IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBYN KRAVITZ, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

Defendants.

No. 18-cv-01041-GJH

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

The relief sought in this suit—an order barring the Secretary of Commerce from collecting demographic information through the decennial census—is as extraordinary as it is unprecedented. The Constitution vests in the political branches of government discretion to decide the manner in which the census is conducted. In the exercise of that discretion, the Secretary decided to reinstate a question about U.S. citizenship on the 2020 decennial census. Not only has citizenship information historically been collected as far back as 1820, but citizenship information also forms an important component of enforcing the Voting Rights Act of 1965. Plaintiffs' claim that the Constitution precludes the Secretary from simply asking a question fails for at least four reasons.

First, Plaintiffs—nineteen individuals scattered across five states—lack standing to challenge the Secretary's decision to add a citizenship question to the decennial census. Plaintiffs' claimed injuries of lost voting power and decreased federal funding, based on their allegation that adding the citizenship question will reduce the response rates of their neighbors, are too abstract and speculative to confer Article III standing. And even if Plaintiffs could allege injuries that are concrete and non-speculative, those injuries would be not be fairly traceable to the Secretary's decision but would be attributable instead to the independent decisions of individuals who disregard their legal duty to respond to the census.

Second, Plaintiffs' challenge is unreviewable under the political question doctrine. The Constitution textually commits the "[m]anner" of conducting the census to Congress, and it contains no judicially discoverable or manageable standards for determining which demographic questions may be included on the census form. That question involves policy determinations that are ill-suited for judicial resolution and that the Constitution expressly commits to the political branches. Plaintiffs' challenge elides the serious separation-of-powers concerns that would be implicated by a court order dictating the form and content of the decennial census questionnaire.

Third, Plaintiffs are similarly barred from proceeding under the Administrative Procedure Act because the form and content of the census is committed to the Secretary's discretion by law. "Congress has delegated its broad authority over the census to the Secretary [of Commerce]," *Wisconsin v. City of NY*, 517 U.S. 1, 19 (1996), and it has done so in broad terms: Congress authorized the Secretary to conduct the decennial census "in such form and content as he may determine," 13 U.S.C. § 141(a), and to obtain other demographic information through that device, *id.* These broad delegations leave a court with no meaningful standard to apply and accordingly preclude judicial review of which demographic questions the Secretary decides to include on the decennial census form.

Fourth, Plaintiffs cannot state a claim for relief under the Constitution's Enumeration Clause. U.S. Const. art. I, § 2, cl. 3. The Secretary has developed comprehensive plans to conduct a person-by-person headcount of the population, and there is no allegation that he has failed to put in place procedures to count the population, all of whom are under a legal obligation to answer. The Secretary's decision to reinstate a citizenship question is consistent with the longstanding historical practice of asking about citizenship and other demographic information, whereas Plaintiffs' theory would call into question the constitutionality of asking *any* demographic questions—*e.g.*, about sex, Hispanic origin, race, or relationship status—that go beyond counting the population and that could cause at least some individuals not to respond for any of various reasons, such as discomfort with the question or increased time needed to answer.

For all of these reasons, this action should be dismissed.

BACKGROUND

I. CONSTITUTIONAL AND STATUTORY AUTHORITY FOR THE CENSUS

The U.S. Constitution requires that an "actual Enumeration" of the population be conducted every 10 years and vests Congress with the authority to conduct that census "in such Manner as they shall by Law direct." U.S. Const. art. I § 2, cl. 3. Through the Census Act, Congress has delegated to the Secretary of Commerce the responsibility to conduct the decennial census "in such form and

content as he may determine," 13 U.S.C. § 141(a), and has "authorized [him] to obtain such other census information as necessary," *id.* The Bureau of the Census assists the Secretary in the performance of this responsibility. *See id.* §§ 2, 4. As required by the Constitution, a national census of the U.S. population has been conducted every 10 years since 1790. U.S. Census Bureau, Questions Planned for the 2020 Census and American Community Survey, at 1 (Mar. 2018), https://www2.census.gov/library/publications/decennial/2020/operations/planned-questions-2020-acs.pdf ("Questions Planned").

The Act directs that the Secretary "shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title." 13 U.S.C. § 5. Nothing in the Act, however, directs the precise content of the questions that are to be included on the decennial census questionnaire. The Act imposes a legal duty on all persons to respond to the census. *See id.* § 221.

II. HISTORY OF INCLUSION OF A CITIZENSHIP QUESTION

Throughout our history, the United States has used the census to collect additional information beyond the population count "in response to the challenges facing the nation and a national desire to understand ourselves." Questions Planned, *supra*, at 1. This has included, for many decennial censuses, information about foreign birth, naturalization, and citizenship.

Beginning in 1820, the Census was used to tabulate citizenship by inquiring of each household the number of "foreigners not naturalized." *See* U.S. Census Bureau, Measuring America: The Decennial Censuses From 1790 to 2000, at 6, https://www2.census.gov/library/publications/2002/dec/pol_02-ma.pdf ("Measuring America").[1] With the exception of 1840, censuses from 1820

[1] The Court may take judicial notice of the undisputed historical facts concerning the census and other related surveys presented herein. *See Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 655 n.4 (4th Cir. 2004) (taking judicial notice of stock prices); *United States v. Garcia*, No. 3:15-cr-40, 2015 WL 7313425, at *2 (W.D.N.C. Nov. 19, 2015) ("district courts routinely exercise their discretion in taking judicial notice of information available on federal and state government websites").

to 1880 asked for citizenship or birthplace in some form.[2] Decennial censuses from 1890 through 1950 specifically requested citizenship information more consistently. The 1890 Census asked for the place of birth of the respondent and his or her parents and, for adult males of foreign birth 21 years or older, the number of years the individual had resided in the United States, whether he had naturalized, or, if not, whether naturalization papers had been taken out. Measuring America, at 22, 28. The 1900, 1910, 1920, and 1930 Censuses asked, with some variations, for the birthplaces of the individual and his or her parents, the year of immigration for all foreign-born individuals, and, for any adult male of foreign birth 21 years or older, whether he had naturalized or was an alien. *Id.* at 34, 37; *id* at 45, 49; *id.* at 58; *id.* at 59. The next two enumerations asked for the individual's place of birth and either (in 1940) for the citizenship of all foreign-born individuals or (in 1950) whether a foreign-born individual had naturalized. *Id.* at 62; *id.* at 66. The 1940 census also began the practice of sampling a portion of the population to collect some information, though the answers for all individuals were entered on the same form. Thus, the 1940 and 1950 Censuses asked only some of the population for the birthplaces of their parents. *Id.* at 62-63 (1940, 5%); *id.* at 66, 68 (1950, 20%).

The 1950 Census is the last one to have asked *all* respondents for citizenship status. In 1960, the Census Bureau asked 25% of the population for the birthplace of the respondent and his or her parents, though naturalization status was not requested. Measuring America at 72-73. All residents of New York were asked for place of birth and, if not born in the U.S. or Puerto Rico, whether they were citizens. U.S. Census Bureau, Twenty Censuses: Population and Housing Questions 1790-1980, at 71, https://www.census.gov/history/pdf/20censuses.pdf. In 1970, the first year respondents were asked to mail back the questionnaire, 20% of the population were asked for their birthplace, 15% were asked

[2] In 1830, the Census asked whether individuals were "foreigners not nationalized." Measuring America at 7. No question regarding birthplace or citizenship status was included in the 1840 Census. *Id.* at 8. In the 1850, 1860, and 1880 enumerations, the questionnaires asked for place of birth (though not citizenship *per se*). *Id.* at 9, 11, 13. The Census included a question regarding citizenship in 1870, along with questions about the individual's place of birth, whether either parent was of foreign birth, and whether the individual was a "Male citizen of U.S. 21 years of age and upwards." *Id.* at 13, 15.

for parents' birthplace, and 5% were asked whether the individual, if foreign born, had naturalized. Measuring America, at 78. The questionnaires asking for more detailed information from a sample of the population were called the "long-form questionnaire." *See* U.S. Census Bureau, Questionnaires, https://www.census.gov/history/www/through_the_decades/questionnaires/. In 1980, 1990, and 2000, the long form, which approximately 1 in 6 households received instead of the short form, asked for the individual's birthplace, and foreign-born persons were asked either whether they had naturalized (1980) or whether they were citizens (1990, 2000). *See id.*; Measuring America, at 91-92. The corresponding "short-form questionnaire," sent to the majority of households, did not ask for birthplace or citizenship status in those years.

