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

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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In opposing Plaintiffs' attempt to invalidate the Secretary's reinstatement of a citizenship question on the decennial census questionnaire, Defendants set forth the multiple reasons this case is not justiciable, and explained why the Court should not second-guess the Secretary's judgment regarding his exercise of authority delegated to him by the Constitution through Congress. Plaintiffs' opposition does nothing to dispel these justiciability concerns. In particular, Plaintiffs fail to show why third parties' unlawful choices in failing to respond to the census should be fairly attributed to Defendants. Their arguments with regard to injury also do nothing more than underscore the speculative and uncertain nature of the claimed increase in the undercount and alleged consequences. As for their remaining arguments concerning the Court's power to review and the existence of an Enumeration Clause claim, Plaintiffs suggest that every census procedure must be "designed to achieve an accurate count of the population." Pls.' Mem. of Law in Opp'n to Defs.' Mot. to Dismiss, at 31, ECF No. 29 ("Pls.' Opp'n"). But neither the Constitution nor the Census Act says any such thing; the census need not pursue maximum accuracy at the expense of other important goals, and there are no workable standards that restrict Defendants' discretion to achieve other legitimate ends at the same time, even if incidentally impairing accuracy. Moreover, 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 person. For these reasons, and those set forth in Defendants' previous memorandum, this case should be dismissed.

I. THIS CASE IS NOT JUSTICIABLE

A. Plaintiffs Lack Standing.

Plaintiffs' opposition acknowledges that their theory of standing is indirect and relies on a "causal chain travel[ling] through the actions of a third party." Pls.' Opp'n at 21. In such circumstances, standing "is ordinarily 'substantially more difficult' to establish," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992), and Plaintiffs acknowledge that they must show that the

government's action will have a "determinative or coercive effect … upon the action of" those third parties. Pls.' Opp'n at 21 (quoting *Bennett v. Spear*, 520 U.S. 154, 169 (1997)).

Here, far from imposing a "determinative or coercive" effect causing people *not* to respond to the census, the government requires people *to respond* to the census by imposing a legal obligation to do so. *See* 13 U.S.C. § 221. Plaintiffs' theory of standing thus rests on the assumption that people will not comply with that legal obligation. But courts "have consistently refused to 'conclude that the case-or-controversy requirement is satisfied by' the possibility that" people will "violat[e] valid criminal laws." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1541 (2018) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974)). Instead, courts presume that people "will conduct their activities within the law." *Id.* Plaintiffs have also failed to allege facts indicating that any third party's decision not to respond to the census would cease to be that person's "*independent* action." *See Bennett*, 520 U.S. at 169.

Plaintiffs' sole response is to cite predictions over the years regarding how questions about citizenship or legal status *might* affect response rates. Pls.' Opp'n at 22–23; *see also* First Amended Compl. ("FAC") ¶¶ 74-81, 105-13, ECF No. 17. But Plaintiffs have failed to allege any facts indicating that the particular questions on which those predictions were based were similar to the 2020 citizenship question in terms of wording, order, context, skip instructions, and formatting. *See* FAC ¶¶ 58, 60, 64-71, 95 (acknowledging that all of these variables are critical in assessing a particular question's likely effects). Plaintiffs simply ask the Court to assume, with no supporting factual allegations, that all questions about citizenship are the same.

The other links in Plaintiffs' causal chain are no less speculative. Plaintiffs fail to distinguish between "self-response," which occurs when a household responds online or returns the paper questionnaire, and "response," which includes both self-response *and* response obtained through Census Bureau follow-up methods. The estimated decrease mentioned by the Secretary in his decision memo refers to an estimated decrease in the initial *self*-response rate, not the total "final" response. Plaintiffs have not pleaded facts indicating that a lower "self-response" rate will necessarily mean a

lower *final* response rate. As always, the Census Bureau is committed to a comprehensive non-response follow-up strategy to obtain responses from households that do not self-respond, involving attempts to contact households by telephone or in person, additional mailings, use of proxies, or use of administrative data. *See generally* 2020 Census Operational Plan: A New Design for the 21st Century (Sept. 2017, v.3.0), https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan3.pdf. Contrary to Plaintiffs' contention, these plans are not "vague assurances." Pls.' Opp'n at 16-17. The Census Bureau has decades of experience in non-response follow-up operations, has developed detailed plans for such operations in the 2020 Census, and continues to test, add to, and refine its plans. Plaintiffs have not alleged facts indicating that these efforts will fail to offset any hypothetical decrease in initial self-response.

