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The Taxation Without Representation of Undocumented Immigrants: Counting Unlawfully Earned Tax Dollars While Intentionally Ignoring Unlawful Presence

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ARTICLES

THE TAXATION WITHOUT REPRESENTATION OF UNDOCUMENTED IMMIGRANTS: COUNTING UNLAWFULLY EARNED TAX DOLLARS WHILE INTENTIONALLY IGNORING UNLAWFUL PRESENCE

MARÍA FERNANDA ALFARO*

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* The author would like to dedicate this piece to her mother for being the quintessential resilient and strong woman who has inspired her to work very hard, stay humble, be happy, and above all, to honor God. She would like to thank her husband, family, close friends, and puppies who provide her constant support and unconditional love. To Professor Al Kauffman for his commitment in representing and being the voice of the many individuals who society has deemed as voiceless. To the *Scholar* staff, especially Riley Tunnell for the hours of hard work dedicated to this piece. Lastly, to all the individuals fighting to survive and working to achieve their dreams.

INTRODUCTION

Growing up as an undocumented immigrant in the United States required that I learn not only the essentials of being a proud American, but also that I understand federal immigration and tax laws. My family acquired our limited knowledge and understanding of these complex areas of the law from frequent visits to a local multiservice office in our neighborhood. At the multiservice office we applied for visa extensions, and subsequently received notice that our extension petitions were denied. A staff member at the multiservice office encouraged us to apply for Individual Taxpayer Identification Numbers (ITIN).¹ She informed us that we were supposed to file tax returns despite our immigration status. Without the monetary resources to obtain legal advice or the internet access to do our own research, we did as we were told. We applied and obtained ITINs for everyone in the family. When we picked up our ITINs from the multiservice office, the staff there instructed us to use the ITIN solely for the purpose of filing tax returns and for nothing else.

As a high school student, I had to repeatedly explain to my peers and school authorities that I could not use my tax reporting number in place of a Social Security number. My high school hosted workshops that encouraged college attendance, discussed access to federal student financial aid, and presented other postsecondary education possibilities. I vividly recall the advertisements for one of these workshops. The advertisement indicated that with a copy of our parents' or legal

1. See 26 C.F.R. § 301.6109-1(d)(3)(i) (2018) (defining an ITIN as “a taxpayer identifying number issued to an alien individual by the Internal Revenue Service, upon application, for use in connection with filing requirements under this title.”); see 26 U.S.C. § 6109(i)(1)(A)(i) (2018) (authorizing in-person issuance of individual taxpayer identification numbers through approved community-based certifying acceptance agents); see also *New ITIN Acceptance Agent Program Changes*, IRS, <https://www.irs.gov/individuals/new-itin-acceptance-agent-program-changes> [<https://perma.cc/YY8K-G5WW>] (last updated June 18, 2019) (“A Certifying Acceptance Agent is a person or an entity (business or organization) who, pursuant to a written agreement with the IRS, is authorized to assist individuals and other foreign persons who do not qualify for a Social Security Number but who still need a Taxpayer Identification Number (TIN) to file a Form 1040 and other tax schedules.”); see also AM. IMMIGRATION COUNCIL, *THE FACTS ABOUT THE INDIVIDUAL TAX IDENTIFICATION NUMBER (ITIN)* (2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_facts_about_the_individual_tax_identification_number.pdf [<https://perma.cc/Y9B4-VTZ3>] (defining ITINs, not as an immigration enforcement tool, but as a tax processing number issued by the Internal Revenue Service to ensure that unauthorized immigrants pay taxes).

guardians' tax return, we could apply for financial aid to help pay for college expenses. With high hopes that I would only have to provide the requested tax document, I asked my mother for a copy of her tax return. The next day at the workshop I found out that solely having a tax return did not qualify a student for FAFSA.² I needed to show proof that I qualified for a Social Security number to apply for financial aid.³ I stopped attending my high school's college workshops and stopped visiting with my high school counselor to discuss college and scholarship applications.

Now, as a naturalized United States citizen, I often recall the visits my family and I took to the local multiservice office where we filed our taxes. During these visits, I witnessed my family's desire to comply with the law overpower the fear of exposing our personal information to federal authorities and risking deportation. I remember my mother praying each time our taxes were finalized and submitted. Unlike most aspects of our life which our immigration status limited, we could always count on our federal tax filings being welcomed and received by the federal government regardless of our illegal stay in the country.

