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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LA UNION DEL PUEBLO ENTERO, *et al.*,	
Plaintiffs,	Civil Action No. 8:18-cv-1570 (GJH)
v.	
WILBUR L. ROSS, *in his official capacity as U.S. Secretary of Commerce, et al.*,	
Defendants.	

BRIEF OF AMICUS CURIAE
FEDERATION FOR AMERICAN IMMIGRATION REFORM
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

CORPORATE DISCLOSURE STATEMENT

The Federation for American Immigration Reform Inc. ("FAIR") is a non-profit charitable corporation organized under the laws of the District of Columbia and having its principal place of business at 25 Massachusetts Ave., NW, Suite 330, Washington, DC 20001. FAIR does not have a parent corporation and does not issue stock.

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INTEREST OF *AMICUS CURIAE*

The Federation for American Immigration Reform Inc. (FAIR) is the largest and oldest organization in the United States seeking to educate the citizenry on and increase public awareness of immigration issues, and hold the nation's leaders accountable for enforcing the nation's immigration laws.

FAIR has been prominently participating, sometimes as a litigant, in public debates relating to immigration since its founding in 1979. FAIR has a longstanding interest in census issues as they pertain to citizenship and immigration, as evidenced, for example, by its extensive involvement in the census and apportionment cases *FAIR v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980), and *Ridge v. Verity*, 715 F. Supp. 1308 (W.D. Pa. 1989).

ARGUMENT

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. By this standard, pleadings that are merely consistent with a theory of liability stop "short of the line between possibility and plausibility of entitlement to relief." *Id.* at 662.

For the reasons explained below, plaintiffs' claims fall short of this standard and others, and should be dismissed.

A. Plaintiffs fail to state a claim of violation of either the Enumeration Clause or the Reapportionment Clause of the Fourteenth Amendment.

The First Amended Complaint ("FAC") claims that inclusion of a citizenship question "will result in an undercount of the whole number of persons and inaccurate Census data for the purposes of congressional district apportionment," and thus will violate the Census and Reapportionment Clauses, U.S. Const. art. I, § 2 cl. 3, and Amendment XIV §2. *See* FAC ¶¶ 364-368 and 379-380. Under decades-old controlling precedent, this allegation fails to state a justiciable claim.

Three circuit courts and the Supreme Court have reviewed this very question. The U.S. Courts of Appeals for the Sixth and Seventh Circuits found no constitutional right to accuracy of census data for reapportionment purposes, and that such claims cannot be redressed by judicial action. In reversing the U.S. Court of Appeals for the Second Circuit, the Supreme Court confirmed these essential holdings.

In the Seventh Circuit, Illinois plaintiffs sued the U.S. Department of Commerce claiming that failure to adjust undercounts in the 1990 census "caused them to lose representation in the House of Representatives and a fair share of federal and state funds allocated on the basis of the census figures." *Tucker v. United States Dep't of Commerce*, 958 F.2d 1411 (7th Cir. 1992), *cert. denied*, 506 U.S. 953 (1992). Plaintiffs urged the court to recognize a new fundamental right to census accuracy. *Id.* at 1415. The Seventh Circuit declined to "authorize suits for judicial review of inaccurate census determinations." *Id.* at 1417. "[M]erely by directing congressional apportionment in accordance with the decennial census, Article I, section 2, clause 3 does not authorize lawsuits founded on disagreement with the Census Bureau's statistical methodology." *Id.* at 1418.

"[I]f the apportionment clause, the census statutes, or the Administrative Procedure Act contained guidelines for an accurate decennial census," the Seventh Circuit explained, "that would be some evidence that the framers of these various enactments had been trying to create a judicially administrable standard." *Id.* at 1417.

> [But] there is nothing of that sort, and the inference is that these enactments do not create justiciable rights. The Constitution directs Congress to conduct a decennial census, and the implementing statutes delegate this authority to the Census Bureau. U.S. Const. Art. I, § 2, cl. 3; 2 U.S.C. § 2a; 13 U.S.C. § 141. There is a little more to the statutes—they specify a timetable, and a procedure for translating fractional into whole seats—but they say nothing about how to conduct a census or what to do about undercounts.