Beginning in 2005, in order to provide communities, businesses, and the public with more-timely statistical information, the Census Bureau began collecting monthly (and releasing annually) the more extensive long-form data through the American Community Survey ("ACS"), which is sent yearly to a sample of the population—about one in 38 households. Information regarding national origin and citizenship has been collected through the ACS every year since 2005. *See* U.S. Census Bureau, Archive of American Community Survey Questions, https://www.census.gov/programs-surveys/acs/methodology/questionnaire-archive.html ("ACS Questionnaire Archive") (noting citizenship questions on every ACS questionnaire). The replacement of the long-form questionnaire with the yearly ACS after the 2000 Census enabled the 2010 census to be a "short-form-only" census. The 2020 census will also be a "short-form-only" census. The ACS will continue to be distributed each year, as usual, to collect additional data. https://www.census.gov/programs-surveys/acs/about/acs-and-census.html.

In recent decades, the Census Bureau has obtained citizenship data consistently through the long-form questionnaire and, since 2005, the yearly ACS (as well as some other surveys). Because the ACS collects information from only a sample of the population, it produces annual estimates only for census tracts and census block groups. *See* https://www.census.gov/newsroom/blogs/random-

samplings/2011/07/what-are-census-blocks.html. The decennial census attempts a full count of the population and produces population counts as well as counts of other, limited information (such as race) down to the smallest level, known as the "census block." *See* https://www.census.gov/geo/reference/webatlas/blocks.html. The Census Bureau currently provides the Department of Justice ("DOJ") with estimated citizenship data at the "census block group" level, which is a collection of census blocks.

III. REINSTATEMENT OF A CITIZENSHIP QUESTION IN THE 2020 CENSUS

On March 26, 2018, after taking a hard look and considering input from a variety of sources, the Secretary of Commerce issued a memorandum reinstating a citizenship question on the 2020 Census questionnaire.[3] Memorandum to Karen Dunn Kelley, Under Secretary for Economic Affairs, from the Sec'y of Commerce on Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire at 1 (Mar. 26, 2018) ("Ross Memo"), *cited in* FAC ¶ 88. The Secretary determined that the census should collect such information in order to provide DOJ with census-block-level data to assist in enforcing Section 2 of the Voting Rights Act ("VRA"), now codified at 52 U.S.C. § 10301. Ross Memo, at 1. In December 2017, DOJ had "formally request[ed] that the Census Bureau reinstate on the 2020 census questionnaire a question regarding citizenship." Letter from Arthur Gary, General Counsel, DOJ, to Ron Jarmin, performing the nonexclusive duties of the Director, U.S. Census Bureau, at 3 (Dec. 12, 2017) ("Gary Letter"), *cited in* FAC ¶ 85. DOJ had explained that citizenship "data is critical to the Department's enforcement of Section 2 of the Voting Rights Act" and that "the decennial census questionnaire is the most appropriate vehicle for collecting that data" because it would provide census-block-level citizenship voting age population ("CVAP") data that are not currently available from the ACS surveys (which provide data only at the larger census

[3] As the First Amended Complaint ("FAC") makes clear, the Census Bureau has periodically assessed whether reinstatement of such a question is appropriate. *See, e.g.,* FAC ¶ 76.

block group level). *Id.* DOJ explained that having citizenship data at the census block level will permit more effective enforcement of the Act. *Id.* at 1-2.

The Secretary first emphasized the goal of conducting a complete and accurate decennial census. Ross Memo, at 1. The Secretary also observed that, as detailed above, collection of citizenship data in the decennial census has a long history and that the ACS has included a citizenship question since 2005. *Id.* at 2. The Secretary therefore found that "the citizenship question has been well tested." *Id.* He also confirmed with the Census Bureau that census-block-level citizenship data are not available using the annual ACS. *Id.*

The Secretary asked the Census Bureau to evaluate the best means of providing the data requested by DOJ, and the Census Bureau initially presented three alternatives: Option A would have continued the status quo and provided DOJ with ACS citizenship data at the census-block-group level, rather than the block level requested in the Gary letter; Option B would have placed the ACS citizenship question on the decennial census, which goes to every American household; and Option C instead would have provided block-level citizenship data for the entire population using existing federal administrative-record data.[4] Ross Memo, at 2-4. In his decision memo, the Secretary found that Option A would not provide DOJ with improved CVAP data, as there was no guarantee that the accuracy or level of detail of the ACS data could be enhanced to meet DOJ's requirements even using sophisticated modeling methods. *Id.* at 2-3. After discussing Options B and C, *id.* at 3-4, the Secretary indicated that he had asked the Census Bureau to develop and implement a fourth alternative, Option D, which would effectively combine Options B and C. *Id.* at 4. Under this fourth option, a citizenship

[4] Administrative records include data from the Internal Revenue Service, the Social Security Administration, the Centers for Medicare and Medicaid Services, the Department of Housing and Urban Development, the Indian Health Service, the Selective Service, and the U.S. Postal Service. 2020 Census Operational Plan: A New Design for the 21st Century, at 22-26 (Sept. 2017, v.3.0), https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan3.pdf ("2020 Census Operational Plan"). Administrative records will be utilized only if the data is corroborated by at least two sets of records.

question would be reinstated on the decennial census in the same form as it appears on the ACS, imposing on each of the country's inhabitants the legal obligation to self-respond. *Id.* at 4-5. The Secretary directed the Census Bureau to further enhance its administrative-record data sets, protocols, and statistical models to maximize its ability to match the decennial census responses with administrative records. *Id.* at 4. The combination of responses to the question and more-developed practices for comparing those responses with administrative records would then permit the Census Bureau to determine the inaccurate response rate (whether for non-response, conflicting responses, or other reasons) for the entire population. *Id.* at 5. The Secretary concluded that this combined option would provide DOJ with the most complete and accurate CVAP data. *Id.*

In addition to discussing the operational aspect of DOJ's request with the Census Bureau, the Secretary closely considered stakeholder views. He reviewed letters from local, state, and federal officials and advocacy groups, monitored stakeholder commentary in the press, and spoke personally to interested parties on both sides of the issue. Ross Memo, at 1-2. In particular, the Secretary considered but rejected concerns raised by a number of parties that reinstating a citizenship question on the decennial census would negatively impact the response rate for noncitizens. *Id.* at 3-4, 5-6. While the Secretary agreed that a "significantly lower response rate by non-citizens could reduce the accuracy of the decennial census and increase costs for non-response follow up operations," *id.* at 3, he concluded that "neither the Census Bureau nor the concerned stakeholders could document that the response rate would in fact decline materially" as a result of reinstatement of the citizenship question. *Id.* Based on his discussions with outside parties, Census Bureau leadership and others within the Department of Commerce, the Secretary determined that, to the best of everyone's knowledge, limited empirical data exists on how reinstatement of a citizenship question might impact response rates on the 2020 census. *Id.* at 3, 5. Thus, "while there is widespread belief among many parties that adding a citizenship question could reduce response rates, the Census Bureau's analysis did not provide definitive, empirical support for that belief." *Id.* at 4; *see also id.* at 5-6.