For years I did not understand why the government allowed my mother, who worked as a babysitter, to file her tax return but did not authorize her to lawfully work in the country.⁴ I also did not understand why my mother had to pay taxes each year on her less than \$15,000 yearly income. I found myself doubting the advice we received about the limited use of our ITINs. I started to wonder whether perhaps my high school authorities were correct in telling me that I did have lawful immigration status because, according to them, only U.S. citizens could file tax returns. I even began to entertain the idea that perhaps my mother

2. See FED. STUDENT AID, U.S. DEP'T OF EDUC., FINANCIAL AID AND UNDOCUMENTED STUDENTS 1 (2019), <https://studentaid.ed.gov/sa/sites/default/files/financial-aid-and-undocumented-students.pdf> [<https://perma.cc/4WLE-UUNE>] (listing a social security number as a prerequisite for completing a FAFSA application).

3. See 34 C.F.R. § 668.36(b)(1) (2018) ("An institution may not disburse any title IV, HEA program funds to a student until the institution is satisfied that the student's reported social security number is accurate."); FED. STUDENT AID, *supra* note 2 (noting undocumented immigrants are not eligible for federal student aid).

4. Compare AM. IMMIGRATION COUNCIL, *supra* note 1 (allowing undocumented immigrants who do not have a social security number to file taxes through the use of an ITIN), with *Working in the US*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/working-united-states/working-us> [<https://perma.cc/2AWH-TRX8>] (last updated June 14, 2017) (requiring proof of a social security number in order to lawfully work in the United States).

told me that I was undocumented in this country so that I would not go to college in a different state like we had seen in so many movies. It did not make sense to me how year after year we filed and paid taxes, but our immigration status did not change. We could not work lawfully, and we continued to live in fear of deportation.⁵

I now understand that like thousands of other undocumented immigrants, my mother was illegally working in the country but legally reporting her earnings to the federal government despite her unlawful presence. The federally endorsed oxymoron of undocumented immigrants filing and paying federal taxes is a tradition that continues.

I. BACKGROUND

Federal law mandates that wage earning undocumented immigrants pay taxes.⁶ Like all U.S. citizens and legal permanent residents, undocumented immigrants are not exempt from tax obligations solely because of their immigration status in the country.⁷ Through several detailed publications and designated acceptance agents and centers, the Internal Revenue Service (IRS) not only provides guidance on how an undocumented immigrant can file their taxes, but it also extends an invitation for them to do so.⁸ The resources allocated to assist

5. U.S. CITIZENSHIP & IMMIGR. SERV., *supra* note 4 (requiring certain documents such as a social security card or a visa to lawfully work in the United States).

6. 26 C.F.R. § 1.6012-1(b)(1)(i) (2012). *See Taxation of Nonresident Aliens*, IRS, <https://www.irs.gov/businesses/taxation-of-nonresident-aliens-1> [<https://perma.cc/A2M3-YVYH>] (last updated Feb. 28, 2019) [hereinafter IRS, *Taxation of Nonresident Aliens*] (listing five situations that may trigger an undocumented immigrant's duty to file taxes).

7. *See* 26 C.F.R. § 1.6012-1(b)(2)(ii) (2012) (noting that a return is still required even when there is a change in immigration status, whether from acquisition of a U.S. citizenship or residence, or abandonment of U.S. citizenship or residence).

8. *See, e.g.*, INTERNAL REVENUE SERV., U.S. DEP'T OF TREASURY, PUB. NO. 5259, FACT SHEET: EXPIRING ITINS, <https://www.irs.gov/pub/irs-pdf/p5259.pdf> [<https://perma.cc/EQV6-Y3FP>] (last updated June 2019) [hereinafter INTERNAL REVENUE SERV., FACT SHEET: EXPIRING ITINS] (providing easy-to-follow information in both English and Spanish regarding changes in the ITIN program). U.S. tax laws also refer to immigrants differently than U.S. immigration laws. *Compare* 8 U.S.C. § 1101 (2018) (defining "aliens" as "any person not a citizen or national of the United States."), *with* 26 C.F.R. § 1.871-1 (2018) ("For purposes of the income tax, alien individuals are divided generally into two classes, namely, resident aliens and non-resident aliens."). Resident aliens are non-citizens who pass either the "green card test" or the "substantial presence test" discussed *infra* II.A, while nonresident aliens are any other non-citizens who cannot meet either of the two tests. *See Determining Alien Tax Status*, IRS, <https://www.irs.gov/individuals/international-taxpayers/determining-alien-tax-status> (last updated Mar. 18, 2019) [<https://perma.cc/T5ML-G3S6>] [hereinafter IRS, *Determining Alien Tax Status*].

undocumented immigrants in filing their federal tax returns serve to evidence the significance of their contributions to the U.S. economy.⁹

Redistricting voting districts based on the number of citizens within a district and deriving population counts from a census that includes a citizenship question are the modern-day version of the taxation without representation¹⁰ of undocumented immigrants. The recent proposal by President Trump's Administration to include a question regarding an individual's immigration status in the 2020 Census¹¹ and the initiatives of some state legislatures to base redistricting on voter population only,¹² elevate the potential for further exclusion and suppression of undocumented immigrants—many who pay local, state, and federal taxes.¹³ Immigrants, particularly undocumented immigrants, “form a politically low risk target group on which to impose a disproportionately

