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10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

12 STATE OF CALIFORNIA, *et al.*,

13 Plaintiffs,

14 v.

15 WILBUR L. ROSS, JR., *et al.*,

16 Defendants.
 17
 18

Civil Action No. 3:18-cv-01865-RS

**DEFENDANTS' NOTICE OF MOTION
AND MOTION TO DISMISS;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Date: August 9, 2018
Time: 1:30 p.m.
Judge: Honorable Richard Seeborg
Dept.: 3

19
20 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

21 **PLEASE TAKE NOTICE** that on August 9, 2018, at 1:30 p.m., or as soon thereafter as
22 the matter may be heard, in Courtroom 3 of the above-entitled Court, located at 450 Golden Gate
23 Avenue, San Francisco, California 94102, defendants Wilbur L. Ross, Jr., Secretary of Commerce;
24 U.S. Department of Commerce; Ron Jarmin, performing the nonexclusive functions and duties of
25 Director, U.S. Census Bureau; and U.S. Census Bureau will and hereby do move this Court for an
26 order dismissing this action. This motion is based upon this Notice of Motion and Motion to Dismiss,
27 the Memorandum of Points and Authorities in Support of Motion to Dismiss, all other papers and
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pleadings on file in this action, and such oral and documentary evidence as may be presented at hearing of this motion.

Date: June 21, 2018

Respectfully submitted,

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INTRODUCTION

1
2 The relief sought in this suit—an order barring the Secretary of Commerce from collecting
3 demographic information through the decennial census—is as extraordinary as it is unprecedented.
4 The Constitution vests in the political branches of government discretion to decide the manner in
5 which the census is conducted. In the exercise of that discretion, the Secretary decided to reinstate a
6 question about U.S. citizenship on the 2020 decennial census. Not only has citizenship information
7 historically been collected as far back as 1820, but citizenship information also forms an important
8 component of enforcing the Voting Rights Act of 1965. Plaintiffs’ claim that the Constitution
9 precludes the Secretary from simply asking a question fails for at least four reasons.

10 First, Plaintiffs lack standing to challenge the Secretary’s decision to add a citizenship question
11 to the decennial census. Plaintiffs’ claimed injuries of lost representation in Congress and in the
12 Electoral College and decreased federal funding, based on their allegation that adding the citizenship
13 question will reduce the response rates of their residents, are too speculative to confer Article III
14 standing. And even if Plaintiffs could allege injuries that are concrete and non-speculative, those
15 injuries would not be fairly traceable to the Secretary’s decision but would be attributable instead to
16 the independent decisions of individuals who disregard their legal duty to respond to the census.

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

24 Third, Plaintiffs are similarly barred from proceeding under the Administrative Procedure
25 Act because the form and content of the census is committed to the Secretary’s discretion by law.
26 “Congress has delegated its broad authority over the census to the Secretary [of Commerce],”
27 *Wisconsin v. City of NY*, 517 U.S. 1, 19 (1996), and it has done so in broad terms: Congress authorized
28 the Secretary to conduct the decennial census “in such form and content as he may determine,”

1 13 U.S.C. § 141(a), and to obtain other demographic information through that device, *id.* These broad
2 delegations leave a court with no meaningful standard to apply and accordingly preclude judicial
3 review of which demographic questions the Secretary decides to include on the decennial census
4 form.

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

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

16 **BACKGROUND**

17 **I. CONSTITUTIONAL AND STATUTORY AUTHORITY FOR THE CENSUS**

18 The U.S. Constitution requires that an “actual Enumeration” of the population be conducted
19 every 10 years and vests Congress with the authority to conduct that census “in such Manner as they
20 shall by Law direct.” U.S. Const. art. I § 2, cl. 3. Through the Census Act, Congress has delegated to
21 the Secretary of Commerce the responsibility to conduct the decennial census “in such form and
22 content as he may determine,” 13 U.S.C. § 141(a), and has “authorized [him] to obtain such other
23 census information as necessary,” *id.* The Bureau of the Census assists the Secretary in the
24 performance of this responsibility. *See id.* §§ 2, 4. As required by the Constitution, a national census
25 of the U.S. population has been conducted every 10 years since 1790. U.S. Census Bureau, Questions
26 Planned for the 2020 Census and American Community Survey, at 1 (Mar. 2018),
27 [https://www2.census.gov/library/publications/decennial/2020/operations/planned-questions-](https://www2.census.gov/library/publications/decennial/2020/operations/planned-questions-2020-acs.pdf)
28 [2020-acs.pdf](https://www2.census.gov/library/publications/decennial/2020/operations/planned-questions-2020-acs.pdf) (“Questions Planned”).