Id. at 1417.

The Sixth Circuit also rejected the existence of a right to census accuracy in the 1990 census, even where the undercount disproportionately affected the voting strength of minorities. *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir 1993), *cert. denied*, 510 U.S. 1176 (1994). Detroit complained that its population had "been disproportionately undercounted relative to other (predominately white) areas of the state," causing the resulting redistricting to dilute "the voting strength of the Detroit residents." *Id.* at 1372. Census data was used for state reapportionment because it was the best population data available. *Id.* Since Detroit's voting power was diluted by the state legislature, not the Department of Commerce, the plaintiffs "failed to satisfy the causation element" for standing. *Id*.

The court then examined the plaintiffs' claim that both "the Constitution and census laws require the Census Bureau to undertake affirmative efforts to correct the miscount." *Id.* at 1372. The Sixth Circuit invoked the Seventh Circuit's *Tucker* opinion, and re-affirmed that the Apportionment Clause does not create a fundamental right to census accuracy. *Id.* at 1376 (citing *Tucker*, 985 F.2d at 1418).

The Second Circuit subsequently diverged from this view, holding that failure to adjust the 1990 census was subject to heightened scrutiny because "the right to have one's vote counted equally is fundamental" and "the unadjusted census undercount disproportionately disadvantages certain identifiable minority groups." *City of New York v. U.S. Dep't of Commerce*, 34 F.3d 1114, 1125 (2d Cir. 1994). While the plaintiffs in that case could not show intentional discrimination, the Second Circuit held that in apportionment cases the plaintiff had a lesser burden—"simply to show that the government entity failed to make a good-faith effort to achieve equal districts as nearly as practicable." *Id.* at 1130. Moreover, the "impossibility of achieving precise mathematical equality [was] no excuse for [the federal government] not making [the] mandated good-faith effort." *Id.* at 1129.

On appeal, the Supreme Court rejected the Second Circuit's theory and upheld the position of the Sixth and Seventh Circuits. *Wisconsin v. City of New York*, 517 U.S. 1 (1996). First, the Constitution vests Congress "with virtually unlimited discretion in conducting the decennial 'actual Enumeration.'" *Id. at* 19 (citing *Baldrige* v. *Shapiro*, 455 U.S. 345, 361 (1982)). "The good-faith effort to achieve equality … required [for] … conducting intrastate redistricting does not translate into a requirement that the Federal Government conduct a census that is as accurate as possible." *Id.* at 17. The Second Circuit had erred when it "failed to recognize that the Secretary's decision was made pursuant to Congress' direct delegation of its broad authority over the census. *See* Art. I §2 cl. 3 (Congress may conduct the census 'in such Manner as they shall by law direct')," *id*., and "undervalued the significance of the fact that the Constitution makes it impossible to achieve population equality among interstate districts." *Id.* (citing *Dep't of Commerce v. Montana*, 503 U.S. 442, 447-448 (1992)). The Court concluded:

> [S]o long as the Secretary's conduct of the census is consistent with the constitutional language and the constitutional goal of equal representation, it is

> *within the limits of the Constitution*, and need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population….

Id. at 19-20 (emphasis added, internal citation and quotation marks omitted).

In the present challenge, FAC Counts I and III allege that the inclusion of a citizenship question on the 2020 Census would "violate the 'actual enumeration' clause"—Art. I § 2 cl. 1—by causing "a disproportionate undercount of non-U.S. citizens," and their "U.S. citizen family members," as well as "Asian-Americans" and "Latinos." FAC ¶ 366. Plaintiffs allege (a) that Hispanic, African Americans, Asian American Pacific Islander, and Native American populations were undercounted in the 1990, 2000, and 2010 censuses despite the absence of a citizenship question, (b) because they are among the inherently "hard-to-count" populations, FAC ¶¶ 261, 263-67, and (c) that the undercounts ranged between a "statistically insignificant" 0.08 percent (Asian-Americans in 2010) up to 7.5 percent (Latino children in 2010), with an outlier 12.22 percent (Native Americans living on reservations in 2010). *Id.* ¶¶ 265-66.