Plaintiffs have also failed to allege facts showing that any hypothetical undercount will result in lost representation or funding. While they allege that they live in places at risk of a "disproportionate" undercount, Pls.' Opp'n at 17-18, it is not sufficient for Plaintiffs to plead merely a disproportionate undercount; they must allege facts indicating that the *level* of the disproportionate undercount will be *material* to their claimed injury. Plaintiffs do not dispute that there would be no effect on representation or funding merely if there were *some* levels of undercount *somewhere*. Yet their only allegations connecting the level of the purported undercount to changes in their representation and funding are entirely conclusory. *See* FAC ¶¶ 125-42.

Finally, Plaintiffs have failed to tie any funding decreases resulting from a hypothetical undercount to material changes in the particular public services that they use. The mere fact of a decrease in federal funding to Plaintiffs' states and localities says nothing about how those states and localities will respond to that decrease. Plaintiffs have alleged no facts indicating that their states and localities will reduce spending on the particular roads, schools, and health insurance coverage that Plaintiffs use—as opposed to replacing any lost federal funding with other sources or reducing spending on *other* roads, schools, and health insurance coverage besides those used by Plaintiffs.

In sum, Plaintiffs have not alleged facts sufficient to show that reinstating the citizenship question will "*certainly*" result in material and detrimental changes to Plaintiffs' legislative representation or to the roads, schools, and health insurance coverage that they use. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). This case should therefore be dismissed for lack of standing.

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

Plaintiffs' contention that this case is not barred by the political question doctrine misreads governing case law and rejects imaginary arguments in an attempt to sidestep the central issues presented. Pls.' Opp'n at 24-29. But no amount of obfuscation can cloud the fact that this case has nothing to do with the only judicially-enforceable line drawn by the Enumeration Clause—impermissible estimation versus lawful enumeration. It has nothing to do with whom to count, how to count them, or where to count them. And it has nothing to do with the Secretary's procedures for counting every person.[1] Instead, Plaintiffs challenge the Secretary's information-gathering decision to include a question on the census questionnaire that will be used to enumerate inhabitants almost two years from now. That is a challenge to only the "[m]anner" of the census, which the Constitution expressly commits to Congress (and that Congress has expressly delegated to the Secretary). It is therefore a nonjusticiable political question.

Plaintiffs advance four arguments to support their position that this case is justiciable, all of which are meritless. First, Plaintiffs argue that the political question doctrine's application is "illogical on its face; by definition, a challenge to the conduct of the census based on the 'actual Enumeration' requirement is a challenge to the 'manner' in which the 'actual Enumeration' is undertaken." Pls.' Opp'n at 26. It is unclear what "definition" Plaintiffs are using because the Constitution's text does

[1] 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.

not indicate that calculation methodologies—which implicate an "actual Enumeration"—are part of the "[m]anner" by which the census is conducted. *Id.* The Enumeration Clause is split into two distinct phrases, with "in such Manner" modifying "[t]he actual Enumeration shall be made." U.S. Const. art. I, § 2, cl. 3. If the Framers considered the "[m]anner" of the census to fully encompass calculation methodologies, presumably the Clause would have been written differently; not only did they separate "actual Enumeration" and "such Manner" but they specifically directed the latter phrase to Congress. *Id.*