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

6 II. HISTORY OF INCLUSION OF A CITIZENSHIP QUESTION

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

11 Beginning in 1820, the Census was used to tabulate citizenship by inquiring of each household
12 the number of “foreigners not naturalized.” See U.S. Census Bureau, *Measuring America: The*
13 *Decennial Censuses From 1790 to 2000*, at 6, [https://www2.census.gov/library/](https://www2.census.gov/library/publications/2002/dec/pol_02-ma.pdf)
14 [publications/2002/dec/pol_02-ma.pdf](https://www2.census.gov/library/publications/2002/dec/pol_02-ma.pdf) (“Measuring America”).¹ With the exception of 1840,
15 censuses from 1820 to 1880 asked for citizenship or birthplace in some form.² Decennial censuses
16 from 1890 through 1950 specifically requested citizenship information more consistently. The 1890
17 Census asked for the place of birth of the respondent and his or her parents and, for adult males of
18 foreign birth 21 years or older, the number of years the individual had resided in the United States,
19 whether he had naturalized, or, if not, whether naturalization papers had been taken out. *Measuring*

20
21 ¹ The Court may take judicial notice of undisputed historical facts concerning the census and
22 other related surveys appearing in documents posted on government websites. See *Gerritsen v. Warner*
23 *Bros. Entm’t Inc.*, 112 F. Supp. 3d 1011, 1033 (C.D. Cal. 2015) (“[T]he court can take judicial notice of
24 ‘[p]ublic records and government documents available from reliable sources on the Internet,’ such as
websites run by governmental agencies.”); *Paralyzed Veterans of Am. v. McPherson*, No. 06-cv-4670,
2008 WL 4183981, at *5 (N.D. Cal. 2008) (taking judicial notice of “information on government
agency websites, which have often been treated as proper subjects for judicial notice”).

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

1 America, at 22, 28. The 1900, 1910, 1920, and 1930 censuses asked, with some variations, for the
2 birthplaces of the individual and his or her parents, the year of immigration for all foreign-born
3 individuals, and, for any adult male of foreign birth 21 years or older, whether he had naturalized or
4 was an alien. *Id.* at 34, 37; *id.* at 45, 49; *id.* at 58; *id.* at 59. The next two enumerations asked for the
5 individual's place of birth and either (in 1940) for the citizenship of all foreign-born individuals or (in
6 1950) whether a foreign-born individual had naturalized. *Id.* at 62; *id.* at 66. The 1940 census also
7 began the practice of sampling a portion of the population to collect some information, though the
8 answers for all individuals were entered on the same form. Thus, the 1940 and 1950 censuses asked
9 only some of the population for the birthplaces of their parents. *Id.* at 62-63 (1940, 5%); *id.* at 66, 68
10 (1950, 20%).

11 The 1950 census is the last one to have asked *all* respondents for citizenship status. In 1960,
12 the Census Bureau asked 25% of the population for the birthplace of the respondent and his or her
13 parents, though naturalization status was not requested. *Measuring America* at 72-73. All residents
14 of New York were asked for place of birth and, if not born in the U.S. or Puerto Rico, whether they
15 were citizens. U.S. Census Bureau, *Twenty Censuses: Population and Housing Questions 1790-1980*,
16 at 71, <https://www.census.gov/history/pdf/20censuses.pdf>. In 1970, the first year respondents were
17 asked to mail back the questionnaire, 20% of the population were asked for their birthplace, 15%
18 were asked for parents' birthplace, and 5% were asked whether the individual, if foreign born, had
19 naturalized. *Measuring America*, at 78. The questionnaires asking for more detailed information from
20 a sample of the population were called the "long-form questionnaire." *See* U.S. Census Bureau,
21 *Questionnaires*, https://www.census.gov/history/www/through_the_decades/questionnaires/. In
22 1980, 1990, and 2000, the long form, which approximately 1 in 6 households received instead of the
23 short form, asked for the individual's birthplace, and foreign-born persons were asked either whether
24 they had naturalized (1980) or whether they were citizens (1990, 2000). *See id.*; *Measuring America*,
25 at 91-92. The corresponding "short-form questionnaire," sent to the majority of households, did not
26 ask for birthplace or citizenship status in those years.