9. See INTERNAL REVENUE SERV., FACT SHEET: EXPIRING ITINS, *supra* note 8 (listing the various ways that the IRS provides guidance to undocumented immigrants when renewing their ITIN); see also NAT'L TAXPAYER ADVOCATE, 2015 ANNUAL REPORT TO CONGRESS VOL. 1, at 199 (2015), https://taxpayeradvocate.irs.gov/Media/Default/Documents/2015ARC/ARC15_Volume1.pdf [<https://perma.cc/BGP8-TTHX>] (“In 2015, 4.4 million ITIN filers paid over \$5.5 billion in payroll and Medicare taxes and \$23.6 billion in total taxes.”).

10. See THE DECLARATION OF INDEPENDENCE para. 2, 18 (U.S. 1776) (“The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let facts be submitted to a candid world. . . . For imposing taxes on us without our consent[.]”); see also *James Otis*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/James-Otis> [<https://perma.cc/XDN4-KYXC>] (last updated May 8, 2019) (attributing the phrase “taxation without representation is tyranny” to James Otis).

11. Memorandum on the Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire from Sec'y Wilbur Ross, U.S. Dep't of Commerce, to Under Sec'y for Econ. Affairs Karen Dunn Kelley, U.S. Dep't of Commerce (Mar. 26, 2018), <https://assets.documentcloud.org/documents/4426785/commerce2018-03-26-2.pdf> [<https://perma.cc/L7FB-LNT2>] [hereinafter Ross, Memorandum on the Reinstatement of a Citizenship Question]. See *Dep't of Commerce v. New York*, 588 U.S. ___, 139 S.Ct. 2551, 2569-71 (2019) (remanding the inclusion of a citizenship question on the 2020 Census to the Department of Commerce to come up with a justification that is more than “pretextual”).

12. See, e.g., Complaint for Declaratory Relief, *Alabama v. U.S. Dep't of Commerce*, 2:18-cv-00772-RDP (N.D. Ala. May 21, 2018) (suing to prevent the inclusion of undocumented immigrants in the census enumeration); H.R.J. Res. 48, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019) (proposing to replace “Districts shall be established on the basis of total population[.]” with “Districts shall be as nearly equal as practicable in population, and districts shall be drawn on the basis of one person, one vote, using data reported in the federal decennial census[.]” and proposing to replace a reference to “racial or language minorities” with “any citizen”); L.B. 1115, 105th Leg., 2d Sess. (Neb. 2018) (proposing to subtract noncitizens from the total population count).

13. Henry Ordower, *Taxing Others in the Age of Trump: Foreigners (and the Politically Weak) as Tax Subjects*, 62 ST. LOUIS U. L.J. 157, 171 (2017).

high tax burden.”¹⁴ Instead of focusing on the expansion of rights and benefits that undocumented immigrants could receive in this country, the current political climate is reverting discourse to determine whether undocumented immigrants should be counted at all.¹⁵ We must advocate against new policies and laws that will result in the treatment of “noncitizens as nonpersons.”¹⁶

II. ANALYSIS

This section serves to highlight some of the tax procedures that directly affect undocumented immigrants. A comprehensive explanation of the complex areas of taxation and immigration law is beyond the scope of this article.

A. *Tax Paying Undocumented Immigrants*

In 1996, the IRS created the Individual Taxpayer Identification Numbers.¹⁷ An ITIN is a nine-digit processing number the IRS issues to individuals who do not have a Social Security Number.¹⁸ ITINs “help individuals comply with the U.S. tax laws, and [] provide a means to efficiently process and account for tax returns and payments for those not eligible for Social Security numbers.”¹⁹ An ITIN, however, does not authorize its holder to work in the U.S., and it does not provide eligibility

14. *Id.* at 168.

15. *See, e.g.*, Complaint for Declaratory Relief at 22, *Alabama v. U.S. Dep’t of Commerce*, No. 2:18-cv-00772-RDP (N.D. Ala. May 21, 2018) (arguing “[i]llegal aliens are not members of the political community constituted by the Constitution and thus cannot be counted for apportionment purposes.”).

16. Al Kauffman, Opinion, *There is a Clear, Coordinated Effort to Undermine Minority Voting and Representation*, SAN ANTONIO EXPRESS-NEWS (Sept. 29, 2018), <https://www.my.sanantonio.com/opinion/commentary/article/There-is-a-clear-coordinated-effort-to-undermine-13267212.php> [<https://perma.cc/EYA7-K28S>].