Certain stakeholders informed the Secretary that reinstating a citizenship question could negatively impact response rates because of heightened, general distrust of the government. But the Secretary concluded that those commenters referred to individuals who may decline to participate regardless of whether the census includes a citizenship question and noted that "no one provided evidence that there are residents who would respond accurately to a decennial census that did not contain a citizenship question but would not respond if it did." Ross Memo, at 5. The Secretary further observed that, based on past experience, "certain interest groups consistently attack the census and discourage participation." *Id.* at 6. The Secretary explained that the Census Bureau intends to take steps to conduct respondent and stakeholder-group outreach in an effort to mitigate the impact of the foregoing issues on the 2020 decennial census. *Id.*

Finally, the Secretary explained his decision not to implement Option C, which would have relied solely on administrative records without reinstating a citizenship question. Ross Memo, at 4. The Secretary noted that the use of administrative records is still evolving, and that the Census Bureau does not yet have a complete data set for the entire population; in fact, based on the credible administrative record data identified by the Census Bureau in the 2010 Census, some 25 million voting-age people would need to have their citizenship status imputed by the Census Bureau if not given the opportunity to self-respond. *Id.* Reliance on administrative records alone thus would not provide DOJ with the complete and accurate block-level CVAP data it requested. *Id.*

The citizenship question is not the only question beyond the total number of persons residing at a location that the 2020 census questionnaire will pose. For example, the questionnaire also will ask questions regarding sex, Hispanic origin, race, and relationship status. *See* Questions Planned, at 13. Plaintiffs do not challenge the Secretary's decision to include any of those questions.

IV. 2020 CENSUS PROCEDURES AND PLANS TO MINIMIZE NON-RESPONSE

The Department of Commerce and the Census Bureau have extensive plans in place to maximize self-response and thereby minimize the amount of non-response follow up. The 2020

Census will be the first to rely extensively on digital methods and automation. It will be the first census where individuals are encouraged to respond online. 2020 Census Operational Plan, at 15, 18-19, 26, 88. Most housing units will receive several short mailings instructing them to complete the census either online or by telephone. *Id.* at 18, 21. Individuals will be able to respond online and online forms will be provided in multiple languages. *Id.* at 19, 98. If households do not respond by the fourth mailing, the full paper questionnaire will be sent.[5] *Id.* at 99. Housing units that are less likely to have Internet access will receive a full paper questionnaire in the first mailing, to allow them to respond immediately via mail. *Id.* at 91, 95.

Each household will receive up to six mailings, if necessary. 2020 Census Operational Plan, at 99. If no response has been received after the fifth mailing, a census enumerator will be assigned to that address. *Id.* at 114. The enumerator will personally visit all units to which he or she is assigned to verify that the address is occupied and to attempt to contact a household member to complete the questionnaire. *Id.* If the enumerator is not able to complete the questionnaire, administrative records will be used to identify vacant housing units and determine response data for occupied households where the Census Bureau has high-quality administrative records. *Id.* at 22, 114, 117. If such records do not exist, a final postcard encouraging self-response will be mailed, and all addresses still non-responsive will be subject to up to six contact attempts, with eligibility to have the data obtained from a proxy (such as a neighbor or landlord) after the third unsuccessful attempt. *Id.*

The Census Bureau also plans to mount extensive publicity and outreach campaigns, in which it will work with units of local government, the media, and community-based organizations to encourage people to respond to the census. 2020 Census Operational Plan, at 92-95. Through that outreach the Census Bureau also regularly reiterates its commitment to preserving the confidentiality of the data it collects as required by statute. *Id.* at 19; *see* 13 U.S.C. § 9.

[5] In particularly hard-to-reach areas, census questionnaires will be hand delivered. 2020 Census Operational Plan, at 102-05.

LEGAL STANDARDS

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), a plaintiff must establish a court's jurisdiction through sufficient allegations. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Courts should "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (internal quotation marks and citations omitted). When considering such a motion, the Court must "accept as true … allegations for which there is sufficient factual matter to render them plausible on their face." *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017) (brackets and citation omitted), *cert. denied sub nom. Beck v. Shulkin*, 137 S. Ct. 2307 (2017). The Court need not, however, "apply the same presumption of truth to conclusory statements and legal conclusions contained in … [the] complaint." *Id.* (citation omitted). In evaluating subject-matter jurisdiction, the court may, when necessary, "look beyond the pleadings and the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Vance v. CHF Int'l*, 914 F. Supp. 2d 669, 676 (D. Md. 2012) (citation omitted).

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "plausibility" standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). While the Court accepts well-pleaded factual allegations as true, "mere conclusory statements" and "legal conclusion[s] couched as … factual allegation[s]" are "disentitle[d] … to th[is] presumption of truth." *Id.* at 678, 681 (citation omitted). Although the Court generally may not rely on material outside the pleadings under Rule 12(b)(6), it may consider any "matters of public record" of which the court may take judicial notice, *Sec'y of State for Def. v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th

Cir. 2007) (citations omitted), as well as evidence attached to the motion to dismiss "[if] it was integral to and explicitly relied on in the complaint and [if] the plaintiffs do not challenge its authenticity," *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004) (alteration in original) (citation omitted). Further, "when faced with a motion to dismiss in the APA context, a court may consider the administrative record and public documents without converting the motion into a motion for summary judgment," *Bates v. Donley*, 935 F. Supp. 2d 14, 17 (D.D.C. 2013) (citing *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009)).

In this Circuit, courts also apply the "plausibility" standard of *Twombly* to motions to dismiss for lack of standing under Rule 12(b)(1). "[J]ust because [an] allegation satisfies the elements of Article III standing doesn't mean that [the court] must accept it as true for the purpose of resolving the government's facial challenge to the complaint." *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 210 (4th Cir. 2017). Rather, the court then "proceed[s] to the second part of [the] analysis to decide whether the [allegation] is plausible." *Id.; see also Beck*, 848 F.3d at 270 ("[W]e accept as true . . . allegations for which there is sufficient 'factual matter' to render them 'plausible on [their] face[,]' [but w]e do not, however, apply the same presumption of truth to 'conclusory statements' and 'legal conclusions.'").

ARGUMENT

In seeking to invalidate the Secretary's decision to reinstate a question about citizenship on the decennial census form, Plaintiffs ask the Court to second-guess the Secretary's judgment about how to exercise authority that has been delegated to him by the Constitution through Congress—a particularly troublesome request because the relief requested would intrude deeply into matters textually committed to the discretion of the political branches of government.

Plaintiffs' request is not justiciable for multiple reasons. As an initial matter, Plaintiffs—nineteen individuals living in five different states—have not established Article III standing. Their claimed injuries from vote dilution or loss of funding are too attenuated and speculative to confer

standing. Furthermore, any injury that may occur would not be fairly traceable to the challenged decision; it would be attributable to the independent, unlawful actions of third parties. But even if Plaintiffs could clear the standing hurdle, the Constitution commits the "[m]anner" of conducting the census to Congress, and Congress has delegated that authority to the Secretary in such broad terms that there is no judicially discernible standard against which to measure the Secretary's exercise of his discretion. Plaintiffs' challenge to the Secretary's decision thus presents a nonjusticiable political question. Further, the decision at issue is committed to agency discretion by law and unreviewable under the APA. And lastly, Plaintiffs fail to state a claim under the Enumeration Clause of the Constitution because the Secretary has wide discretion to control the content of the Census, and to determine the method to count every person. This case should be dismissed.

I. THIS CASE IS NOT JUSTICIABLE

A. Plaintiffs Lack Standing to Maintain this Action.

The doctrine of constitutional standing, an essential aspect of the Article III case-or-controversy requirement, demands that a plaintiff have "a personal stake in the outcome of the controversy [so] as to warrant his invocation of federal-court jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). At its "irreducible constitutional minimum," the doctrine requires a plaintiff, as the party invoking the Court's jurisdiction, to establish three elements: (1) a concrete and particularized injury-in-fact, either actual or imminent; (2) a causal connection between the injury and defendants' challenged conduct, such that the injury is "fairly trace[able] to the challenged action of the defendant"; and (3) a likelihood that the injury suffered will be redressed by a favorable decision. *Defs. of Wildlife*, 504 U.S. at 560-61. Where a plaintiff does not establish each of the elements of standing, a court must dismiss that claim for lack of subject matter jurisdiction. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475-76 (1982) ("Those who do not possess Art[icle] III standing may not litigate as suitors in the courts of the United States.").

As the party invoking federal jurisdiction, the plaintiff bears the burden of establishing the required elements of standing "with the manner and degree of evidence required at the successive stages of the litigation." *Defs. of Wildlife*, 504 U.S. at 561. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," *id.*, so long as they plausibly identify an injury. *Beck*, 848 F.3d at 270; *see also FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990) ("it is the burden of the 'party who seeks the exercise of jurisdiction in his favor,' … 'clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'" (citation omitted)). However, the Court does not "apply the same presumption of truth to 'conclusory statements' and 'legal conclusions.'" *Beck*, 848 F.3d at 270.