27 Beginning in 2005, in order to provide communities, businesses, and the public with more-
28 timely statistical information, the Census Bureau began collecting monthly (and releasing annually)

1 the more extensive long-form data through the American Community Survey (“ACS”), which is sent
2 yearly to a sample of the population—about one in 38 households. Information regarding national
3 origin and citizenship has been collected through the ACS every year since 2005. *See* U.S. Census
4 Bureau, Archive of American Community Survey Questions, [https://www.census.gov/programs-](https://www.census.gov/programs-surveys/acs/methodology/questionnaire-archive.html)
5 [surveys/acs/methodology/questionnaire-archive.html](https://www.census.gov/programs-surveys/acs/methodology/questionnaire-archive.html) (“ACS Questionnaire Archive”) (noting
6 citizenship questions on every ACS questionnaire). The replacement of the long-form questionnaire
7 with the yearly ACS after the 2000 Census enabled the 2010 census to be a “short-form-only” census.
8 The 2020 census will also be a “short-form-only” census. The ACS will continue to be distributed
9 each year, as usual, to collect additional data. [https://www.census.gov/programs-](https://www.census.gov/programs-surveys/acs/about/acs-and-census.html)
10 [surveys/acs/about/acs-and-census.html](https://www.census.gov/programs-surveys/acs/about/acs-and-census.html).

11 In recent decades, the Census Bureau has obtained citizenship data consistently through the
12 long-form questionnaire and, since 2005, the yearly ACS (as well as some other surveys). Because the
13 ACS collects information from only a sample of the population, it produces annual estimates only
14 for census tracts and census block groups. *See* [https://www.census.gov/newsroom/blogs/random-](https://www.census.gov/newsroom/blogs/random-samplings/2011/07/what-are-census-blocks.html)
15 [samplings/2011/07/what-are-census-blocks.html](https://www.census.gov/newsroom/blogs/random-samplings/2011/07/what-are-census-blocks.html). The decennial census attempts a full count of the
16 population and produces population counts as well as counts of other, limited information (such as
17 race) down to the smallest level, known as the “census block.” *See*
18 <https://www.census.gov/geo/reference/webatlas/blocks.html>. The Census Bureau currently
19 provides the Department of Justice (“DOJ”) with estimated citizenship data at the “census block
20 group” level, which is a collection of census blocks.

21 **III. REINSTATEMENT OF A CITIZENSHIP QUESTION IN THE 2020 CENSUS**

22 In early 2017, the new leadership at the Department of Commerce began evaluating various
23 fundamental issues in connection with the upcoming 2020 census, including funding and content.
24 Administrative Record (“A.R.”) at 1321 (Dkt. Nos. 38, 52). Part of those considerations included
25 whether to reinstate a citizenship question. *Id.* As part of that evaluation process Commerce reached
26 out to federal government components, including the Department of Justice (“DOJ”). *Id.*

27 On December 12, 2017, DOJ submitted a letter to the Census Bureau “formally request[ing]
28 that the Census Bureau reinstate on the 2020 Census questionnaire a question regarding citizenship.”

1 Letter from Arthur Gary, General Counsel, DOJ, to Ron Jarmin, performing the nonexclusive duties
2 of the Director, U.S. Census Bureau (Dec. 12, 2017) (“DOJ Letter”), *cited in* First Amended
3 Complaint (“FAC”) ¶ 3 (Dkt. No. 12); *see also* Administrative Record (“A.R.”) at 663 (ECF No. 23).
4 DOJ stated that “[t]his data is critical to the Department’s enforcement of Section 2 of the Voting
5 Rights Act” (“VRA”), now codified at 52 U.S.C. § 10301, and instrumental “[t]o fully enforce those
6 requirements.” A.R. 663. DOJ explained that “the decennial census questionnaire is the most
7 appropriate vehicle for collecting that data” because it would provide census-block-level citizenship
8 voting age population (“CVAP”) data that are not currently available from the ACS surveys (which
9 provide data only at the larger census block group level). *Id.* DOJ explained that having citizenship
10 data at the census block level will permit more effective enforcement of the VRA. *Id.* at 663-64.