17. TREASURY INSPECTOR GEN. FOR TAX ADMIN., REFERENCE NO. 2013-40-052, REVIEW AND VERIFICATION OF INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER APPLICATIONS HAS IMPROVED; HOWEVER, ADDITIONAL PROCESSES AND PROCEDURES ARE STILL NEEDED (2013), <https://www.treasury.gov/tigta/auditreports/2013reports/201340052fr.html> [<https://perma.cc/M45Q-PB6U>].

18. *See* 26 U.S.C. § 6109(i) (2018); *Individual Taxpayer Identification Number*, IRS, <https://www.irs.gov/individuals/individual-taxpayer-identification-number> [<https://perma.cc/D84G-HE6P>] (last updated June 19, 2019) [hereinafter IRS, *Individual Taxpayer Identification Number*].

19. IRS, *Individual Taxpayer Identification Number*, *supra* note 18.

for Social Security or other government benefits.²⁰ The IRS issued more than twenty-three million ITINs as of December 2016, though they may not all be currently valid.²¹

The IRS does not distinguish income earned through employment with valid work authorization from income earned through unauthorized employment.²² The IRS does not report taxpaying undocumented immigrants to immigration authorities or law enforcement.²³ In an effort to increase the number of undocumented immigrants that file tax returns, unless one of the few exceptions apply, the Internal Revenue Code prohibits the release of taxpayer information to other government agencies.²⁴ The IRS does not issue ITINs to track undocumented immigrants, nor do they use ITINs to enforce federal immigration laws, because taxpayer privacy is critical to ensure undocumented immigrants comply with federal tax laws.²⁵ In order to obtain an ITIN, an individual must first identify their alien tax status as defined by the IRS.²⁶ For tax reporting purposes, the IRS classifies all non-citizens as nonresident aliens unless the individual meets the “green card test”²⁷ or the

20. *Id.* (specifying the permissive and non-permissive uses of an ITIN); Francine J. Lipman, *Taxing Undocumented Immigrants: Separate, Unequal, and Without Representation*, 59 TAX LAW. 813, 819 (2006) (“[U]ndocumented immigrants are barred from almost all government benefits, including food stamps, Temporary Assistance for Needy Families, Medicaid, federal housing programs, Supplemental Security Income, Unemployment Insurance, Social Security, Medicare, and the Earned Income Tax Credit[.]”).

21. TREASURY INSPECTOR GEN. FOR TAX ADMIN., REFERENCE NO. 2018-40-010, PROCESSES NEED TO BE IMPROVED TO IDENTIFY INCOMPLETE AND FRAUDULENT APPLICATIONS FOR INDIVIDUAL TAXPAYER IDENTIFICATION NUMBERS 1 (2018), <https://www.treasury.gov/tigta/auditreports/2018reports/201840010fr.pdf> [<https://perma.cc/4JNV-FMDS>].

22. 26 U.S.C. § 61(a) (2018) (“[G]ross income means all income from whatever source derived[.]”); see *Paying Taxes as an Undocumented Immigrant*, ILL. LEGAL AIDE ONLINE, <https://www.illinoislegalaid.org/legal-information/paying-taxes-undocumented-immigrant-0> (last updated Aug. 2018) (“Illegal income is still taxable and must be reported.”).

23. ILL. LEGAL AIDE ONLINE, *supra* note 22.

24. 26 U.S.C. § 6103 (2018) (identifying as confidential all tax returns and return information, and prohibiting the release of this information, but allowing the release of return information to the Bureau of the Census and Bureau of Economic Analysis for statistical use).

25. AM. IMMIGRATION COUNCIL, *supra* note 1, at 2.

26. IRS, *Taxation of Nonresident Aliens*, *supra* note 6.

27. See 26 U.S.C. 7701(b)(1)(A)(i) (2018) (calling the “green card test” “lawfully admitted for permanent residence” and requiring that an individual be “a lawful permanent resident of the United States at any time during the calendar year.”); see also *Alien Residency - Green Card Test*, IRS, <https://www.irs.gov/individuals/international-taxpayers/alien-residency-green-card-test> (last updated Jan. 29, 2019) [<https://perma.cc/9KHN-X3BW>].

“substantial presence test.”²⁸ Generally, most undocumented immigrants living and working in the U.S. are classified as resident aliens for tax purposes under the “substantial presence test.”²⁹

Undocumented immigrants are taxed in the same manner as U.S. citizens and documented immigrants, but in reality, they pay a higher effective tax rate than any other taxable group.³⁰ On average nationwide, undocumented immigrants pay an estimated 8 percent effective state and local tax rate on their incomes.³¹ By comparison, our nation’s top 1 percent of taxpayers pay an average nationwide effective tax rate of 5.4 percent.³² Undocumented immigrants are subject to the IRS’s withholding rules just like any other tax group, but they may never receive Social Security and Medicare benefits even though these funds increase from their wages.³³ Undocumented immigrants, who are often at the lowest income levels, pay more in taxes than their low-income neighbors, but they do not, however, qualify for the same welfare benefits that their neighbors can access in order to alleviate the burden of low-