Reciting the *Wisconsin* formula, the FAC alleges that inclusion would also be "inconsistent with the constitutional purposes of the Census" and "does not bear a reasonable relationship to the accomplishment of an actual enumeration…" FAC ¶ 367. Inclusion "will result in an undercount of the whole number of persons and inaccurate Census data for the purposes of congressional district apportionment" in alleged violation of the Reapportionment Clause, Amendment XIV §2. FAC ¶¶ 379-380.

Even with these factual allegations accepted as true for purposes of a motion to dismiss, Plaintiffs fail to state a justiciable claim. First, alleging that inclusion of a citizenship question will cause an undercount, even of minorities, does not imply that such inclusion has no reasonable relationship to an actual enumeration, or is inconsistent with the purpose of the census; the plaintiffs alleged undercounts of minorities in *Wisconsin* itself.

Furthermore, the action at issue—reintroduction of a citizenship question for the 2020 Census—is not even subject to the constitutional mandate of enumeration for federal reapportionment among the states. Rather, it derives from the longstanding historical practice of asking census questions "without a direct relationship to the constitutional goal of an 'actual Enumeration'"—a practice that "has been blessed by all three branches of the federal government." *New York v. United States DOC*, 315 F. Supp. 3d 766, 801-802 (S.D.N.Y. Jul 26, 2018). The Supreme Court has recognized "valuable and important" functions for census questions that do not need to have a "reasonable relationship" to the actual enumeration, such as "the allocation of federal grants to states based on population" and providing "important data for Congress and ultimately the private sector." *Baldrige v. Shapiro*, 455 U.S. 345, 353 (1982) (holding that such functions derive from Congress's discretion to conduct the census 'as they shall by Law direct.'"). Tellingly, the FAC itself recognizes a broad range of beneficial uses of "information about citizenship" that fit within this historical classification of "valuable and important" census functions. *See, e.g.*, FAC ¶ 172 (acknowledging that citizenship information collected in the inter-census American Community Survey (ACS) "helps policymakers and agencies better understand the immigrant experience in order to establish or evaluate policy, enforce anti-discrimination laws, regulations or policies, and/or tailor services to different groups."). Indeed, to construe the "reasonable relationship" language in *Wisconsin* as applying to every census question would lead to the absurd conclusion that historically the census has been conducted in violation of the Enumeration Clause.

B. Plaintiffs' allegations fail to state an equal protection claim under the Fifth Amendment.

FAC Count II ("Violation of the Equal Protection Clause [sic] of the Fifth Amendment") fails to state a claim and must be dismissed.

The Equal Protection Clause of the Fourteenth Amendment guarantees the "right to be free from invidious discrimination in statutory classifications and other governmental activity." *Harris v. McRae*, 448 U.S. 297, 322 (1980) (internal quotation marks omitted). The Fifth Amendment's Due Process Clause applies this same equal protection right to federal government action. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

"To succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). *See e.g. Johnson v. Holmes*, 2018 U.S. Dist. LEXIS 45040, *11, (W.D. Va. Mar. 19, 2018) (noting that, for a showing of a discriminatory racial effect, the Fourth Circuit requires evidence that "similarly situated" individuals of another race were treated differently than the plaintiffs). Only if this threshold showing is made does the court then "determine whether the disparity in treatment can be justified under the requisite level of scrutiny." *Morrison, supra*, at 654.

Plaintiffs failed to allege facts that would meet this threshold showing.