Second, Plaintiffs contend that employing the political question doctrine here "is inconsistent with … Supreme Court decisions, which expressly considered the challenged census procedures to be part of the 'manner' in which the census was conducted." Pls.' Opp'n at 26 (citing *Utah v. Evans*, 536 U.S. 452, 474 (2002) and *Wisconsin v. City of NY*, 517 U.S. 1, 17 (1996)). But neither *Utah* nor *Wisconsin* cast any doubt on Defendants' argument because both cases focused on calculation methodologies under the Enumeration Clause's "actual Enumeration" prong, rather than pre-census information-gathering decisions under the Enumeration Clause's "[m]anner" prong. In *Utah*, the Supreme Court analyzed whether "hot-deck imputation"—a calculation methodology that infers characteristics of individuals based upon the characteristics of neighbors, resulting in inclusion of individuals who otherwise would be excluded—violated the Enumeration Clause. *Utah*, 536 U.S. at 457-58. Directly contrary to Plaintiffs' contention, the Court explicitly stated that "Utah's constitutional claim rests upon the words 'actual Enumeration' as those words appear in the Constitution's Census Clause." *Id.* at 473. In analyzing the calculation methodology at issue, the *Utah* Court's extensive textual analysis focused only on the Constitution's mention of an "actual Enumeration." *Id.* at 473-77.

Similarly, *Wisconsin* is inapposite. In *Wisconsin*, the Supreme Court considered whether the Secretary's refusal to correct a census undercount with data from a post-enumeration survey (*i.e.*, a calculation methodology) violated the Enumeration Clause. *Wisconsin*, 517 U.S. at 10. Plaintiffs make much of the Court's statement that "the Secretary's decision was made pursuant to Congress' direct

delegation of its broad authority over the census." *Id.* at 17 (citing the "[m]anner" prong of the Enumeration Clause). But no one disputes that Congress (and, by delegation, the Secretary) has broad authority over calculation methodologies; Defendants already have said so. Mem. of Law in Supp. of Defs.' Mot. to Dismiss, at 34, ECF No. 24-1 ("Defs.' Mem.") (pointing out that the Supreme Court has never invalidated the Secretary's population count on Enumeration Clause grounds). The issue in this case, though, is whether the Enumeration Clause textually commits pre-census information-gathering decisions exclusively to Congress under the "[m]anner" prong, or if there are any judicially-manageable standards for assessing such decisions. Nothing in *Wisconsin* speaks to those inquires.

Indeed, none of the cases cited by Plaintiffs confronted the question of whether pre-census information-gathering decisions—as opposed to calculation methodologies—present a nonjusticiable political question. *See, e.g.*, *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (finding justiciable a post-census challenge to the counting accuracy of a specific city);[2] *District of Columbia v. U.S. Dep't of Commerce*, 789 F. Supp. 1179, 1185 (D.D.C. 1992) (finding justiciable a post-census dispute as to whether the prisoners of a correctional facility should be counted as residents of Virginia or D.C., but noting that it "is a close question, and there are authorities on both sides"); *Texas v. Mosbacher*, 783 F. Supp. 308, 312 (S.D. Tex. 1992) (finding justiciable a post-census dispute regarding whether the Secretary must statistically adjust the population count); *Young v. Klutznick*, 497 F. Supp. 1318, 1326 (E.D. Mich. 1980) (same), *rev'd,* 652 F.2d 617 (6th Cir. 1981); *City of Phila. v. Klutznick*, 503 F. Supp. 663, 674 (E.D. Pa. 1980) (finding justiciable a post-census challenge to the counting accuracy of a specific city). Plaintiffs point to no court that has reviewed a pre-census challenge to the census questionnaire's content—a purely information-gathering decision—and held that such a challenge is justiciable.

[2] This Second Circuit opinion is not binding on this Court and, in any event, also contains such scant analysis as to constitute the type of "drive-by jurisdictional ruling[]" that "ha[s] no precedential effect," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998).

Third, citing Defendants' brief, Plaintiffs claim that they "*do* challenge 'how' the Secretary has chosen to count the population—*i.e.*, by using an untested questionnaire that demands information regarding the citizenship status of every household member." Pls.' Opp'n at 26. This misstates the point. Defendants' use of the phrase "how to *count*" referenced only calculation methodologies, not "how to conduct the census." *See, e.g.*, *Utah,* 536 U.S. at 452; *Wisconsin*, 517 U.S. at 1 (emphasis added). Here, the relevant application of "how to count" is the Secretary's use of wide-ranging census operations to conduct a person-by-person headcount, which Plaintiffs do not challenge. Instead, Plaintiffs simply disagree with the Secretary's policy choice in which he 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 procedures, and the completeness and cost of administrative records. As with every pre-count information-gathering procedure, there are no judicially manageable standards for balancing those factors and a myriad of others.