28. See 26 U.S.C. 7701(b)(3) (2018) (requiring, generally, “such individual was present in the United States on at least 31 days during the calendar year, and the sum of the number of days on which such individual was present in the United States during the current year and the 2 preceding calendar years (when multiplied by the applicable multiplier determined [from a table provided in the United States Code (1/3 for the “1st preceding year,” 1/6 for the “2nd preceding year”)]) equals or exceeds 183 days[.]”); see also *Substantial Presence Test*, IRS, <https://www.irs.gov/individuals/international-taxpayers/substantial-presence-test> (last updated Mar. 18, 2019) [<https://perma.cc/HJW9-SDU5>]. See 26 U.S.C. 7701(b)(4) (2018) (providing a third option called “first year election”); see also IRS, *Determining Alien Tax Status*, *supra* note 8 (listing circumstances why individuals would elect to override the green card test and substantial presence test and elect to be treated as a Dual Status Alien).

29. Lipman, *supra* note 20, at 832.

30. Lipman, *supra* note 20, at 820, 831, 833.

31. LISA CHRISTENSEN GEE ET AL., INSTITUTE ON TAXATION & ECON. POLICY, UNDOCUMENTED IMMIGRANTS’ STATE AND LOCAL TAX CONTRIBUTIONS 2-3, <https://itep.org/wp-content/uploads/ITEP-2017-Undocumented-Immigrants-State-and-Local-Contributions.pdf> (last updated Mar. 2017) [<https://perma.cc/W2LY-8FUP>] (“[Undocumented immigrants] pay sales and excise taxes when they purchase goods and services . . . [.] [t]hey pay property taxes directly on their homes or indirectly as renters [.] [and they] also pay state income taxes. . . . Collectively, undocumented immigrants in the United States pay an estimated total of \$11.74 billion in state and local taxes a year[.]”).

32. *Id.* at 2.

33. Lipman, *supra* note 20, at 819, 831, 833, 837, 857, 865; see also *New Aliens Employed in the U.S.*, IRS, <https://www.irs.gov/individuals/international-taxpayers/aliens-employed-in-the-us> [<https://perma.cc/MF49-KM3N>] (last updated Jan. 30, 2019) (describing the procedures for income tax withholding for resident and nonresident alien employees).

wages.³⁴ Similarly, they cannot claim the same tax credits available to other taxable groups, and the only benefits that they receive from filing a tax return are the possibility of getting a refund, the option to present routinely filed tax returns as favorable conduct in deportation proceedings, and a method of establishing a record of residency in the United States.³⁵

B. *The Census, Apportionment, and Redistricting*

The Supreme Court's opinion in *Department of Commerce v. New York* effectively ended the attempt to get a citizenship question on the 2020 Census, but it by no means closed the door on future attempts.³⁶ Writing for the majority, Chief Justice Roberts believed that "the Enumeration Clause . . . permit[ted] Congress, and by extension the Secretary [of Commerce], to inquire about citizenship on the census questionnaire."³⁷ From there, Chief Justice Roberts found Secretary Ross's decision to include a citizenship question was neither arbitrary nor capricious, but was, however, merely pretextual.³⁸ Upon this finding, he

34. Lipman, *supra* note 20, at 856-57, 861-62, 865.

35. INTERNAL REVENUE SERV., U.S. DEP'T OF TREASURY, PUB. NO. 4152, ELECTRONIC TOOLKIT FOR NONRESIDENT ALIEN VITA/TCE SITES 1-24, 2-1-2-7 <https://www.irs.gov/pub/irs-pdf/p4152.pdf> (last updated Jan. 21, 2019) [<https://perma.cc/8977-QPR6>]; see Lipman, *supra* note 20, at 840-56; see Octavio Blanco, *Why Undocumented Immigrants Pay Taxes*, CNN BUSINESS (Apr. 19, 2017, 6:06 AM), <https://money.cnn.com/2017/04/19/news/economy/undocumented-immigrant-taxes/index.html>; Maria Sacchetti, *Undocumented and Paying Taxes, They Seek a Foothold in the American Dream*, WASH. POST (Mar. 11, 2017), https://www.washingtonpost.com/local/social-issues/undocumented-and-paying-taxes-they-seek-a-foothold-in-the-american-dream/2017/03/11/bc6a8760-0436-11e7-ad5b-d22680e18d10_story.html?utm_term=.778feacf589b [<https://perma.cc/QU33-EYWM>].