1. Plaintiffs failed to plead or reasonably imply selective treatment compared to others similarly situated.

The FAC never makes the threshold pleading that the Secretary or any other Defendant, by including a citizenship question in the 2020 Census, will treat any similarly-situated person differently than a Plaintiff or member of a Plaintiff association. Plaintiffs merely assert that some

"hard-to-count populations" have "concerns about confidentiality" FAC ¶ 262. These populations "already experience undercounts relative to the general population," so that "any reluctance by Latinos, African Americans, Asian Americans, and Native Americans to participate in the Census will result in a more severe undercount" of those populations. FAC ¶ 268. Nationwide, citizen respondents who self-identify as having one of these four ethnicities, plus "non-U.S. citizens" in general, are alleged to be "less likely to respond to a Census questionnaire that includes a citizenship question." FAC ¶ 269. Thus, it is alleged, inclusion "will discourage Plaintiffs' members, clients, and constituents from completing the Census form." FAC ¶ 272.

Even assuming the truth of those claims, plaintiffs never identify a similarly situated "racial group" that, were the 2020 census to include a citizenship question, would be "treated differently" than any suspect group to which an individual plaintiff (or any member of a plaintiff association) belonged. For example, no facts are plead at all about any differential effect of inclusion of a citizenship question on other hard-to-count populations with "confidentiality concerns" who do not self-identify as Latino, African American, Asian American, or Native American.

2. Plaintiffs' allegations fail to support reasonable inferences of invidious discriminatory intent on the part of any defendant.

The burden of proof is on plaintiffs to show that any discriminatory effect was intentional. *Washington v. Davis*, 426 U.S. 229, 239-45 (1976). Even if plaintiffs had identified similarly situated persons who were treated differently, they still failed to meet the threshold showing because the FAC does not give rise to a reasonable inference of discriminatory intent on the part of the Secretary of Commerce, the Director of the Census, or their respective agencies.

Hoping to state a claim by "consider[ing] the background of facially neutral decisions to smoke out covert 'discriminatory purposes,'" *Vills. of Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 267 (1977), plaintiffs have selected news reports, press releases, and social media reports about or by non-defendants. FAC ¶¶ 219-259. But the FAC never pleads nor implies that any of the allegedly invidious statements originated with or were endorsed by defendants Ross or Jarmin, or any other official or employee of defendant U.S. Department of Commerce. Only in a FAC *caption* are defendants baldly labelled as being "Motivated By Racially Discriminatory Intent … to Target Latinos, African Americans, Asian Americans, Native Americans, and Non-U.S. Citizens." FAC, Docket No. 42, prefatory captions to ¶ 219.

Instead, the FAC invokes alleged invidious statements by four *non-defendants*. FAC ¶¶ 219-259. The vast majority of these third-party statements are attributed to President Trump, with five attributed to Attorney General Sessions. *Id.*

Most of the statements attributed to alleged co-conspirator President Trump are on their face expressions of his views on either the foreign policy of the Mexican government or current U.S. immigration policies—concerning both legal and illegal immigration, that the President dislikes or seeks to change. For example, in three of the statements, then-candidate Trump blamed the Mexican government and its immigration policy for the illegal entry of "criminals," "drug dealers," and "rapists." *See, e.g.*, FAC ¶ 219 ("When Mexico sends . . ."), ¶ 220 ("The Mexican government is forcing . . . ,"), ¶ 221 ("The Mexican government is much smarter, much sharper, much more cunning. And they send the bad ones over because they don't want to pay for them."). The animus conveyed by these statements is political, against entities that are not suspect classes—the Mexican government and categories of criminal aliens from Mexico.

Plaintiffs also plead that President Trump vilified "anti-Trump protestors" in New Mexico and "thugs that attacked peaceful Trump supporters in San Jose . . . ." FAC ¶¶ 227-231. But there is no claim that the protesters were ethnically Mexican or Latino in the complaint, only that "many … were illegals." FAC ¶ 231. These allegations do not reasonably imply that the speaker harbored particularized animus against Mexicans or Latinos in general.

Other supposedly "smoked-out" statements of animus are the President's hostile remarks that a federal judge of Mexican ancestry who was presiding over a case where a Trump-controlled company was a party had an apparent conflict of interest arising from his alleged membership in a local "La Raza" bar association. *See* FAC ¶ 224, 228-29. This rhetorical claim is a garden-variety tactic in commercial litigation, to seek a possibly more favorable judge than the one assigned. The pleadings also fail to provide a particularized context for another set of supposedly invidious statements, that the President denigrated unidentified members of the MS-13 criminal gang as "animals." FAC ¶ 250-5. These statements merely denounce vicious criminals—specifically, a notorious gang of predominantly alien criminals—and thus do not reasonably imply discriminatory animus.