Plaintiffs have not met this burden here. Plaintiffs' allegations of injury are too attenuated and speculative to satisfy the requirement that they present a concrete injury-in-fact. In addition, Plaintiffs fail the causation prong of the standing inquiry because they have not established that their alleged injuries can be fairly traced to government action rather than the independent actions of third parties.

1. Plaintiffs' allegations of injury are too attenuated and speculative.

The standing requirement of "injury in fact" requires an allegation that the plaintiff "has sustained or is immediately in danger of sustaining a direct injury" as a result of the challenged action. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1552 (2016) (citations omitted). The injury or threat of injury must be "concrete and particularized," *Defs. of Wildlife*, 504 U.S. at 560 (citations omitted), and not "merely 'conjectural' or 'hypothetical' or otherwise speculative." *Summers v. Earth Island Inst.*, 555 U.S. 488, 505 (2009) (quoting *Defs. of Wildlife*, 504 U.S. at 560). An alleged future injury must be "*certainly impending*"; "'[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (emphasis in original) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

Plaintiffs' claimed injuries—resulting from the hypothesized consequences of attenuated events starting with a speculative increase in non-responses to the census—are too abstract and attenuated to demonstrate the necessary concrete injury-in-fact. Plaintiffs, nineteen individuals, claim

that the reinstatement of the citizenship question on the decennial census (but not the presence of other questions touching on sex, Hispanic origin, race, or relationship status that some respondents might prefer not to answer) could increase non-response rates, particularly in hard-to-count populations, and accordingly will result in a disproportionate undercount of the populations where they live. FAC ¶¶ 115-120. These anticipated undercounts, they aver, will have several consequences that, eventually, will produce an impact on them as individuals. First, they allege that the asserted increased undercount is expected to deprive Arizona, Florida, and Texas of the additional congressional seats that these states otherwise expect to gain following the 2020 Census and also is expected to cause Nevada to lose one of its present congressional seats. *Id.* ¶ 125. Second, they allege that the assumed undercount will skew the drawing of congressional and state legislative districts and will thereby dilute their votes. *Id.* ¶ 126. Third, they contend a disproportionate undercount will reduce the amount of federal funding distributed to the areas in which they live, impacting the schools their children attend, the roads on which they drive, and Medicaid and foster care programs in which they participate. *Id.* ¶¶ 127-142.

At the outset, Plaintiffs' claims of injury are premised on their belief that the addition of the citizenship question will ultimately cause a net *decrease* in the response rate for the 2020 Census, at least in certain areas. *See, e.g.,* FAC ¶ 105. This assertion is entirely speculative, however. As Secretary Ross pointed out, there is little "definitive, empirical" evidence regarding the effect of adding a citizenship question to the decennial census. Ross Memo, at 3; *see also id.* at 4-6. Indeed, as the Secretary confirmed with the Census Bureau, non-response rates for the citizenship question on the 2013-2016 ACS surveys were comparable to non-response rates for other questions on those same surveys. *Id.* at 3. Moreover, households historically have failed to respond to the census and other surveys for a variety of reasons, even when no citizenship question was included. *See id.* Plaintiffs do not provide any reason to conclude that households who otherwise would respond in 2020 would now choose not to do so because of the citizenship question and even admit that certain demographic groups already "have

become even more suspicious and distrustful of efforts to collect personal data." FAC ¶ 108. As the Secretary noted, there are many individuals who would decline to participate regardless of whether the Census included a citizenship question, and "no one provided evidence that there are residents who would respond accurately to a decennial census that did not contain a citizenship question but would not respond if it did." Ross Memo, at 5.

Thus, Plaintiffs merely speculate that the reinstatement of a citizenship question alone will reduce self-response rates. Moreover, Plaintiffs ignore that the Census Bureau has extensive procedures in place to address non-responses and to obtain accurate data for those households that decline to respond. Indeed, the Census Bureau plans to increase outreach to address the potential for non-responses (for whatever reason), and is investing in extensive procedures to meet any non-response challenge. Consequently, it is entirely unknown (and unknowable) at present whether any initial decrease in self-response rates will result in an undercount at the close of the 2020 Census, after the Census Bureau has completed all its processes for enumerating.[6] In sum, Plaintiffs' allegations that the reinstatement of the citizenship question will ultimately produce an increase in the undercount in certain areas is nothing more than speculation and hence insufficient to establish standing.

Second, even to the extent that there may be a chance of a greater undercount because of the citizenship question, the individual Plaintiffs' allegations that they face a likelihood of experiencing an ensuing impact are too attenuated and speculative to satisfy Article III. Plaintiffs allege generally that an increased undercount (assuming one occurs) will impact the number of representatives that their states have in the House of Representatives (apportionment), will affect the size of state voting

[6] This conclusion is confirmed by recent testimony by Dr. Ron Jarmin, performing the nonexclusive duties of the Director of the Census Bureau, who stated that there is no "definitive answer" as to whether a citizenship question could produce a differential increase in the non-response rate and could offer only that the impact in some communities "*might* be important." *See* Testimony, https://appropriations.house.gov/calendar/eventsingle.aspx?EventID=395239, at 1:41:36, 1:44:20; *see also* FAC ¶ 114.

districts (redistricting), and will affect the share of federal funds granted to the areas in which plaintiffs live. FAC ¶¶ 125-142. In none of these categories, however, are Plaintiffs' allegations sufficiently concrete and nonspeculative. As to the allegations regarding apportionment, Plaintiffs assert that Arizona, Florida, Texas, and Nevada risk losing a congressional seat (either present or anticipated) but do not set forth facts explaining how they reached this conclusion or whether it takes into account any potential undercount in other states resulting from the reinstatement of the citizenship question. *Id.* ¶ 125. Apportionment is a complex process that is determined by ranking states in order of priority for seats, based on their populations (multiplied by a multiplier). *See* 2 U.S.C. § 2a(a) (apportionment of existing number of Representatives to occur "by the method known as the method of equal proportions"); https://www.census.gov/population/apportionment/about/computing.html; *see generally U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 461 (1992). Thus, each state's likelihood of gaining or losing seats is affected by its own total population as well as the population of *other* states, which may also be moving up or down in the priority listing. Here, Plaintiffs do not allege that their states will remain at risk of losing seats *even if potential undercounts in other states are taken into account*. Their allegations in this regard are therefore too conclusory to establish standing. *See Ridge v. Verity*, 715 F. Supp. 1308, 1318 (W.D. Pa. 1989) (finding no standing to bring an apportionment claim when "none of the plaintiffs in this case can show which states would gain and which would lose representation in Congress"); *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 570 (D.D.C. 1980) (holding "none of the plaintiffs are able to allege that the weight of his or her vote in the next decade will be affected" where plaintiffs "can do no more than speculate as to which states might gain and which might lose representation" which depends, *inter alia,* on "the interplay of all the other population factors which affect apportionment"); *see also Sharrow v. Brown*, 447 F.2d 94, 97 (2d Cir. 1971) (noting that plaintiff's claim of standing to challenge method of apportionment "presents difficulty" because plaintiff "would have to show, at least approximately, the apportionment his interpretation . . . would yield, not only for New York *but for every other State as well*" (emphasis added)); *cf. Glavin v. Clinton*, 19 F.

Supp. 2d 543, 548 (E.D. Va. 1998) (finding that plaintiffs had alleged a sufficient injury related to appointment and redistricting resulting from the Commerce Department's plan regarding statistical adjustment where "they are able to calculate its effects by reference to the results of the Post–Enumeration Survey completed in 1992, which closely mirrors the methodology the Department will utilize as part of its plan for Census 2000"), *aff'd sub nom, Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999).