36. *Dep't of Commerce v. New York*, 588 U.S. ___, 139 S.Ct. 2551, 2573-74, 2576 (2019) (remanding the case to the Department of Commerce to justify the inclusion of the citizenship question on the 2020 census with something more than a "pretext"). *Remarks by President Trump on Citizenship and the Census*, WHITE HOUSE (July 11, 2019, 5:37 PM), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census/> [<https://perma.cc/B7GS-86RL>] (acknowledging that there will not be a citizenship question on the 2020 census, but promising "we are not backing down on our effort to determine the citizenship status of the United States population").

37. *Dep't of Commerce v. New York*, 588 U.S. ___, 139 S.Ct. 2551, 2567 (2019). Justices Breyer, Ginsberg, Sotomayor, and Kagan did not join in this belief. *Id.* at 2584 (Breyer, J., concurring in part and dissenting in part).

38. *Id.* at 2569-76. Justice Thomas, joined by Justices Gorsuch and Kavanaugh, agreed with Chief Justice Robert's finding that Secretary Ross was neither arbitrary nor capricious in his decision but felt the inquiry should end there. *Id.* at 2578-79, 2583 (Thomas, J., concurring in part and dissenting in part) (calling the Chief Justice's conclusion on pretextual grounds

upheld the District Court's remand to the Department of Commerce.³⁹ Pursuant to the Administrative Procedure Act, "[t]he Secretary . . . consider[ed] the evidence and [gave] reasons for his chosen course of action[.]" but Chief Justice Roberts concluded the evidence "reveal[ed] a significant mismatch between the decision the Secretary made and the rationale he provided[.]" and further called the rationale "contrived" and a "distraction."⁴⁰

The Department of Commerce initially stated that the Department of Justice (DOJ) requested the Census Bureau reinstate a citizenship question on the census to provide the DOJ with better data to aid it in enforcement of the Voting Rights Act.⁴¹ Justice Breyer, in his opinion concurring in part and dissenting in part, found,

The administrative record shows that DOJ's request to add a citizenship question originated not with the DOJ, but with the Secretary himself. The Voting Rights Act rationale was in fact first proposed by Commerce Department officials. DOJ officials, for their part, were initially uninterested in obtaining more detailed citizenship data, . . . and they agreed to request the data only after the Secretary personally spoke to the Attorney General about the matter[.] And when the acting director of the Census Bureau proposed alternative means of obtaining better citizenship data, DOJ officials declined to meet to discuss the proposal.⁴²

"extraordinary," believing it to be the first of its kind, and "open[ing] a Pandora's box of pretext-based challenges in administrative law"). Justice Breyer, joined by Justices Ginsberg, Sotomayor, and Kagan, agreed that Secretary Ross's reasoning for adding a citizenship question was merely pretextual, but also believed that the Secretary's decision was arbitrary and capricious. *Id.* at 2584 (Breyer, J., concurring in part and dissenting in part) ("[T]he Secretary's decision to add a citizenship question created a severe risk of harmful consequences, yet he did not adequately consider whether the question was necessary or whether it was an appropriate means of achieving his stated goal. The Secretary thus failed to 'articulate a satisfactory explanation' for his decision, 'failed to consider . . . important aspect[s] of the problem,' and 'offered an explanation for [his] decision that runs counter to the evidence,' all in violation of the [Administrative Procedure Act] (quoting *Motor Vehicle Mfr. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))). Justice Alito believed Secretary Ross's decision was "committed to agency discretion by law and therefore may not be challenged under the [Administrative Procedure Act]." *Id.* at 2598 (Alito, J., concurring in part and dissenting in part). He otherwise concurred with the Chief Justice. *Id.* at 2606. (Alito, J., concurring in part and dissenting in part).

39. *Id.* at 2576.

40. *Id.* at 2571, 2575-76.

41. Ross, Memorandum on the Reinstatement of a Citizenship Question, *supra* note 11.

42. *Dep't of Commerce v. New York*, 588 U.S. ___, 139 S.Ct. 2551, 2594 (2019) (Breyer, J., concurring in part and dissenting in part) (internal citations omitted).

[The] evidence reveals that the DOJ official who wrote the letter agreed that adding the question ‘is not necessary for DOJ’s [Voting Rights Act] enforcement efforts.’ And that official further acknowledged that he did not ‘know whether or not [citizenship] data produced from responses to the citizenship question . . . will, in fact, be more precise than the [citizenship] data on which the DOJ is currently relying for purposes of [Voting Rights Act] enforcement.’⁴³

Following the decision, the Trump Administration conceded in its endeavor, but accompanied with the concession were an executive order and a reassurance from Attorney General Barr.⁴⁴ “In my view,” he explained, “the government has ample justification to inquire about citizenship status on the census, and could plainly provide rationales for doing so that would satisfy the Supreme Court. And therefore, there is no question that a new decision to add the question would ultimately survive legal review.”⁴⁵ The executive order, which is essentially

43. *Id.* at 2595 (2019) (Breyer, J., concurring in part and dissenting in part) (internal citations omitted).

