constitution. The Rutherford Institute therefore calls on the Census Bureau to respect people’s privacy and right to be left alone by the government, to not include the proposed additional questions asking about a person’s sexuality, and to cease requiring responses to the American Community Survey altogether.

¹ The Rutherford Institute is a nonprofit civil liberties organization which seeks to protect individuals’ constitutional rights and educate the public about threats to their freedoms.

² 88 Fed. Reg. 64404 (proposed Sept. 19, 2023); <https://www.federalregister.gov/documents/2023/09/19/2023-20256/agency-information-collection-activities-submission-to-the-office-of-management-and-budget-omb-for>.

³ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

The Rutheford Institute submits this letter in response to this notice for proposed rulemaking’s solicitation for comments to both “(a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department [of Commerce], including whether the information will have practical utility;...and (d) Minimize the reporting burden on those who are to respond....”⁴

General Background of the ACS and Data Collection

The American Community Survey (“ACS”) is *not* the decennial census conducted every ten years as authorized under Article I, Section II of the U.S. Constitution.⁵ Rather, the ACS is a highly invasive, “ongoing monthly survey” issued by the U.S. Census Bureau to collect “detailed housing and socioeconomic data” from about 3.5 million U.S. households each year.⁶ Survey recipients are asked to respond by internet, paper via mail, or “interviewer-administered modes via telephone and in-person.”⁷ There are so many questions on the ACS that it is estimated the average household will have to take 40 minutes to answer the questionnaire.⁸

The ACS demands recipients to provide the government with extensive and sensitive information about each and every person in the household, including their work schedules, their physical disabilities and limitations, the number of automobiles kept at the residence, and their access to phones and the internet.⁹ This information collected by the ACS is *not* anonymous—the questionnaire contains the name, age, sex, race, and home address of each person at the residence, along with the phone number of the person who fills out the form.¹⁰

Even though many people are incredibly uncomfortable providing such detailed private information, the Census Bureau tries to intimidate and bully them into responding to the ACS by implying a threat of penalty for not answering it. The Bureau is sure to make clear to recipients that “**Your response is required by law,**” as is written in bold on the first page of the ACS,¹¹ is stated on the Bureau’s website (“you are legally obligated to answer all the questions”),¹² and is often stated in other correspondence to survey recipients. The notice for proposed rulemaking also states the “Respondent’s Obligation” as being “Mandatory.”¹³

⁴ 88 Fed. Reg. at 64406.

⁵ <https://www.census.gov/programs-surveys/acs/about/acs-and-census.html>

⁶ 88 Fed. Reg. at 64405.

⁷ 88 Fed. Reg. at 64405.

⁸ 88 Fed. Reg. at 64406.

⁹ Form ACS-1(INFO)(2023) (05-16-2022); <https://www2.census.gov/programs-surveys/acs/methodology/questionnaires/2023/quest23.pdf>.

¹⁰ Id. at 1-7.

¹¹ Id. at 1.

¹² <https://www.census.gov/programs-surveys/acs/about/top-questions-about-the-survey.html>.

¹³ 88 Fed. Reg. at 64406.

When people do not respond online or by mail, the Census Bureau repeatedly sends field representatives to their homes at unannounced times to harass and interview them until they answer the survey.¹⁴ People have reported that field representatives have remained outside their houses for hours while waiting on them to arrive home or come out, have walked around their homes, and have talked to minor children when parents were away. One Bureau field representative left a written note at a recipient's residence, stating that the "Census Bureau sends refusals to DOJ [the Department of Justice] and you will be fined."¹⁵

The Census Bureau claims that responses are mandatory under 13 U.S.C. § 221, which states in relevant part: "Whoever...refuses or willfully neglects...to answer, to the best of his knowledge, any of the questions on any...survey...shall be fined not more than \$100. Whoever...willfully gives any answer that is false, shall be fined not more than \$500." Despite the maximum fine of \$100 stated in the statute, the Census Bureau has threatened people that they will be fined up to \$5,000 for not answering the ACS based on the Bureau's strained legal theory that "Title 18 U.S.C. Section 3571 and Section 3559...amends Title 13 U.S.C. Section 221."¹⁶

