



## Supreme Court Sends 2020 Census Citizenship Question Back to the Department of Commerce, Citing Contrived Rationale

*Department of Commerce v. New York*,  
No. 18-966

Decided June 28, 2019

Yesterday, the Supreme Court held that the Secretary of Commerce’s decision to reinstate a citizenship question on the 2020 census violates the Administrative Procedure Act because the Secretary’s stated rationale—though reasonable and reasonably explained—was contrived.

### Background:

To apportion Members of the House of Representatives among the States, the Constitution requires an “Enumeration” of the population every ten years, “in such Manner” as Congress “shall by Law direct.” Congress enacted the Census Act and delegated to the Secretary of Commerce the task of conducting the census “in such form and content as he may determine.” 13 U.S.C. § 141(a). In every census between 1820 and 1950, all households were asked about citizenship or place of birth. Since 1950, however, only some households have been asked these questions. Last year, the Secretary of Commerce announced that the 2020 census would reinstate a question about citizenship in order to collect data to aid the government in enforcing the Voting Rights Act. A group of state and local governments filed suit, alleging that the Secretary’s decision violates the Enumeration Clause and the Administrative Procedure Act. The district court dismissed the Enumeration Clause claim, but authorized discovery outside the administrative record on the other claims. The district court then held that the Secretary’s decision was not supported by the evidence before him, rested on a pretextual basis, and violated the Census Act. The Secretary appealed directly to the Supreme Court.

*“Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction.”*

Chief Justice Roberts,  
writing for the majority

**Gibson Dunn filed an amicus brief on behalf of businesses and business organizations in support of Respondents.**

### Issue:

Did the Secretary's decision to reinstate a citizenship question on the 2020 census violate the Administrative Procedure Act?

### Court's Holding:

Yes. Although the Secretary's decision was reasonable and supported by the evidence, the district court was warranted in remanding the case to the agency because the Secretary's stated rationale was contrived.

### What It Means:

- A majority of the Court—the Chief Justice and Justices Ginsburg, Breyer, Sotomayor, and Kagan—agreed that the Secretary's explanation was contrived. This aspect of the Court's decision creates a potentially significant new basis for challenging discretionary administrative actions, at least where there is strong evidence of pretext in the administrative record.
- The Court acknowledged the general rule that judges generally avoid inquiring into "executive motivation," but relied on a "narrow exception" that permits such inquiry "[o]n a strong showing of bad faith or improper behavior." Though the Court could point to "no particular step" in the administrative process that was "inappropriate or defective," it reasoned that "the Secretary began taking steps to reinstate a citizenship question about a week into his tenure," yet did not identify a need for census data to enforce the Voting Rights Act until much later.
- The Court also held that the Secretary's decision did not violate the Enumeration Clause. That provision affords Congress "virtually unlimited discretion" in conducting the census. Congress, in turn, has properly "delegated its broad authority over the census to the Secretary." Here, the Chief Justice joined with Justices Thomas, Alito, Gorsuch, and Kavanaugh to form a 5-4 majority.
- Justice Thomas wrote an opinion concurring in part and dissenting in part, which Justices Gorsuch and Kavanaugh joined. He viewed the Court's holding as "an unprecedented departure from our deferential review of discretionary agency decisions"—one that, "if taken seriously as a rule of decision . . . would transform administrative law." The Court's decision was notable because it marked "the first time ever" that the Court has "invalidated an agency action solely because it questions the sincerity of an agency's otherwise adequate rationale." Justice Thomas worried that the Court "has opened a Pandora's box of pretext-based challenges in administrative law." Given the nature of decisionmaking in the Executive

Branch, “[o]pponents of future executive actions can be expected to make full use of the Court’s new approach.”

- Justice Breyer wrote an opinion concurring in part and dissenting in part, which Justices Ginsburg, Sotomayor, and Kagan joined. Justice Breyer believed that even if the Secretary’s rationale was not contrived, his decision still violated the Administrative Procedure Act because the evidence “indicated that asking the question would produce citizenship data that is *less* accurate, not more.”
- Justice Alito also wrote separately because he would have held that the Secretary’s decision was “committed to agency discretion by law” and thus not subject to judicial review. “To put the point bluntly,” Justice Alito wrote, “the Federal Judiciary has no authority to stick its nose into the question whether it is good policy to include a citizenship question on the census or whether the reasons given by Secretary Ross for that decision were his only reasons or his real reasons.”

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As always, Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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