Plaintiffs' allegations regarding redistricting are also merely conclusory and do not identify concretely how Plaintiffs believe the feared increased undercount will affect state-level districting and therefore in turn affect their own voting power. FAC ¶ 126; *see Nat'l Law Ctr. on Homelessness & Poverty, v. Kantor*, 91 F.3d 178, 186 (D.C. Cir. 1996) ("interstate vote dilution injury is difficult to establish"); *Strunk v. U.S. Dep't of Commerce*, Civ. A. No 09-1295 (RJL), 2010 WL 960428, at *3 (D.D.C. Mar. 15, 2010) (rejecting vote dilution claims for lack of standing where plaintiff was "but one citizen of New York and one voter in New York's 11th Congressional District"). In addition to failing to explain precisely how they believe their votes will be diluted, Plaintiffs do not take into account that their states may choose to adjust census data before beginning redistricting, as discussed in the next section below concerning causation.

Finally, as to the funding-related allegations, even assuming a reduction in federal grant monies from an increased undercount in the areas in which Plaintiffs live, they have failed to allege sufficient facts to establish the possibility of a concrete injury to themselves from such a loss of funds. *See Warth v. Seldin*, 422 U.S. 490, 502 (1975) ("Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent."). For example, Plaintiffs do not state the amount of funds currently received for schools or roads where they live, do not comment on the likelihood that an overall reduction in federal grant monies to their area will cause a decrease in the funds received for schools or roads they actually use, or assert how any reduction in those amounts will affect their

experience in using the schools or roads. Plaintiffs cannot establish standing by simply alleging that roads in their area are supported in part by federal funds, and that they drive on those roads. *See Defs. Of Wildlife,* 504 U.S. at 573-74 ("We have consistently held that a plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy."). Neither do the two plaintiffs who participate in Medicaid allege how they believe their participation will be impacted, FAC ¶¶ 17, 32, and the one plaintiff who cites the foster care program has not yet even been accepted into that program. *Id.* ¶ 16. The allegations in the FAC in this regard therefore are insufficient to "allege an injury . . . that is distinct and palpable, as opposed to merely abstract." *Whitmore*, 495 U.S. at 155 (internal citations and alterations omitted).

Even if Plaintiffs were permitted to amend their Complaint a second time to add more specific allegations regarding anticipated harm from loss of funding, such amendment could not cure Plaintiffs' lack of standing, as their asserted chain of events is too attenuated to satisfy Article III. *See Beck*, 848 F.3d at 275. Plaintiffs claim that a decreased count will decrease federal funding, which will decrease funding to their roads, schools, and state Medicaid programs, which will have some (still unknown) impact on the specific programs they use. But too many eventualities (controlled by third parties, as discussed in the next section) could break this "highly attenuated chain of possibilities." *Clapper*, 568 U.S. at 410. The federal government could alter its funding formulas, the states or localities could make up the difference, the impact could be minimal in Plaintiffs' areas, or the states or local authorities could determine ways to stretch the more limited funds.

In addition, it is not at all certain that a decrease in the count would affect funding, even assuming the chain of eventualities listed above. Plaintiffs' allegations fail to acknowledge that the allocation of funds under the cited programs is not generally directly proportional to population but is a function of multiple factors including, often, the populations of *other* states. *See* 49 U.S.C. § 5305(d)(1) (apportioning public transportation planning funds to states in the relation that the population of urbanized areas in each state bears to the total population of urbanized areas in all

states); 20 U.S.C. § 6337; 42 U.S.C. § 1301(a)(8)(A) (Medicaid formula measuring a state's per capita income against the national average per capita income). Given the complexity of these calculations and the interrelationships between all the states' funding, Plaintiffs' allegations that their regions may face a loss of federal funds from an increased undercount are too speculative to satisfy Article III's requirements. *See Nat'l Law Ctr. on Homelessness & Poverty*, 91 F.3d at 185 (finding no standing where court could not determine "what effect any methodology for counting the homeless would have on the federal funding of any particular appellant," noting that "if a more accurate count would have enlarged some communities' shares, it likely would have reduced the shares of other communities").[7]

In sum, Plaintiffs do not make out a claim which satisfies the Article III requirement that a plaintiff's threatened injury must be concrete and "certainly impending" and must not rely on a "highly attenuated chain of possibilities." *Clapper*, 568 U.S at 410. However, even if Plaintiffs had adequately pled a concrete, non-speculative injury regarding loss of funding and therefore had met their pleading burden for Article III standing, that injury alone would not bring them within the zone of interests protected by the Constitution's Enumeration Clause, which has no relation to, and was not intended to, ensure that federal grant monies flow equally to all individuals. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990) ("[A] plaintiff must establish that the injury he complains of … falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint."); *Taubman Realty Grp. Ltd. P'ship v. Mineta*, 320 F.3d 475, 480 (4th Cir. 2003). For prudential standing to exist to assert a claim under the Enumeration Clause, Plaintiffs would have to adequately plead an injury related to *apportionment*. As shown above, they have not.

[7] Defendants acknowledge that the court in *National Law Center on Homelessness and Poverty* was ruling on a motion for summary judgment and that a number of courts have found allegations of loss of funding to be sufficient to survive motions to dismiss. *See* 91 F.3d at 185 (citing cases). But most of those cases involved post-census challenges to counting methodologies, and none of them involved a challenge to the mere inclusion of a *question* on the census form. Defendants respectfully contend that the layers of speculation required here to conclude that plaintiffs will be injured by the addition of one question on the census form distinguishes this case from these prior decisions.

2. Plaintiffs' alleged injuries are not fairly traceable to the challenged action.

To ensure that a plaintiff's allegations of harm are fairly attributable to the challenged action, it is necessary to allege "a causal connection between the injury and the conduct complained of," such that the alleged injury is "fairly traceable to the challenged action of the defendant." *Defs. of Wildlife*, 504 U.S. at 560 (internal alterations and citation omitted). Indeed, the Supreme Court repeatedly has "decline[d] to abandon [its] usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper*, 568 U.S. at 414. At bottom, "a federal court [must] act only to redress injury that fairly can be traced to the challenged [conduct] of the defendant, and not injury that results from the independent action *of some third party not before the court*." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (emphasis added); *see also Warth v. Seldin*, 422 U.S. at 506 (finding standing lacking where alleged injury resulted from outside forces, "rather than . . . respondents' assertedly illegal acts").

Even if Plaintiffs' allegations here were not inherently speculative, and even accepting all well-pleaded facts as true, Plaintiffs' own allegations rely upon the intervening acts of third parties violating a clear legal duty to participate in the decennial census. *See* 13 U.S.C. § 221. Specifically, Plaintiffs do not claim that their threatened injuries—dilution of their votes and decreases in federal funding—will result directly from the Secretary's decision to reinstate a citizenship question on the decennial form. Rather, Plaintiffs posit that individuals in their communities who otherwise would comply with their legal obligation to respond to the census will be deterred from participating in the entire survey because of the reinstatement of a single question. But that unlawful failure to respond to a legitimate question simply is not "*fairly* traceable" to the Secretary.

Moreover, it likely would be impossible to isolate and quantify the number of individuals who would have responded but for addition of the citizenship question, both because every census undercounts the population to some degree, *see Wisconsin*, 517 U.S. at 6, and because there will be no reliable method to exclude from the total undercount individuals who would refuse to respond

regardless of the citizenship question because of any number of other factors, such as a general reluctance to provide information to the government or the current political climate. *See Lane v. Holder*, 703 F.3d 668, 673 (4th Cir. 2012) (affirming dismissal for lack of standing where "any injury to the plaintiffs is caused by decisions and actions of third parties not before this court rather than by the laws themselves").

Plaintiffs also cannot premise standing for their vote-dilution allegations on injuries allegedly produced by state-level redistricting actions following the census, as states are not required to use unadjusted census figures in such actions. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 & n.3 (2016); *see also* Md. Code Ann., Local Gov't § 1-1307 (West 2017) (modifying census count of prisoners). Accordingly, a state's decision to use such figures is another independent action by a third party that breaks the chain of causation. *See City of Detroit v. Franklin*, 4 F.3d 1367, 1374 (6th Cir. 1993).