44. WHITE HOUSE, *supra* note 36 (acknowledging that there will not be a citizenship question on the 2020 census, but promising “we are not backing down on our effort to determine the citizenship status of the United States population”); Exec. Order No. 13880, 84 Fed. Reg. 33,821 (July 11, 2019).

45. WHITE HOUSE, *supra* note 36 (calling the Supreme Court’s decision “a logistical impediment, not a legal one[.]” but lamenting the other ongoing cases and the likelihood of further legal challenges to similar subsequent attempts). *See, e.g.*, Plaintiffs’ Unopposed Motion to Enter Final Judgment After Remand; Proposed Order at 3-4, *California v. Ross*, No. 3:18-cv-01865 (N.D. Cal. July 30, 2019) (“The proposed judgment permanently enjoins Defendants from including a citizenship question on the 2020 decennial census questionnaire; from delaying the process of printing the 2020 decennial census questionnaire after June 30, 2019, for the purpose of including a citizenship question; and from asking persons about their citizenship status on the 2020 census questionnaire or otherwise asking a citizenship question as part of the 2020 decennial census.”); Order at 1-2, *Kravitz v. U.S. Dep’t of Commerce*, No. 8:18-cv-01570-GJH (D. Md. July 16, 2019) (“Defendants . . . are [permanently enjoined] from including a citizenship question on the 2020 decennial census questionnaire; from delaying the process of printing the 2020 decennial census questionnaire after June 30, 2019 for the purpose of including a citizenship question; and from asking persons about citizenship status on the 2020 [c]ensus questionnaire or otherwise asking a citizenship question as part of the 2020 decennial [c]ensus.”); Stipulation and Order of Settlement, *NAACP v. U.S. Dep’t of Commerce*, No. 3:17-cv-01682-WWE (D. Conn. Feb. 4, 2019) (FOIA Request); Joint Status Report, *Arab Am. Inst. v. Office of Mgmt. & Budget*, No. 1:18-cv-00871 (ABJ) (D.D.C. July 10, 2019) (FOIA Request); Reply in Support of Plaintiff’s Cross-Motion for Summary Judgment and Opposition to Defendant’s Motion for Summary Judgment, *Campaign Legal Ctr. v. U.S. Dep’t of Justice*, No. 18-1771 (TSC) (D.D.C. June 12, 2019) (FOIA Request); Memorandum of Law in Support of Plaintiff’s Cross-Motion for Summary Judgment and Opposition to Defendant’s Motion for Summary Judgment, *NAACP Legal Def. & Educ. Fund, Inc.*

“Option C” proposed by the Census Bureau in response to Secretary Ross’s initial request,⁴⁶ seeks to ensure accurate citizenship data by facilitating the Department of Commerce’s access to the administrative records of executive departments and agencies.⁴⁷ The president believes this executive order, when used “in conjunction with the census[,]” will “help us understand the effects of immigration on our country[,]” will provide the federal government with better data when evaluating public benefits programs, will “generate a more reliable count of the unauthorized alien population in the country[,]” and lastly, it may assist states in designing “[s]tate and local legislative districts based on the population of voter-eligible citizens.”⁴⁸ Attorney General Barr echoed this last policy aspiration in his speech on the outcome of the *Department of Commerce v. New York*.⁴⁹ In response, Representative Elijah E. Cummings stated, “The President just admitted what his Administration has been denying for two years—that he wants citizenship data in order to gerrymander legislative districts in partisan and discriminatory ways. This never had anything to do with helping to enforce the Voting Rights Act. That was a sham, and now the entire country can see that.”⁵⁰

Even without a citizenship question, an undercount is very likely on the 2020 Census, especially for the immigrant community, due to the

v. U.S. Dep’t of Justice, No. 18-CV-09363 (AJN) (S.D.N.Y. June 10, 2019) (FIOA Request); Memorandum Opinion and Order, *Nat’l Assoc. for the Advancement of Colored People v. Bureau of the Census*, No. PWG-18-891 (D. Md. Aug. 1, 2019) (dismissing plaintiffs’ Enumeration Clause claims for mootness and dismissing plaintiffs’ Administrative Procedure Act claims as not subject to judicial review); Order, *Nat’l Assoc. for the Advancement of Colored People v. Bureau of the Census*, No. 19-1863 (4th Cir. Aug. 20, 2019) (setting the matter for oral argument on October 30, 2019); Complaint for Declaratory Relief, *Alabama v. U.S. Dep’t of Commerce*, 2:18-cv-00772-RDP (N.D. Ala. May 21, 2018) (suing to prevent the inclusion of undocumented immigrants in the census enumeration).