The data collected and amassed by the Census Bureau through the ACS is a goldmine for hackers, burglars, perverts, and other criminals who could use this information to determine the most vulnerable potential victims for their crimes (those with physical health problems, those without phone or internet service to call for help, etc.) and to determine when those potential victims are the most vulnerable (when no one is home or when everyone else in the household has left for work, knowing how many cars are otherwise usually at the residence, etc.).

The questions on the ACS are so overwhelming and invasive that numerous people have said they initially thought the survey was a phishing scam to steal their personal information and could not possibly be legitimate. Recipients of the ACS have expressed that they are highly stressed, conflicted, and anxious because they are law-abiding citizens who want to follow the law, but they are incredibly uncomfortable providing such detailed personal information and are being harassed by the Census Bureau with threats of punishment and repeated unannounced visits to their home by field representatives who are strangers that appear to be stalking them and trespassing on their private property.¹⁷

Some ACS recipients have reported extreme stress and trauma sharing this information and being visited by unknown field representatives because they have been victims of home assaults and break-ins, and they therefore strive to avoid strangers and to keep their information private for security and safety reasons. But when they express these concerns to the Census

¹⁴ See "American Community Survey Information Guide," ACS-331(C)(2017) at 7.

¹⁵ Written on Form 11-38A, "Request for Appointment."

¹⁶ <https://www.census.gov/programs-surveys/acs/about/top-questions-about-the-survey.html>.

¹⁷ Of additional concern is that any criminal could find a name from the Census Bureau Staff Search and pose as a field representative to prowl around houses and gather sensitive information from residents.

Bureau, they are met with a cold callousness and are told that they have to answer the ACS anyway. Other ACS recipients have expressed concerns that their tax dollars are being used to harass them and collect this personal information, and recipients who are veterans have expressed concerns that they have fought for freedom and now their own country is demanding they provide this sensitive information.

As of this year, the ACS asks, among other things, the following info of each person living at the residence: name, sex, date of birth, race, place of birth, citizenship, when the person came to live in the U.S., ancestry or ethnic origin, languages spoken, how well the person speaks English, previous address one year ago if different than current address, marital status (including when married and any change in status during the past year), if the person gave birth within the past year and is now 15 years of age or older, if the person is responsible for taking care of any grandchildren in the residence, if and when the person ever served on active duty in the military and if the person has any service-connected disability rating,¹⁸ if the person received Food Stamp Program, SNAP, or welfare benefits during the past year, education, health insurance coverage, and types and amounts of income over the past year.¹⁹ It further asks for the relationship of each person to the one who fills out the ACS, and for the phone number of the person filling out the form.²⁰

What is even more concerning, is that the ACS also asks the following about each person in the household: if they have any difficulties hearing, seeing, thinking, walking, dressing, bathing, doing errands; if the person worked for pay last week, the name and address of where they worked, the position they worked, what type of transportation the person used most to get to work, if they carpooled, what time the person left for work, how long it took the person to get to work, and how many weeks and how many hours per week the person usually worked within the past year.²¹ The ACS further asks about whether computers, phones, or tablets are at the residence, if there is phone reception, and what type of internet access is there.²² It also asks how many automobiles are kept at the residence.²³

The ACS then asks questions related to the residence itself: the type of building, when it was built, if it has running water, a bath/shower, and a sink with a faucet, when the respondent moved into the residence, the acreage of land, the value of sales of agricultural products in the past year, how many rooms and bedrooms are in the residence, what appliances are in the residence, how the residence is heated, the amounts of last month's electric and gas bills, the amounts of the previous year's water and heating fuel bills, estimated value of the home, annual

¹⁸ Veterans could have additional concerns about providing this information and being tracked by the government. See John Whitehead and Nisha Whitehead, *Badge of shame: The government's war on military veterans*, *The Washington Times*, Nov. 7, 2023; <https://highergroundtimes.com/higher-ground/2023/nov/7/badge-shame-governments-war-military-veterans/>.