Fourth, Plaintiffs argue that "the Constitution itself provides a straightforward, judicially administrable standard for reviewing Defendants' conduct of the census: it must bear a 'reasonable relationship to the accomplishment of an actual enumeration of the population.'" Pls.' Opp'n at 27 (citing *Wisconsin*, 517 U.S. at 19-20).[3] Plaintiffs derive their standard from *Wisconsin*, but, as noted above, that case concerned whether the Secretary's calculation methodology violated the Enumeration Clause's requirement of an "actual Enumeration." The Supreme Court's decision in *Wisconsin* says

[3] Plaintiffs also cite "statutes, regulations, and agency standards" as providing a judicially manageable standard. Pls.' Opp'n at 28-29. This improperly conflates the political question doctrine's inquiry into "judicially discoverable and manageable standards" with the APA's "committed to agency discretion by law" inquiry. These are distinct questions. The first concerns whether the *Constitution* supplies a principled and workable judicial standard for assessing whether the inclusion of a particular question on the census questionnaire is unconstitutional. The second concerns whether the *Census Act* vests the content of the census questionnaire in the Secretary's discretion so as to preclude judicial review under the APA. Defendants therefore analyze these questions separately.

nothing about standards applicable to the "[m]anner" prong of the Enumeration Clause. There is a good reason for this: the Secretary's decision to correct (or not correct) a census undercount implicates an affirmative constitutional command to count, rather than estimate, the population. Hence, a court may adjudicate challenges to calculation methodologies using *Wisconsin*'s standard even before the census. *See, e.g.*, *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) (holding that the Secretary's pre-census decision to use statistical sampling violates the Census Act, 13 U.S.C. § 195, and declining to reach the Enumeration Clause claim). But once a court ventures beyond the affirmative constitutional command to perform a headcount into the "[m]anner" of conducting the census, there is simply no law to apply.

Furthermore, Plaintiffs' proposed standard—the Secretary must conduct the "census in a manner that is designed to achieve an accurate count of the population," Pls.' Opp'n at 31—is judicially unworkable.[4] How does a court determine whether any individual aspect of the census—a massive undertaking to enumerate upwards of 325 million people across 3.8 million square miles—is "designed to achieve" accuracy? *Id.* Has the Secretary violated the Constitution if he employs 550,000 enumerators for in-person visits instead of 551,000 enumerators because he is valuing cost, training, testing, and timing over accuracy? How about when the census questionnaire is distributed in 12 non-English languages instead of 13? Or when the Secretary opens six regional census centers instead of seven? Just as with the content of the census questionnaire, each of these determinations are pieces of a much larger puzzle, all of which involve a careful consideration of factors such as cost, testing, training, effectiveness, timing, informational need, and accuracy. Courts have no standards by which to judge the consideration of those factors, and therefore Plaintiffs' suggested designed-to-achieve-

[4] As set forth below, Plaintiffs' Enumeration Clause claim fails as a matter of law under their own standard derived from *Wisconsin*.

accuracy standard is unworkable. As explained below, Plaintiffs' attempt to formulate a rule in this regard is also plainly wrong.

Despite admitting that Defendants need not achieve a perfect count, Pls.' Opp'n at 34, Plaintiffs seek to constitutionalize for judicial review every logistical decision in the 10-year lead up to the census. But the Constitution envisions a nuanced process by an institution capable of weighing the numerous factors that must be considered in such policy choices—Congress. The Secretary's decision to reinstate the citizenship question on the 2020 Census is therefore a "policy choice[] and value determination[] constitutionally committed for resolution to the halls of Congress [and] the confines of the Executive Branch," *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986), and this case is barred by the political question doctrine.