46. Ross, Memorandum on the Reinstatement of a Citizenship Question, *supra* note 11.

47. Exec. Order No. 13880, 84 Fed. Reg. 33,821, 33,821-22 (July 11, 2019).

48. *Id.* at 33,822-24.

49. WHITE HOUSE, *supra* note 36 (“[Data on citizenship] will be used for countless purposes For example, there is a current dispute over whether illegal aliens can be included for apportionment purposes.”).

50. *Cummings Issues Statement on Executive Order on the Census*, COMMITTEE ON OVERSIGHT & REFORM (July 12, 2019), <https://oversight.house.gov/news/press-releases/cummings-issues-statement-on-executive-order-on-the-census>.

politicization of what should be a scientific enumeration.⁵¹ The undercount will shift federal funding and political apportionment away from the communities that are home to immigrant populations, and will similarly skew state and local funding and apportionments which are allocated and calculated using census data.⁵² Despite shifting funding and representation away from their communities, the government will continue to collect taxes from undocumented immigrants.

51. See, e.g., DIANA ELLIOTT ET AL., URBAN INSTITUTE, ASSESSING MISCOUNTS IN THE 2020 CENSUS 13-15 (2019) (projecting in their “high risk” scenario (“[i]f 2020 Census operational changes perform below expectations, and discourse surrounding immigration and the citizenship question further suppresses participation”) “a total population net undercount of 1.22 percent.” “Similarly, the Hispanic/Latinx-identified population would be undercounted by as little as 2.01 percent to as much as 3.57 percent in the high-risk scenario.” “Even if the citizenship question is not included on the 2020 Census, we know from [U.S.] Census Bureau researchers that there is an increased climate of fear and hesitation to participate among Hispanic/Latinx and immigrant residents, which makes this estimate plausible either way. For these same reasons, we assume that noncitizens will systematically be missing from household rosters, even when households respond. Experts predict that such noncitizen omission (i.e., nonparticipation) could exacerbate the census differential undercount for noncitizens by 0.5 to 2.0 percentage points.”).

52. See, e.g., Brief for Harris County, Texas et al. as Amici Curiae Supporting Respondents at 4, 35-36, *Dep’t of Commerce v. New York*, 588 U.S. ___, 139 S.Ct. 2551 (2019) (No. 18-966) (listing as dependent on census data, “apportionment of congressional districts,” “apportionment of districts for state senate and house, county commissioners, city council, school boards,” “a myriad local government positions,” “federal funds,” and “state and local funds[.]” “Texas law defines ‘population’ as that in the most recent Decennial Census and often ‘brackets’ statutes to only apply to certain ranges of population. See TEX. GOV’T CODE § 311.005(3). A myriad of government functions and powers are triggered by the Decennial Census from elections for countywide taxation for public education, TEX. EDUC. CODE § 18.07, to designation as a homestead preservation district and reinvestment zone, TEX. LOC. GOV’T CODE § 373A.052, to regional transportation authority creation, taxation and representation, TEX. TRANSP. CODE ch. 452, to representation on the Big Bend Regional Hospital District board, TEX. SPEC. DIST. CODE § 1007.051, to provision of bilingual ballots and educational material for voting, TEX. ELEC. CODE § 272.003, to application and qualification for grants for [] home-delivered meals for the elderly and disabled, TEX. AGRIC. CODE § 12.042, to participation in a statewide rural health care system, TEX. INS. CODE § 845.003, to whether municipal and county hospital districts may operate nursing homes, TEX. HEALTH & SAFETY CODE §§ 262.034, 285.101, and even to how late in the night one can buy beer, TEX. ALCO. BEV. CODE § 105.05, just to name a few examples. . . . [P]olicy makers must have accurate data to do their jobs. They must know how many people have to be moved to safety if another hurricane pummels the Gulf Coast or wildfires threaten the City of Marfa. They must know population densities and composition should an industrial accident threaten the health and lives of a neighborhood near the Port of Houston or when spring or fall rains trigger widespread flooding in the former rice fields of Fort Bend County. They must know exactly how many and where people live to draw evenly apportioned districts for local offices such as county commissioners, school boards, hospital districts, and innumerable other local governmental entities.”).

CONCLUSION

Like my family, there are thousands of undocumented immigrants who have paid and continue to pay taxes to the U.S. government, both at the state and federal level. Some of these taxpayers will never obtain legal immigration status. Federal immigration laws are punishing undocumented immigrants for their unlawful presence in the United States, while federal tax laws praise and encourage their continued tax reporting. Perhaps it is as Lupe Fiasco says, “Rich man, poor man, we all gotta pay, cause freedom ain’t free, especially ‘round my way.”⁵³

53. LUPE FIASCO, *Around My Way (Freedom Ain't Free)*, on FOOD & LIQUOR II: THE GREAT AMERICAN RAP ALBUM PT. 1 (Atlantic 2012).