B. Plaintiffs' Suit is Barred by the Political Question Doctrine.

Even if Plaintiffs had standing, their claims still must be dismissed because they are barred by the political question doctrine. The Constitution provides that Representatives "shall be apportioned among the several States . . . according to their respective numbers," which requires "counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2. To calculate the "number of persons in each State," *id.*, the Enumeration Clause requires an "actual Enumeration" every 10 years "in such Manner as [Congress] shall by Law direct." *Id.* art. I, § 2, cl. 3. This Clause says only two things about the census: (1) there must be a decennial, person-by-person headcount of the population, and (2) the "[m]anner" of conducting the census is up to Congress. The former command presents a judicially cognizable question that courts have routinely answered; the latter presents a nonjusticiable political question reserved for Congress and, through Congress's delegation, for the Secretary.

This case implicates only the latter question because it does not involve whom to count, how to count them, or where to count them. Indeed, Plaintiffs' theory of harm relies on the Secretary putting procedures in place to reach every individual in the country. *See* FAC ¶¶ 105-14. Thus, only

the Enumeration Clause's "[m]anner" prong is at issue here, as this case concerns simply the "[m]anner" by which the Secretary performs the information-gathering function of the census. Judicial review of that question is barred by the political question doctrine.

The political question doctrine is "primarily a function of the separation of powers," *Baker v. Carr*, 369 U.S. 186, 210 (1962), and "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government," *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990). The doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). The functional nature of this doctrine requires a case-by-case inquiry into "the precise facts and posture of the particular case." *Baker*, 369 U.S. at 217; *Wu Tien Li-Shou v. United States*, 777 F.3d 175, 180 (4th Cir. 2015).

Six factors inform whether a case presents a nonjusticiable political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217; *see also In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 334 (4th Cir. 2014). While the first two factors are most important, *see Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (examining only the first two factors); *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (observing that the factors are "probably listed in descending order of both importance and certainty"), the presence of any one of these factors can render a case nonjusticiable. *See id.* at 277 (referencing the six factors as six "independent tests"); *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005) ("To find a political

question, we need only conclude that one factor is present, not all."); *Du Daobin v. Cisco Sys., Inc.*, 2 F. Supp. 3d 717, 723 (D. Md. 2014). This case presents not one, but at least three factors that render this controversy nonjusticiable.

1. The content of the census questionnaire is textually committed to Congress.

While the Enumeration Clause requires an "actual Enumeration" every 10 years, it also states that the census will be conducted "in such Manner as [Congress] shall by Law direct." U.S. Cons. art. I, § 2, cl. 3. The plain text of this Clause commits the "[m]anner" of conducting the Census to the sound discretion of Congress, thus satisfying the first and most important political question factor.

By using the phrase "in such Manner" to modify the phrase "[t]he actual Enumeration shall be made," the Constitution makes clear that Congress fully controls the manner in which the decennial census is conducted. Dictionaries roughly contemporaneous with the ratification of the Constitution demonstrate that the "[m]anner" of conducting the Census necessarily includes control over the census questionnaire.[8] The census questionnaire is quite literally the "form" of the census,[9] and it is the "method" by which an "actual Enumeration" is conducted—*i.e.*, the census is completed by inhabitants filling out the census questionnaire. Plaintiffs' challenge to the content of census questions thus goes directly to the "way of performing or executing" the census itself, a determination that is constitutionally entrusted to Congress.

Accordingly, the remedy for an unwise census question lies not in the courts, but in Congress. It is Congress to whom the Constitution entrusts the "[m]anner" of conducting the census, and only Congress can overturn the Secretary's decision to reinstate the citizenship question. The Census Act

[8] Noah Webster's 1828 American Dictionary of the English Language defines "manner" as "form; method; way of performing or executing," and Thomas Sheridan's 1796 Complete Dictionary of the English Language (6th ed.) defines "manner" as "form, method" or "habit, fashion." *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346-47 (1999) (Scalia, J., concurring in part) (examining the text of the Enumeration Clause by referencing these dictionaries).

[9] *See Form*, Sheridan's Complete Dictionary of the English Language (6th ed. 1796) (defining "form" as "[t]he external appearance of any thing, shape; particular model or modification").

even requires the Secretary to report census questions to Congress two years prior to the Census for exactly this reason: to allow the Legislative Branch adequate time to consider the propriety of these questions. 13 U.S.C. § 141(f)(2). That congressionally established process further underscores what the Constitution's text makes clear: that Congress, not the courts, determines the form of the census. This case should therefore be dismissed as a nonjusticiable political question.

2. The Court has no judicially manageable standards to make the necessarily policy-based determinations regarding the content of the census questionnaire.

The second and third political question factors also preclude the Court's intervention because there are no judicially manageable standards for making policy decisions regarding census procedures, such as the content of the census questionnaire.

The text and history of the Enumeration Clause unequivocally demonstrate that decisions regarding the information-gathering procedures of the census are fully committed to Congress's discretion. The reason for this constitutional delegation is axiomatic: each census procedure—from the types of advertising and the use of different languages to promote the census, to the number of regional census offices and the particular systems used to tabulate responses, to the number of enumerators to hire and the process for in-person enumeration visits—requires a careful balancing of considerations such as cost, testing, training, effectiveness, timing, informational need, and accuracy.[10]

These considerations are quintessentially policy choices outside the province of the judiciary. In this case, for example, the Secretary balanced the need for citizenship information with the cost and effectiveness of efforts to mitigate non-responses, the possibility of lower response rates, the cost of increased non-response follow-up, and the completeness and cost of administrative records. There are no judicially manageable standards for determining how to weigh these factors, which do not implicate the affirmative constitutional command to count, rather than estimate, the population. Once

[10] These considerations are present to some degree when the Secretary decides who, where, and how to count inhabitants of the United States, which is why the Supreme Court defers to the Secretary's judgment in calculation-methodology cases. *See Wisconsin*, 517 U.S. at 19.

a court ventures beyond that affirmative constitutional command, there is no law to apply; it is in the realm of cost/benefit analyses and value judgments constitutionally entrusted to representatives of the people and executive officials confirmed by the same. *Japan Whaling*, 478 U.S. at 230.

The census-related cases decided by the Supreme Court are distinguishable. All have concerned calculation methodologies, not pre-count information-gathering functions or content determinations. *See, e.g., Utah v. Evans*, 536 U.S. 452, 452 (2002) ("hot-deck imputation"—a non-sampling process which infers characteristics of individuals based upon the characteristics of neighbors, resulting in inclusion of individuals who otherwise would be excluded—did not violate the Enumeration Clause); *Dep't of Commerce*, 525 U.S. at 316 (holding that statistical sampling violates the Census Act, 13 U.S.C. § 195, and declining to reach the Enumeration Clause claim); *Wisconsin*, 517 U.S. at 1 (holding that Secretary did not violate Enumeration Clause by failing to correct a census undercount with data from a post-enumeration survey); *Franklin*, 505 U.S. at 788 (confirming that the method used to count federal employees serving overseas did not violate Enumeration Clause). The Constitution supplies a simple judicial standard for determining the constitutionality of such practices—the Secretary must perform a person-by-person headcount, rather than an estimate, of population. There is nothing incomprehensible about that standard. [11]

In stark contrast, there is no judicially discernible standard for determining whether the Secretary's decision to reinstate the citizenship question on the 2020 Census is unconstitutional. This

[11] The Court's apportionment cases are also inapposite. The Supreme Court has routinely decided cases involving congressional districting by States on the theory that the Constitution requires "equal representation for equal numbers of people." *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964). And the Court similarly has decided that challenges to the way in which Congress allocates congressional seats are justiciable. *See U.S. Dep't of Commerce v. Montana*, 503 U.S. at 459 (noting Congress is granted more deference than states in apportionment). But the nature of those controversies provided easily administrable standards: the number of people in each congressional district. *See Wesberry*, 376 U.S. at 2 (observing that one of Georgia's congressional districts contained more than twice as many residents as its other 10 districts); *Tucker v. Dep't of Commerce*, 958 F.2d 1411, 1418 (7th Cir. 1992) (noting that the Supreme Court's reapportionment cases "authorize the courts to intervene in the process of apportioning representatives," because "[e]quality of voting power is an administrable standard").

is a "policy choice[] and value determination[] constitutionally committed for resolution to the halls of Congress [and] the confines of the Executive Branch." *Japan Whaling*, 478 U.S. at 230. Thus, this case is barred from judicial consideration by the political question doctrine.