11 On March 26, 2018, after examining the issue and considering input from a variety of sources,
12 the Secretary of Commerce issued a memorandum reinstating a citizenship question on the 2020
13 Census questionnaire. Memorandum to Karen Dunn Kelley, Under Secretary for Economic Affairs,
14 from the Sec’y of Commerce on Reinstatement of a Citizenship Question on the 2020 Decennial
15 Census Questionnaire at 1 (Mar. 26, 2018), *cited in* FAC ¶ 4; *see also* A.R. at 1313. The Secretary stated
16 that the census should collect such information in order to provide DOJ with census-block-level data
17 to assist in enforcing the VRA. A.R. 1313.

18 The Secretary first emphasized the goal of conducting a complete and accurate decennial
19 census. A.R. at 1313. The Secretary also observed that, as detailed above, collection of citizenship
20 data in the decennial census has a long history and that the ACS has included a citizenship question
21 since 2005. *Id.* at 1314. The Secretary therefore found that “the citizenship question has been well
22 tested.” *Id.* He also confirmed with the Census Bureau that census-block-level citizenship data are
23 not available using the annual ACS. *Id.*

24 The Secretary asked the Census Bureau to evaluate the best means of providing the data
25 requested by DOJ, and the Census Bureau initially presented three alternatives: Option A would have
26 continued the status quo and provided DOJ with ACS citizenship data at the census-block-group
27 level, rather than the block level requested in the DOJ Letter; Option B would have placed the ACS
28 citizenship question on the decennial census, which goes to every American household; and Option

1 C instead would have provided block-level citizenship data for the entire population using existing
2 federal administrative-record data.³ A.R. 1314-16. In his decision memo, the Secretary found that
3 Option A would not provide DOJ with improved CVAP data, as there was no guarantee that the
4 accuracy or level of detail of the ACS data could be enhanced to meet DOJ's requirements even using
5 sophisticated modeling methods. *Id.* at 1314-15. After discussing Options B and C, *id.* at 1315-16, the
6 Secretary indicated that he had asked the Census Bureau to develop and implement a fourth
7 alternative, Option D, which would effectively combine Options B and C. *Id.* at 1316. Under this
8 fourth option, a citizenship question would be reinstated on the decennial census in the same form
9 as it appears on the ACS, imposing on each of the country's inhabitants the legal obligation to self-
10 respond. *Id.* at 1316-17. The Secretary directed the Census Bureau to further enhance its
11 administrative-record data sets, protocols, and statistical models to maximize its ability to match the
12 decennial census responses with administrative records. *Id.* at 1316. The combination of responses
13 to the question and more-developed practices for comparing those responses with administrative
14 records would then permit the Census Bureau to determine the inaccurate response rate (whether for
15 non-response, conflicting responses, or other reasons) for the entire population. *Id.* at 1317. The
16 Secretary concluded that this combined option would provide DOJ with the most complete and
17 accurate CVAP data. *Id.*

18 In addition to discussing the operational aspect of DOJ's request with the Census Bureau,
19 the Secretary closely considered stakeholder views. He reviewed letters from local, state, and federal
20 officials and advocacy groups, monitored stakeholder commentary in the press, and spoke personally
21 to interested parties on both sides of the issue. A.R. 1313-14. In particular, the Secretary considered
22 but rejected concerns raised by a number of parties that reinstating a citizenship question on the
23 decennial census would negatively impact the response rate for noncitizens. *Id.* at 1315-16, 1317-18.

25 ³ Administrative records include data from the Internal Revenue Service, the Social Security
26 Administration, the Centers for Medicare and Medicaid Services, the Department of Housing and
27 Urban Development, the Indian Health Service, the Selective Service, and the U.S. Postal Service.
28 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](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.