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

Agency actions are insulated from judicial review under the APA where "statutes are drawn in such broad terms that . . . there is no law to apply." *Speed Mining, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 528 F.3d 310, 317 (4th Cir. 2008) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)). Although this is "a 'very narrow exception' to the presumption favoring judicial review, the Supreme Court and other courts have found numerous administrative decisions unreviewable under this standard." *Id.* (citation omitted). Plaintiffs have searched for law governing the Secretary's decision to reinstate a citizenship question on the 2020 Census, but their search was in vain. Contrary to Plaintiffs' assertions, no standards exist in the relevant statutes or regulations that a court may apply to the Secretary's decision, and therefore Plaintiffs' APA claim is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

Plaintiffs first point to the Census Act, arguing that Defendants' argument "has been roundly rejected by almost every court that has considered it." Pls.' Opp'n at 30. But none of Plaintiffs' cited cases addressed the question at issue here: whether the Census Act provides any standards by which

to judge the census questionnaire's content. *See, e.g.*, *District of Columbia*, 789 F. Supp. at 1189 (challenging the decision to count inmates of a particular prison as residents of Virginia rather than the District of Columbia); *City of Phila.*, 503 F. Supp. 663 (challenging the counting accuracy of a specific city); *City of Camden v. Plotkin,* 466 F. Supp. 44, 46 (D.N.J. 1978) (same); *Borough of Bethel Park v. Stans*, 319 F. Supp. 971, 972 (W.D. Pa. 1970) (challenging where to count college students, members of the Armed Services, and inmates in relation to their colleges, military bases, and institutions), *aff'd,* 449 F.2d 575 (3d Cir. 1971). Given that the relevant inquiry under the APA depends on both the statutory language and "the nature of the administrative action at issue," *Speed Mining*, 528 F.3d at 317, Plaintiffs' cited cases are inapposite.

Plaintiffs' other Census Act arguments boil down to a single point: "Congress has not relieved (and indeed could not relieve) the Secretary of the constitutional duty to conduct the census in a manner that is designed to achieve an accurate count of the population."[5] Pls.' Opp'n at 31. As discussed above, Section I.B., and below, Section II., that argument fails for multiple reasons.[6]

Plaintiffs also set forth amorphous requirements of other statutes and regulations, although they fail to explain how any of them provide standards for judicial review under the APA. *See* Pls.'

[5] Plaintiffs suggest that foreclosing judicial review here would allow the Secretary to manipulate information-gathering census procedures. Pls.' Opp'n at 28. But as Plaintiffs' own cited cases demonstrate, the Framers were concerned with manipulation of the census at the state and local level, not the federal level. *See City of Phila.*, 503 F. Supp. at 676-77 ("As the Framers in their wisdom clearly foresaw, the unique yet necessary and favored advantage of a federal census is the uniformity nationwide of its method; which, by avoiding the possibility of local bias, prevents the result from suffering the Nation's distrust."). Moreover, any alleged manipulation of the census by the Secretary is subject to oversight by Congress, and Congress is subject to its own checks on manipulation—elections.

[6] As Defendants previously noted, Defs.' Mem. at 30, Congress reserved responsibility for oversight of the Secretary's performance, requiring 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." 13 U.S.C. § 141(f)(2). Contrary to Plaintiffs' contention, Pls.' Opp'n at 32, Defendants do not argue that this feature of the Census Act alone renders the Secretary's decision unreviewable. This reporting requirement simply underscores that it is for Congress, not the courts, to review the Secretary's content determinations.

Opp'n at 3-5, 28-33. For example, Plaintiffs cite the Information Quality Act ("IQA"), which "obligates agencies to adopt standards to maximize the 'quality, objectivity, utility, and integrity' of the data they gather." Pls.' Opp'n at 29 n.16 (citation omitted). But Plaintiffs cannot cite to anything in the IQA that would inform the Secretary's exercise of discretion over the census questionnaire's content, which is understandable given that the IQA provides neither a private right of action nor a suitable basis for APA review. *See, e.g.*, *Salt Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006); *Family Farm All. v. Salazar*, 749 F. Supp. 2d 1083, 1092 (E.D. Cal. 2010) ("[T]he IQA itself contains *absolutely no substantive standards,* let alone any standards relevant to the claims brought in this case."). Plaintiffs' citation to the Paperwork Reduction Act ("PRA") suffers from the same fatal flaw, as the PRA also contains no private right of action or any standards for a court to use. *Springer v. I.R.S. ex rel. U.S.*, 231 F. App'x 793, 800 (10th Cir. 2007); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 844 (9th Cir. 1999). And Plaintiffs cite no cases in which courts have applied the PRA's "accuracy" and "objectivity" instructions, the OMB's guidelines to "maximize[ing] data quality," or the Census Bureau's questionnaire pretest procedures to agency actions under the APA. *See* Pls.' Opp'n at 28-29. The reason is axiomatic: none of the administrative guidance referenced by Plaintiffs provides any law by which courts could judge the Secretary's exercise of discretion over the census questionnaire's content.