¹⁹ Form ACS-1(INFO)(2023) (05-16-2022) at 2-6, 10, 12-19.

²⁰ *Id.* at 1-6.

²¹ *Id.* at 14, 16-17.

²² *Id.* at 9.

²³ *Id.* at 9.

real estate taxes, annual property insurance, and the mortgages or loans on the property and monthly payments.²⁴

With so many detailed questions, survey respondents might have to spend hours looking over financial, property, and employment records to answer accurately. The ACS thus creates a minefield for accusations of false statements, which carries a higher penalty under 13 U.S.C. § 221, even when someone was innocently mistaken in their answers.

The Government has No Credibility in Guaranteeing that Information collected from the ACS will be kept Secure and Confidential

The Census Bureau tries to reassure ACS recipients that their responses will be kept confidential. The ACS notes on the first page that the “Census Bureau is required by law to protect your information.”²⁵ The Bureau also states that it “will ensure that only authorized persons with a work-related need-to-know view your personal information” and that “Title 13, United States Code (U.S.C.) [Section 9] prohibits the Census Bureau from giving or selling your personal information to anyone.”²⁶

Even if it is a violation of law to share this information, the employees of the Census Bureau have it, and similar laws have not prevented the disclosure of confidential information from the government. Indeed, as almost everyone is aware, classified documents from when Joe Biden was Vice President were found in his home garage,²⁷ and classified documents from when Donald Trump was President were found in a public ballroom and bathroom at his Mar-a-Lago resort.²⁸ Additionally, an Air National Guard member, who worked as an IT professional, has been charged with “abus[ing] his top secret clearance by illegally sharing U.S. intelligence assessments and other sensitive information on Discord, a social media platform popular with video game players.”²⁹ If the government cannot ensure the laws are followed to keep classified documents and sensitive information confidential, then ordinary people certainly cannot have any confidence that the Census Bureau will keep their information protected.

²⁴ Id. at 8-11.

²⁵ Id. at 1.

²⁶ “American Community Survey Information Guide,” ACS-331(C)(2017) at 9.

²⁷ Ben Gittleston, *More classified documents found in garage at Biden's Wilmington home, White House says*, ABC News, Jan. 12, 2023; <https://abcnews.go.com/Politics/classified-documents-found-bidens-wilmington-home-garage-white/story?id=96390141#:~:text=%22During%20the%20review%2C%20the%20lawyers.residence%20garage%2C%22%20he%20said..>

²⁸ Hannah Rabinowitz and Dan Berman, *Here's where Donald Trump allegedly kept classified documents at Mar-a-Lago*, CNN, June 9, 2023; <https://www.cnn.com/2023/06/09/politics/heres-where-donald-trump-allegedly-kept-classified-documents-at-mar-a-lago/index.html>.

²⁹ Devlin Barrett and Shane Harris, *Leak suspect indicted on new counts of mishandling classified material*, The Washington Post, June 15, 2023; <https://www.washingtonpost.com/national-security/2023/06/15/jack-teixeira-indicted-discord-leaks/>.