1 While the Secretary agreed that a “significantly lower response rate by non-citizens could reduce the
2 accuracy of the decennial census and increase costs for non-response follow up operations,” *id.* at
3 1315, he concluded that “neither the Census Bureau nor the concerned stakeholders could document
4 that the response rate would in fact decline materially” as a result of reinstatement of the citizenship
5 question. *Id.* Based on his discussions with outside parties, Census Bureau leadership and others
6 within the Department of Commerce, the Secretary determined that, to the best of everyone’s
7 knowledge, limited empirical data exists on how reinstatement of a citizenship question might impact
8 response rates on the 2020 census. *Id.* at 1315, 1317. Thus, “while there is widespread belief among
9 many parties that adding a citizenship question could reduce response rates, the Census Bureau’s
10 analysis did not provide definitive, empirical support for that belief.” *Id.* at 1316; *see also id.* at 1317-
11 18.

12 Certain stakeholders informed the Secretary that reinstating a citizenship question could
13 negatively impact response rates because of heightened, general distrust of the government. But the
14 Secretary concluded that those commenters referred to individuals who may decline to participate
15 regardless of whether the census includes a citizenship question and noted that “no one provided
16 evidence that there are residents who would respond accurately to a decennial census that did not
17 contain a citizenship question but would not respond if it did.” A.R. at 1317. The Secretary further
18 observed that, based on past experience, “certain interest groups consistently attack the census and
19 discourage participation.” *Id.* at 1318. The Secretary explained that the Census Bureau intends to take
20 steps to conduct respondent and stakeholder-group outreach in an effort to mitigate the impact of
21 the foregoing issues on the 2020 decennial census. *Id.*

22 Finally, the Secretary explained his decision not to implement Option C, which would have
23 relied solely on administrative records without reinstating a citizenship question. A.R. at 1316. The
24 Secretary noted that the use of administrative records is still evolving, and that the Census Bureau
25 does not yet have a complete data set for the entire population; in fact, based on the credible
26 administrative record data identified by the Census Bureau in the 2010 Census, some 25 million
27 voting-age people would need to have their citizenship status imputed by the Census Bureau if not
28

1 given the opportunity to self-respond. *Id.* Reliance on administrative records alone thus would not
2 provide DOJ with the complete and accurate block-level CVAP data it requested. *Id.*

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

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

8 The Department of Commerce and the Census Bureau have extensive plans in place to
9 maximize self-response and thereby minimize the amount of non-response follow up. The 2020
10 Census will be the first to rely extensively on digital methods and automation. It will be the first
11 census where individuals are encouraged to respond online. 2020 Census Operational Plan, at 15, 18-
12 19, 26, 88. Most housing units will receive several short mailings instructing them to complete the
13 census either online or by telephone. *Id.* at 18, 21. Online forms will be provided in multiple
14 languages. *Id.* at 19, 98. If households do not respond by the fourth mailing, the full paper
15 questionnaire will be sent.⁴ *Id.* at 99. Housing units that are less likely to have Internet access will
16 receive a full paper questionnaire in the first mailing, to allow them to respond immediately via mail.
17 *Id.* at 91, 95.

18 Each household will receive up to six mailings, if necessary. 2020 Census Operational Plan,
19 at 99. If no response has been received after the fifth mailing, a census enumerator will be assigned
20 to that address. *Id.* at 114. The enumerator will personally visit all units to which he or she is assigned
21 to verify that the address is occupied and to attempt to contact a household member to complete the
22 questionnaire. *Id.* If the enumerator is not able to complete the questionnaire, administrative records
23 will be used to identify vacant housing units and determine response data for occupied households
24 where the Census Bureau has high-quality administrative records. *Id.* at 22, 114, 117. If such records
25 do not exist, a final postcard encouraging self-response will be mailed, and all addresses still non-
26

27
28 ⁴ In particularly hard-to-reach areas, census questionnaires will be hand delivered. 2020
Census Operational Plan, at 102-05.