As a last-ditch effort, Plaintiffs advance the argument that, even when agency actions are "committed to agency discretion by law," they may nonetheless be judicially reviewable. Pls.' Opp'n at 33. Plaintiffs cite only two Fourth Circuit opinions from the 1980s to support this proposition, but ignore the language in those opinions explaining that courts "may not review agency action where the challenge is only to the decision itself." *Garcia v. Neagle*, 660 F.2d 983, 988 (4th Cir. 1981); *Elecs. of N.C., Inc. v. Se. Power Admin.*, 774 F.2d 1262, 1267 (4th Cir. 1985). More recent Fourth Circuit cases have emphasized this aspect of *Garcia* and made clear that *Garcia*'s exception cannot be used in an "attempt [to] bypass[ ] the reviewability exception in § 701(a)(2)." *Angelex Ltd. v. United States*, 723

F.3d 500, 508 (4th Cir. 2013); *Chan v. U.S. Citizenship & Immigration Servs.*, 141 F. Supp. 3d 461, 467 (W.D.N.C. 2015) (noting the Fourth Circuit's analysis in *Angelex* and recognizing that the court should "carefully screen for any improper attempt by Plaintiffs to characterize review of a discretionary decision as a challenge to allegedly unlawful agency action in order to obtain subject matter jurisdiction"), *aff'd,* 850 F.3d 625 (4th Cir. 2017). Plaintiffs' challenge here is merely to the Secretary's decision itself, thus rendering the Fourth Circuit's rarely-invoked exception inapplicable.

Although Plaintiffs canvass the Constitution, the Census Act, and administrative guidance, they can point to no source of law that provides a suitable basis for judicial review of the issue raised here: the Secretary's decision to reinstate a citizenship question on the 2020 Census. Accordingly, Plaintiffs' APA claim is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

II. PLAINTIFFS FAIL TO STATE AN ENUMERATION CLAUSE CLAIM

Even if this case were justiciable, Plaintiffs' Enumeration Clause claim should be dismissed for three straightforward reasons: (1) the Enumeration Clause mandates only a person-by-person headcount, and 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 person; (2) the Secretary is granted "virtually unlimited" discretion in conducting the census, and he exercised that discretion to reinstate a citizenship question with historical pedigree dating back to the founding era; and (3) Plaintiffs' theory, if accepted, would invalidate demographic questions on nearly every decennial census since 1790. *See* Defs.' Mem. at 30-35. Plaintiffs fail to substantively counter the second of these points, instead focusing on the first and third.

Plaintiffs first claim that Defendants set forth a "fictitious legal standard" of a person-by-person headcount "[w]ithout citing a single legal authority." Pls.' Opp'n at 34. But Defendants are not advancing a "standard" by which to judge Plaintiffs' Enumeration Clause claim; as set forth above, there is no judicially manageable standard for reviewing a pre-census challenge to the census questionnaire's content. If the Court finds this case justiciable, however, Plaintiffs' Enumeration

Clause claim fails regardless of the metric that is applied. *See* Defs.' Mem. at 30-35. Historical practice? The census has collected demographic information since its first iteration in 1790, and it asked citizenship-related questions as early as 1820. Person-by-person headcount?[7] Plaintiffs advance 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 person. Indeed, Plaintiffs' Enumeration Clause claim is particularly weak because it relies on an undercount that results, not from any alleged deficiencies in Defendants' administration of the census, but from third parties' unlawful failure to answer a lawful question. Logical implications? As discussed previously and below, Plaintiffs' theory would invalidate all decennial census questionnaires in our Nation's history. In short, taking into account the Secretary's "virtually unlimited discretion in conducting the decennial" census, *Wisconsin*, 517 U.S. at 19, there is simply no standard by which Plaintiffs' Enumeration Clause claim should proceed.