Similarly, the FBI was found to have violated its own standards by conducting thousands of improper queries into data gathered through the Foreign Intelligence Surveillance Act (FISA) to find information on American citizens even though “the searches were not likely to find foreign intelligence information or evidence of a crime,” and an internal audit of data searches found a compliance rate of only 82%.³⁰

Even if every government employee actually follows the law and does not impermissibly remove, share, or search the data, it is still subject to hacking and mistaken disclosure. For example, the personal information of 237,000 current and former federal government employees was exposed in a data breach because of a hack at the U.S. Transportation Department earlier this year, two breaches at the U.S. Office of Personnel Management in 2014 and 2015 compromised sensitive data belonging to more than 22 million people, and hackers breached nine U.S. federal agencies in 2021.³¹ And for over ten years, millions of emails associated with the U.S. military, several of which contain sensitive information including medical and tax records, and some of which were sent by military staff and U.S. intelligence, were mistakenly sent to the country of Mali, which is allied with Russia, due to a typo in the email address, despite repeated warnings to the U.S. government.³²

Based on incidents like these, the American people have rightly lost all confidence in their government to keep their personal information protected from disclosure and misuse.

The Census Bureau’s Proposed Addition to the ACS

Despite the government’s proven inability to safeguard the detailed personal information of the American people, the Census Bureau now seeks to add to the already exhaustive and invasive list of personal questions contained in the ACS. In a recent notice for proposed rulemaking on the “American Community Survey SOGI Test” (“NPRM”), the Bureau seeks to add questions about people’s sexual orientation and gender identity (“SOGI”) to the ACS.³³ These proposed questions include a “two-step gender identity question” asking:

- **“What sex was <Name> assigned at birth?”** (providing selected answer options of either Male or Female for each person in a household), and
- **“What is <Name’s> current gender?”** (providing selected answer options of either Male, Female, Transgender, Nonbinary, or a space to write in a different term for each person in the household who is 15 years of age and older).³⁴

³⁰ Eric Tucker, *FBI broke rules in scouring foreign intelligence on Jan. 6 riot, racial justice protests, court says*, Associated Press, May 19, 2023; <https://apnews.com/article/justice-department-fbi-surveillance-75c466a64e838ab12eaf96f6335f3cd>.

³¹ David Shepardson, *Data of 237,000 US government employees breached*, Reuters, May 15, 2023; <https://www.reuters.com/world/us/data-237000-us-government-employees-breached-2023-05-12/>.

³² Emma Roth, *‘Millions’ of sensitive US military emails were reportedly sent to Mali due to a typo*, The Verge, July 17, 2023; <https://www.theverge.com/2023/7/17/23797379/mali-ml-typo-us-military-emails-leak>.

³³ 88 Fed. Reg. 64404 (proposed Sept. 19, 2023); <https://www.federalregister.gov/documents/2023/09/19/2023-20256/agency-information-collection-activities-submission-to-the-office-of-management-and-budget-omb-for>.

³⁴ 88 Fed. Reg. at 64405.

Additionally, a new question on sexual orientation would ask those in the household who are 15 years of age and older:

- **“Which of the following best represents how <Name> thinks of themselves?** (providing selected answer options of either Gay or Lesbian, Straight, Bisexual, or a space to write in a different term).³⁵

Survey recipients can now expect to be incessantly harassed about their sexuality by insensitive, aggressive, overly persistent, and out-of-control Census Bureau field representatives. And even the Census Bureau recognizes the privacy issues that will be raised within households by having one resident answer this information as a proxy for other residents, or having multiple residents present during in-person interviews.³⁶

While the government might be able to ask people to *voluntarily* provide this and other information as part of answering the ACS, mandating their responses is unconstitutional.

Mandating Responses to the ACS is Compelled Speech in Violation of the First Amendment

The U.S. Supreme Court has explained that “[t]he First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, *not as the government demands*.”³⁷ Thus, as the “First Amendment...forbids abridgment of the freedom of speech,” the Court has “held time and again that freedom of speech includes both the right to speak freely *and the right to refrain from speaking at all*.”³⁸

The Court has also held that compelling individuals to speak a particular message is a content-based regulation of speech.³⁹ “[W]hether the government seeks to compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include[,]...[a]ll that offends the First Amendment just the same.”⁴⁰ And “[w]hile assurances of confidentiality may reduce the burden of disclosure to the State, they do not eliminate it,” and factual “disclosure requirements can chill association even if there is no disclosure to the general public.”⁴¹

By forcing non-willing respondents to answer the ACS, especially questions about household members’ relations to each other, their sexuality, what personal property they own, opinions as to real property values, and calculations of weeks and hours worked for the past year,

³⁵ 88 Fed. Reg. at 64406.