1 responsive will be subject to up to six contact attempts, with eligibility to have the data obtained from
2 a proxy (such as a neighbor or landlord) after the third unsuccessful attempt. *Id.*

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

8 **LEGAL STANDARDS**

9 To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), a plaintiff
10 must establish a court's jurisdiction through sufficient allegations. *See Lujan v. Defs. of Wildlife*, 504
11 U.S. 555, 561 (1992). Courts should “presume that [they] lack jurisdiction unless the contrary appears
12 affirmatively from the record.” *Renne v. Geary*, 501 U.S. 312, 316 (1991) (internal quotation marks and
13 citations omitted). “A Rule 12(b)(1) jurisdictional attack may be facial or factual.” *Safe Air for Everyone*
14 *v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). “In a facial attack, the challenger asserts that the
15 allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction.” *Id.*
16 When considering such a facial attack, the Court must “must accept as true the allegations of the
17 complaint.” *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1189 (9th Cir. 2001).

18 To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint
19 must contain “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v.*
20 *Twombly*, 550 U.S. 544, 570 (2007). This “plausibility” standard “asks for more than a sheer possibility
21 that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).
22 “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short
23 of the line between possibility and plausibility of ‘entitlement to relief.’” *Id.* (quoting *Twombly*, 550
24 U.S. at 557). While the Court accepts well-pleaded factual allegations as true, “mere conclusory
25 statements” and “legal conclusion[s] couched as ... factual allegation[s]” are “disentitle[d] ... to th[is]
26 presumption of truth.” *Id.* at 678, 681 (citation omitted). Although the Court generally may not rely
27 on evidence outside the pleadings in deciding a motion under Rule 12(b)(6), it “may, however,
28 consider certain materials—documents attached to the complaint, documents incorporated by

1 reference in the complaint, or matters of judicial notice—without converting the motion to dismiss
2 into a motion for summary judgment.” *United States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003).
3 Further, “when faced with a motion to dismiss in the APA context, a court may consider the
4 administrative record and public documents without converting the motion into a motion for
5 summary judgment,” *Bates v. Donley*, 935 F. Supp. 2d 14, 17 (D.D.C. 2013) (citing *Rempfer v. Sharfstein*,
6 583 F.3d 860, 865 (D.C. Cir. 2009)).

7 ARGUMENT

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

13 Plaintiffs’ request is not justiciable for multiple reasons. As an initial matter, Plaintiffs have
14 not established Article III standing because their claimed injuries from loss of representation or
15 funding are too speculative. Furthermore, any injury that may occur would not be fairly traceable to
16 the challenged decision; it would be attributable to the independent, unlawful actions of third parties.
17 But even if Plaintiffs could clear the standing hurdle, the Constitution commits the “[m]anner” of
18 conducting the census to Congress, and Congress has delegated that authority to the Secretary in
19 such broad terms that there is no judicially discernible standard against which to measure the
20 Secretary’s exercise of his discretion. Plaintiffs’ challenge to the Secretary’s decision thus presents a
21 nonjusticiable political question. Further, the decision at issue is committed to agency discretion by
22 law and unreviewable under the APA. And lastly, Plaintiffs fail to state a claim under the Enumeration
23 Clause of the Constitution because the Secretary has wide discretion to control the content of the
24 Census, and to determine the method to count every person. This case should be dismissed.

25 **I. THIS CASE IS NOT JUSTICIABLE**

26 **A. Plaintiffs Lack Standing to Maintain this Action.**

27 The doctrine of constitutional standing, an essential aspect of the Article III case-or-
28 controversy requirement, demands that a plaintiff have “a personal stake in the outcome of the

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

12 As the party invoking federal jurisdiction, the plaintiff bears the burden of establishing the
13 required elements of standing “with the manner and degree of evidence required at the successive
14 stages of the litigation.” *Def. of Wildlife*, 504 U.S. at 561. “At the pleading stage, general factual
15 allegations of injury resulting from the defendant’s conduct may suffice.” *Id.* But “[t]his is not to say
16 that plaintiff may rely on a bare legal conclusion to assert injury-in-fact, or engage in an ‘ingenious
17 academic exercise in the conceivable’ to explain how defendants’ actions caused his injury.” *Maya v.*
18 *Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011); *see also FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231
19 (1990) (“it is the burden of the ‘party who seeks the exercise of jurisdiction in his favor,’ ... ‘clearly
20 to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.’”
21 (citation omitted)).