C. The Secretary's Decision Is Not Subject to Judicial Review Under the Administrative Procedure Act.

The APA bars judicial review of certain categories of decisions that "courts traditionally have regarded as 'committed to agency discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quoting 5 U.S.C. § 701(a)(2)). Agency action is committed to agency discretion by law where "'statutes are drawn in such broad terms that in a given case there is no law to apply,'" *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402, 410 (1971) (internal citation omitted). These decisions are not amenable to judicial review because there exists "no meaningful standard against which to judge the agency's exercise of discretion" in these areas. *Webster v. Doe*, 486 U.S. 592, 600 (1988); *see also Speed Mining, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 528 F.3d 310, 317 (4th Cir. 2008) (applying § 701(a)(2) to bar judicial review where "the relevant provisions of the . . . Act provide *no meaningful standard* for review" (emphasis added)). This bar applies, moreover, even when "the agency gives a 'reviewable' reason for otherwise unreviewable action." *ICC v. Bhd. of Locomotive Eng'rs* ("*BLE*"), 482 U.S. 270, 283 (1987).

As the Supreme Court has repeatedly emphasized, application of § 701(a)(2)'s bar on judicial review "requires careful examination of the statute on which the claim of agency illegality is based," *Webster*, 486 U.S. at 600, along with whether the matter traditionally has been viewed as committed to agency discretion, *BLE*, 482 U.S. at 282, or whether the challenged action manifests a "general unsuitability" for judicial review because it involves a "complicated balancing of a number of factors," difficult judgments concerning the proper allocation of agency resources, or matters uniquely committed to another branch of government, *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). Here, these factors compel the conclusion that the Secretary's decision to reinstate a citizenship question on

the decennial census is—just like the conduct of the census generally—a classic example of a discretionary determination that is committed to the discretion of the Secretary of Commerce and thus not subject to judicial review.

In the first place, the applicable section of the Census Act, 13 U.S.C. § 141(a), contains *no* standards against which to assess the Secretary's exercise of discretion, particularly with regard to a matter as fundamental as the form and content of the questionnaire itself. Far from confining the Secretary's discretion, the statute delegates it in the broadest terms: "The Secretary shall … take a decennial census of population … *in such form and content as he may determine*," and, "[i]n connection with any such census, the Secretary is authorized to obtain such other census information *as necessary*." 13 U.S.C. § 141(a) (emphases added). This plain language confers discretion as broad as that granted by the statute at issue in *Webster*, 486 U.S. at 600, which allowed the CIA Director to terminate an employee whenever he "shall *deem* such termination necessary or advisable in the interests of the United States." The language of § 141(a) contains similar "deeming" language—the census is to be conducted as the Secretary "may determine." And, just as the CIA Director's decision that terminating an employee is "necessary or advisable" is immune from judicial review, *id.*, so too is the Secretary's decision to collect information through the decennial census "as necessary" and "in such form and content as he may determine." 13 U.S.C. § 141(a). As in *Webster*, this statutory scheme embodies deference to the Secretary, and forecloses the application of any meaningful judicial review. *See Angelex Ltd. v. United States*, 723 F.3d 500, 507 (4th Cir. 2013) (reversing and remanding to dismiss for lack of jurisdiction where challenged action committed to agency discretion by law).

It is thus unsurprising that, even in cases challenging calculation methodologies under the Enumeration Clause, courts have construed the "conduct" of the census as generally unfit for judicial interference. As the Supreme Court has explained:

> The text of the Constitution vests *Congress* with virtually unlimited discretion in conducting the decennial "actual Enumeration," *see* Art. I, § 2, cl. 3, and notwithstanding the plethora of lawsuits that inevitably

> accompany each decennial census, there is no basis for thinking that Congress' discretion is more limited than the text of the Constitution provides. … Through the Census Act, Congress has delegated its broad authority over the census to the Secretary.

Wisconsin, 517 U.S. at 19 (emphasis added). The Supreme Court's explication of the political branches' virtually unlimited discretion is highly probative of whether the Secretary's decisions exercising that discretion are subject to judicial review.[12]

Similar concerns led the Seventh Circuit to conclude that the absence of "guidelines for an accurate decennial census" from the Constitution, the Census Act, and the APA itself creates "the inference . . . that these enactments do not create justiciable rights." *Tucker*, 958 F.2d at 1417-18 ("So nondirective are the relevant statutes that it is arguable that there is no law for a court to apply in a case like this, that you might as well turn it over to a panel of statisticians and political scientists and let them make the decision, for all that a court could do to add its rationality or fairness.") (internal citations omitted); *see also id.* at 1419 (Ripple, J., concurring) ("[T]he plain language of the governing statute makes it clear that the matter is committed to agency discretion."); *Senate of the State of Cal. v. Mosbacher*, 968 F.2d 974, 977-79 (9th Cir. 1992) (finding "no law to apply" under the Constitution and Census Act); *City of Phila. v. Klutznick*, 503 F. Supp. 663, 677 (E.D. Pa. 1980) (recognizing danger of permitting local governments to manipulate conduct of census through judicial review).

Nor can Plaintiffs identify any meaningful standards derived from any other statute, regulation, or historical practice against which to judge the Secretary's choice of content for the census questionnaire, further demonstrating that there is no law to apply in this case. To the contrary, the long history of decennial censuses since ratification of the Constitution establishes a tradition of commitment of the *general* conduct of the census to the Secretary's discretion, subject to oversight

[12] Although Justice Stevens's concurrence in *Franklin*, 505 U.S. at 816-20, concluded that the conduct of the census is not committed to agency discretion by law, this opinion failed to garner a majority of the Court and therefore lacks precedential value. It also predated *Wisconsin* and cannot be squared with the language in that unanimous opinion to the effect that Congress has delegated its virtually unlimited discretion to the Secretary.

only by Congress. Furthermore, the longstanding historical practice of including citizenship, dating back to 1820, *see supra*, Background § II, coupled with the fact that no challenge to the subject matter of the census questions has ever been successfully maintained (much less attempted), strongly countenances the conclusion that this matter traditionally has been viewed as discretionary.

Tellingly, Congress has reserved to itself the responsibility for oversight of the Secretary's performance and correction of any perceived defects in the census without the intrusive and fragmenting involvement of numerous—and often competing—lawsuits. Section 141(f) of the Census Act requires the Secretary to submit to Congress "not later than 2 years before the appropriate census date, a report containing the Secretary's determination of the questions proposed to be included in such census." Plaintiffs' challenge here arises from the Secretary's decision to include in that report a planned question regarding citizenship. FAC ¶¶ 1, 47, 72.

But the fact that the challenged final agency action takes the form of a statutorily mandated report to Congress only underscores that Congress intended that *it* would address any defects in those questions, not *courts* in suits brought against Executive Branch officers after the report has been transmitted. By expressly reserving to itself the power to review the Secretary's exercise of his discretion, Congress foreclosed the courts from second-guessing his judgment as to the content of the census questionnaire. *Cf. Armstrong v. Bush*, 924 F.2d 282, 290-91 (D.C. Cir. 1991) (holding that Presidential Records Act impliedly precludes judicial review because it "would upset the intricate statutory scheme Congress carefully drafted to keep in equipoise important competing political and constitutional concerns"). In the end it is for Congress, not this Court, to review the Secretary's exercise of his delegated discretion to determine which demographic questions to ask in the census.

II. PLAINTIFFS FAIL TO STATE A CLAIM UNDER THE ENUMERATION CLAUSE

Even if this case were justiciable, Plaintiffs' Enumeration Clause claim should be dismissed. The Constitution does not forbid the census from asking whether a person is a U.S. citizen. The

Constitution's reference to "actual Enumeration" is simple: population is to be determined through a person-by-person headcount, rather than through estimates or conjecture. There is no allegation that the Secretary is estimating rather than counting the population, nor any allegation that he has failed to establish procedures for counting every resident of the United States. The Enumeration Clause is therefore satisfied. Moreover, the Secretary's decision to reinstate a citizenship question is consistent with historical practice dating back to the founding era. The census has collected demographic information since its first iteration in 1790, and it asked citizenship-related questions as early as 1820, and in many enumerations thereafter. The Secretary has complied fully with the Constitution, and Plaintiffs' Enumeration Clause claim should be dismissed.