³⁶ 88 Fed. Reg. at 64406.

³⁷ *303 Creative LLC v. Elonis*, 600 U.S. ___, ___ (2023) (slip op., at 26) (emphasis added).

³⁸ *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018) (emphasis added).

³⁹ *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

⁴⁰ *303 Creative LLC*, 600 U.S. at ___ (slip op., at 9).

⁴¹ *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2388 (2021) (cleaned up).

among other things, the Census Bureau is violating their First Amendment “right to refrain from speaking at all.”

Additionally, as people’s mistaken responses might be suspected of being a false statement which would subject them to greater punishment, or as their responses could reveal a violation of law (known or unknown),⁴² forcing people to respond to the ACS could also violate their Fifth Amendment right not to be compelled as a witness against oneself.

Mandating Responses to the ACS is a Search in Violation of the Fourth Amendment

The U.S. Supreme Court has explained that the “right of personal privacy” includes “the right to shield information from disclosure”⁴³ and “the right of the individual...to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person.”⁴⁴ The Court has further indicated that citizens’ constitutional right to privacy is implicated by the government’s collection of massive amounts of private information,⁴⁵ and privacy concerns may be heightened where a summary of private information about a person is stored in a single file.⁴⁶ Even if there is “a reduced expectation of privacy in information knowingly shared with another,” any “diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely.”⁴⁷

The right to privacy is violated when the government commits an unreasonable search to gather private information about an individual. The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....” “When the Fourth Amendment was adopted, as now, to ‘search’ meant ‘to look over or through for the purpose of finding something; to explore; to examine by inspection; as, to search the house for a book; to search the wood for a thief.’”⁴⁸ Much of the information which the Census Bureau gathers through the ACS would not otherwise be available without searching the recipient’s person, house, papers, and effects.

Thus, the extensive amount of information which the Census Bureau mandates ACS recipients to provide the government, without any compelling interest for that information or probable cause based upon criminal activity, constitutes an unreasonable search, and the Bureau

⁴² See, e.g., *Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part) (“criminal laws have grown so exuberantly . . . that almost anyone can be arrested for something”); Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313, 1314-15 (2012) (estimating ten million misdemeanor cases filed annually).

⁴³ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2267 (2022).

⁴⁴ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

⁴⁵ *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

⁴⁶ See *United States Dept. of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 764 (1989).

⁴⁷ *Carpenter v. United States*, 138 S. Ct. 2206, 2219 (2018) (finding that “[t]he Government's acquisition of the cell-site records was a search within the meaning of the Fourth Amendment.”).

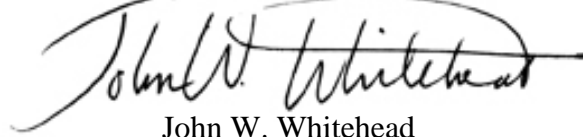
⁴⁸ *Kyllo v. United States*, 533 U.S. 27, 32 n.1 (2001) (quoting Webster, *An American Dictionary of the English Language* 66 (1828) (reprint 6th ed. 1989)).

cannot circumvent the Fourth Amendment by compelling survey recipients to provide the information themselves under threat of penalty.

Conclusion

For these reasons, The Rutherford Institute opposes the U.S. Census Bureau's proposed rule to add sexual orientation and gender identity questions to the ACS, and calls on the Bureau to abide by its obligation to respect and uphold the constitutional rights of all its citizenry.

Sincerely yours,

A handwritten signature in black ink that reads "John W. Whitehead". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John W. Whitehead
President