Other alleged invidious Presidential statements were self-evidently partisan political attacks on the Democratic Party in general and Democratic Senator Elizabeth Warren in particular. FAC ¶¶ 230, 237, 246-247, 253-54. The President castigated the former for promoting non-citizen voting, and ridiculed the latter for falsely claiming indigenous ancestry to advance her academic career, with the implication that this ruse made her unfit for electoral office.

Also, Attorney General Jeff Sessions is alleged to have made five statements showing animus toward groups to which certain plaintiffs claim to belong. Four were made while Sessions was still an elected Senator: (1) his observations in a 2015 radio interview that the

percentage of foreign-born persons in the U.S. population was historically high, and that restrictive immigration policy between 1924 and 1965 had improved assimilation and social mobility, FAC ¶ 222; (2) his statement that immigrants from the Dominican Republic lacked "provable skill" that would benefit existing citizens, FAC ¶ 233; (3) his 2016 description of the Obama administration's policy on unaccompanied alien minors as "idiotic," FAC ¶ 235; and (4) his 2012 observation of the adverse effects of "large numbers" of illegal aliens in Alabama, FAC ¶ 236. Mr. Sessions's fifth alleged invidious statement was made as Attorney General, in a 2017 speech on the Deferred Action for Childhood Arrivals (DACA) program in which he claimed that granting DACA beneficiaries work authorization "denied jobs to hundreds of thousands of Americans." FAC ¶ 244. Needless to say, plaintiffs completely fail to explain how any of these statements by Jeff Sessions indicates animus toward any group.

In summary, plaintiffs' fail to plead facts supporting any reasonable inference that the decision to include the citizenship question in the 2020 census was based on animus on the part of anyone, let alone defendants.

C. This Court lacks jurisdiction to hear plaintiffs' Information Quality Act claims.

The allegation in FAC ¶ 387 that "Defendants departed from statutory and regulatory requirements under the Paperwork Reduction Act ['PRA'] and Information Quality Act ['IQA']," has been unambiguously rejected by the Fourth Circuit.

The IQA requires the Director of the Office of Management and Budget to issue guidelines under the PRA, 44 USC §§ 3504(d)(1) and 3516, to "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of… the [PRA]," IQA § 515(a), and provide an

administrative complaint system in which any of the plaintiffs might "seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines…," IQA § 515(b).

The plaintiffs do not plead that they have made the requisite administrative complaint. In any case, the IQA limits the administrative remedy to "correction of information maintained and disseminated by the agency that does not comply with the guidelines…." Since Defendants have not yet "maintained or disseminated" final information from the 2020 census, plaintiffs' claims that "Defendants have failed to act in a manner consistent with" IQA standards, *see, e.g.*, ¶¶ 184, 190-192, "by failing to adequately test the citizenship demand, [or] minimize the burden such a demand imposes on respondents, [or] maximize data quality," *see* ¶ 184, are at best unripe.

In any event, the IQA creates no legal rights in any third parties, such as plaintiffs. *Salt Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006). "Nor has this Court located any authority supporting Plaintiffs' contention that they may bring such a claim under the APA. Absent such authority, this Court declines to fashion a new remedy." *Id.* Accordingly, this Court lacks jurisdiction to hear plaintiffs' IQA claim. *See id.* ("Because the statute upon which appellants rely does not create a legal right to access to information or to correctness, appellants have not alleged an invasion of a legal right and, thus, have failed to establish an injury in fact sufficient to satisfy Article III.").

CONCLUSION

For the foregoing reasons, this Court should grant defendants' motion to dismiss.

DATE: September 21, 2018

Respectfully Submitted, *Amicus Curiae*,
By its Attorneys,

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