Plaintiffs do not allege that the Secretary has failed to establish procedures for conducting a headcount of population; to the contrary, Plaintiffs' theory of harm relies on this fact. *See* FAC ¶¶ 105-14. As described above at Background § IV, the Census Bureau has comprehensive measures in place for non-response follow up and will attempt to contact nearly every person in the country, utilizing up to six mailings and an in-person visit by an enumerator. 2020 Census Operational Plan*,* at 88-92, 112-21. These operations for 2020 are more wide-ranging and more advanced than the operations performed in any previous decennial census, thus demonstrating that a complete and accurate person-by-person enumeration of the population is fully contemplated.

Furthermore, while the possibility of an undercount exists in every census, the Constitution does not require perfection. *See Utah*, 536 U.S. at 504 (Thomas, J., concurring in part and dissenting in part) (canvassing the history of census undercounts, including the first Census in 1790); *Wisconsin*, 517 U.S. at 6 ("Although each [of the 20 past censuses] was designed with the goal of accomplishing an 'actual Enumeration' of the population, no census is recognized as having been wholly successful in achieving that goal."); *Gaffney v. Cummings,* 412 U.S. 735, 745 (1973) (census data "are inherently less than absolutely accurate"); *Carey v. Klutznick*, 653 F.2d 732, 735 (2d Cir. 1981) ("Although the mechanics of the counting process have been improved in each of the nineteen ensuing censuses,

there has never been a perfect count."). As long as the Secretary has established procedures for counting every resident of the United States—and there is no allegation he has not—any undercount is the constitutionally permissible result of attempting to enumerate upwards of 325 million people across 3.8 million square miles. *See* https://www.census.gov/popclock/.

Historical practice confirms that the Secretary's decision to reinstate a citizenship question on the 2020 Census cannot convert an otherwise constitutional headcount into a violation of the Enumeration Clause. *See Wisconsin*, 517 U.S. at 21 (noting the importance of historical practice when examining Enumeration Clause issues); *Franklin*, 505 U.S. at 803-06 (same). Despite the Constitution's reference only to "the whole number of persons in each State," *see* U.S. Const. amend. XIV, § 2, every census since 1790 has collected demographic information beyond the number and location of inhabitants. *Morales v. Daley*, 116 F. Supp. 2d 801, 809 (S.D. Tex. 2000), *aff'd*, 275 F.3d 45 (5th Cir. 2001). In fact, the First Census in 1790 asked about age, race, and sex. Census Act of 1790, § 1, 1 Stat. 101 (1790). Further, a wide range of demographic questions were asked in subsequent decennial censuses and will be asked in 2020.[13] As detailed above, Background § II, these broad demographic questions included citizenship-related questions as early as 1820 and continuing (on the long-form questionnaire) through the 2000 Census. Although the long-form questionnaire was discontinued after the 2000 Census, citizenship questions have been asked on the ACS to a sample of the population—about one in 38 households—every year since 2005. *See* ACS Questionnaire Archive, https://www.census.gov/programs-surveys/acs/methodology/questionnaire-archive.html (noting

[13] Throughout the Nineteenth Century, demographic information on the Census expanded to include questions such as the number of persons "engaged in agriculture, commerce, and manufactures," Census Act of 1820, 3 Stat. 548 (1820), the "[p]rofession, occupation, or trade of each person over 15 years of age," the "value of real estate owned," and whether persons over age 20 could read and write, Census Act of 1850, 9 Stat. 430 (1850).

citizenship questions on every ACS questionnaire). Thus, citizenship questions have a long and established history in the census.[14]

Plaintiffs' theory, taken to its logical conclusion, would mean that the Enumeration Clause prohibits any demographic questions on the census questionnaire that may theoretically reduce response rates and cause some entirely speculative undercount. Under that standard, the long-form questionnaire would have been unconstitutional, given that the long-form questionnaire *replaced* the short form for a subset of population in previous censuses and elicited a substantially lower response rate. *See* Census Topic Report No. 11, Response Rates and Behavior Analysis, at 9, https://www.census.gov/pred/www/rpts/TR11.pdf (concluding that mail-back response rate for 2010 long form was 9.6% lower than short form). And many of the questions on the current and prior short forms—such as questions about sex, Hispanic origin, race, and relationship status—would also be called into question, as some people may prefer not to answer those questions as well.

But courts have universally approved the historical practice of gathering demographic information. *See, e.g., Legal Tender Cases*, 79 U.S. 457, 536 (1870) ("Congress has repeatedly directed . . . not only an enumeration of persons but the collection of statistics respecting age, sex, and production. Who questions the power to do this?"); *abrogated on other grounds, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Dep't of Commerce*, 525 U.S. at 341 (such questions, the Court has recognized, serve as "a linchpin of the federal statistical system by collecting data on the characteristics of individuals, households, and housing units throughout the country.") (quoting Nat'l Research Council, Counting People in the Information Age 1 (D. Steffey & N. Bradburn eds. 1994)).[15]

[14] There is nothing inherently suspect about a country asking its residents for citizenship information. Indeed, the United Nations recommends that its member countries ask their residents for such information during censuses. United Nations, Dep't of Econ. & Social Affairs, Principles & Recommendations for Population & Housing Censuses, § 4.110, https://unstats.un.org/unsd/publication/seriesM/Series_M67rev3en.pdf.

[15] On the rare occasions that census questions have been challenged as unconstitutional—usually on Fourth and Fifth Amendment grounds—lower courts have dismissed such contentions out of hand. *United States v. Rickenbacker*, 309 F.2d 462, 463 (2d Cir. 1962) (Marshall, J.); *Morales*, 116 F.

And the Supreme Court has consistently held that such longstanding historical practice is powerful evidence of constitutionality. *See Nat'l Labor Relations Board v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014). As noted above, all decennial censuses have included demographic inquiries, and the 2020 questionnaire is no different.

Plaintiffs do not challenge any aspect of the 2020 census that might infringe the Enumeration Clause's command to conduct a person-by-person headcount of the population. Instead, Plaintiffs' challenge focuses entirely on the Secretary's information-gathering decision to reinstate a citizenship question on the 2020 Census. This is as meritless as it is unprecedented. Even when the Supreme Court struggled to distinguish between unconstitutional estimates and acceptable enumeration in calculation-methodology cases,[16] it recognized that the Clause "vests Congress with virtually unlimited discretion in conducting the decennial" census. *Wisconsin*, 517 U.S. at 19; *see Utah*, 536 U.S. at 474 (explaining that the Clause's language indicates "the breadth of congressional methodological authority, rather than its limitation"). And in light of this discretion, the Supreme Court has never invalidated the Secretary's population count on Enumeration Clause grounds. *See Utah*, 536 U.S. at 474 (holding hot-deck imputation permissible under the Enumeration Clause); *Dep't of Commerce*, 525 U.S. at 344 (holding that statistical sampling violates the Census Act and declining to reach Enumeration Clause claim); *Wisconsin*, 517 U.S. at 1; *Franklin*, 505 U.S. at 788. This case presents no reason to break from those precedents.

The Secretary's decision to reinstate a citizenship question was well within his discretion and is fully consistent with the Constitution's text, longstanding historical practice, and judicial precedent. Plaintiffs' theory, by contrast, would deem virtually every census questionnaire in the Nation's history

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Supp. 2d at 814-15; *United States v. Little*, 321 F. Supp. 388, 392 (D. Del. 1971); *United States v. Moriarity*, 106 F. 886, 891 (S.D.N.Y. 1901).

[16] *See, e.g.*, *Utah*, 536 U.S. at 452 (four separate opinions regarding hot-deck imputation); *Dep't of Commerce*, 525 U.S. at 316 (five separate opinions regarding statistical sampling); *Franklin*, 505 U.S. at 788 (three separate opinions regarding how to count federal employees serving overseas).

unconstitutional. The choice between those options is clear: Plaintiffs' Enumeration Clause claim should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion and dismiss this case.

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