[7] Contrary to Plaintiffs' contention, the requirement of a person-by-person headcount derives from the same text, history, and case law that Plaintiffs themselves cite. Prior to the first census in 1790, the Framers settled on an interim number of Representatives allocated to each State. U.S. Const. art. I, § 2, cl. 3 (providing the number of Representatives for each State "until such enumeration shall be made" within "three Years after the first Meeting of the Congress of the United States"). This allocation was based on "estimates" of the population derived from "materials ranging from relatively complete enumerations . . . to fragmentary data such as contemporary local population estimates, militia registrations, tax records, church records, and official vital statistics." U.S. Dep't of Commerce, Historical Statistics of the United States, 1789-1945 (1949).

Given this context, "Article I makes clear that the original allocation of seats in the House was based on a kind of 'conjectur[e],' in contrast to the deliberately taken count that was ordered for the future. What was important was that contrast—rather than the particular phrase used to describe the new process." *Utah*, 536 U.S. at 475 (citations omitted); *see id.* at 493 (Thomas, J., concurring in part and dissenting in part) ("[A]t the time of the founding, 'conjecture' and 'estimation' were often contrasted with the actual enumeration that was to take place pursuant to the Census Clause."); *Dep't of Commerce*, 525 U.S. at 363 (Stevens, J., dissenting) ("The words 'actual Enumeration' require post-1787 apportionments to be based on actual population counts, rather than mere speculation or bare estimate."); Thomas R. Lee, *The Original Understanding of the Census Clause: Statistical Estimates and the Constitutional Requirement of an "Actual Enumeration,"* 77 Wash. L. Rev. 1, 20 (2002) (providing an in-depth examination of this contrast and its historical context).

Indeed, even applying Plaintiffs' inapt standard from *Wisconsin* (used in calculation-methodology cases), Plaintiffs' claim should be dismissed. Under Plaintiffs' theory, the Secretary's conduct of the census must bear "a reasonable relationship to the accomplishment of an actual enumeration of the population." Pls.' Opp'n at 34 (citing *Wisconsin*, 517 U.S. at 19). And an "actual enumeration" simply means a person-by-person headcount. *See* note 7, *supra*. The FAC sets forth no allegation that the Secretary is using "estimates" or "conjecture" rather than a headcount, nor any allegation that he has failed to establish procedures for counting every person. So, the Secretary's conduct forms not only "a reasonable relationship" to an actual enumeration, but a perfect fit. Plaintiffs' claim therefore fails as a matter of law even under their own standard.

Plaintiffs also try to distinguish their challenge to the citizenship question from other demographic questions, arguing that some demographic questions "might 'theoretically' cause an inaccurate count," but there are "specific grounds to conclude that [the citizenship question] likely *will* lead to an inaccurate count." Pls.' Opp'n at 35. This misses the point. Even *accepting* Plaintiffs' allegations of an undercount, the logical conclusion of Plaintiffs' theory is that the Enumeration Clause prohibits any demographic questions on the census questionnaire because such questions are likely to reduce response rates at least somewhat, if not substantially, and therefore the Secretary has violated his "constitutional duty to conduct the census in a manner that is designed to achieve an accurate count of the population." *Id.* at 31. But it is simply not true that the Secretary must pursue accuracy to the exclusion of all other legitimate considerations. Indeed, the long-form questionnaire, which likewise sought demographic information unrelated to the enumeration, indisputably resulted in a lower response rate, *see* Defs.' Mem. at 33 (noting the lower response rate for the long-form questionnaire), and the same is quite likely true for questions like sex, Hispanic origin, race, and relationship status. So, Plaintiffs' theory either invalidates all decennial census questionnaires in our Nation's history, or, as discussed above, it propounds an unworkable standard that does not account for the numerous policy considerations in conducting the census.

For these reasons, and those set forth in Defendants' previous memorandum, Plaintiffs' Enumeration Clause claim fails as a matter of law and should be dismissed.

Dated: July 2, 2018

Respectfully submitted,

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