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

26 **1. Plaintiffs’ allegations of injury are too speculative and conclusory.**

27 The standing requirement of “injury in fact” requires an allegation that the plaintiff “has
28 sustained or is immediately in danger of sustaining a direct injury” as a result of the challenged action.

1 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1552 (2016) (citations omitted). The injury or threat of injury
2 must be “concrete and particularized,” *Defs. of Wildlife*, 504 U.S. at 560 (citations omitted), and not
3 “merely ‘conjectural’ or ‘hypothetical’ or otherwise speculative.” *Summers v. Earth Island Inst.*, 555 U.S.
4 488, 505 (2009) (quoting *Defs. of Wildlife*, 504 U.S. at 560). An alleged future injury must be “*certainly*
5 *impending*”; “[a]llegations of *possible* future injury’ are not sufficient.” *Clapper v. Amnesty Int’l USA*, 568
6 U.S. 398, 409 (2013) (emphasis in original) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

7 Plaintiffs’ claimed injuries—stemming from predictions about future non-responses to
8 census questions—are not “certainly impending” and are too speculative to demonstrate the
9 necessary concrete injury-in-fact. Plaintiffs claim that the reinstatement of the citizenship question
10 on the decennial census (but not the presence of other questions touching on sex, Hispanic origin,
11 race, or relationship status that some respondents might prefer not to answer) “will directly cause an
12 undercount in the 2020 Census,” FAC ¶ 37, including in particular an undercount of Californians. *Id.*
13 ¶¶ 6, 40, 49, 55. This anticipated undercount, they aver, will threaten Plaintiff State of California with
14 loss of representation in the U.S. House of Representatives and the Electoral College. *Id.* ¶ 40.
15 Plaintiffs also contend that this alleged undercount will deprive each of them of their fair share of
16 federal funding under a variety of federal programs. *Id.* ¶¶ 41-46.

17 At the outset, Plaintiffs’ claims of injury are premised on their belief that the addition of the
18 citizenship question will ultimately cause a net *decrease* in the response rate (and ultimately in the
19 population count) for the 2020 Census, at least disproportionately in California. *See, e.g.*, FAC ¶ 49,
20 55. This assertion is entirely speculative, however. As Secretary Ross pointed out, there is little
21 “definitive, empirical” evidence regarding the effect of adding a citizenship question to the decennial
22 census. A.R. 1316; *see also id.* at 1315-18. Indeed, as the Secretary confirmed with the Census Bureau,
23 non-response rates for the citizenship question on the 2013-2016 ACS surveys were comparable to
24 non-response rates for other questions on those same surveys. *Id.* at 1315. Moreover, households
25 historically have failed to respond to the census and other surveys for a variety of reasons, even when
26 no citizenship question was included. *See id.* Plaintiffs do not provide any reason to conclude that
27 households who otherwise would respond in 2020 would now choose not to do so because of the
28 citizenship question and even admit that “apprehension about participating in the census is

1 unsurprising in the current political climate.” FAC ¶ 37. As the Secretary noted, there are many
2 individuals who would decline to participate regardless of whether the Census included a citizenship
3 question, and “no one provided evidence that there are residents who would respond accurately to a
4 decennial census that did not contain a citizenship question but would not respond if it did.” A.R. at
5 1317.

6 Thus, Plaintiffs merely speculate that the reinstatement of a citizenship question alone will
7 reduce self-response rates. Moreover, Plaintiffs ignore that the Census Bureau has extensive
8 procedures in place to address non-responses and to obtain accurate data for those households that
9 decline to respond. Indeed, the Census Bureau plans to increase outreach to address the potential for
10 non-responses (for whatever reason), and is investing in extensive procedures to meet any non-
11 response challenge. Consequently, it is entirely unknown (and unknowable) at present whether any
12 initial decrease in self-response rates will result in an undercount at the close of the 2020 Census,
13 after the Census Bureau has completed all its processes for enumerating.⁵ Plaintiffs cite no support
14 for their conclusion that any nonresponse problem will be proportionately higher in California simply
15 because it “has a proportionately large population of non-citizens and relatives of non-citizens
16 compared to other states.” FAC ¶ 40. In sum, Plaintiffs’ allegations that the reinstatement of the
17 citizenship question will ultimately produce an increase in the undercount in California is nothing
18 more than speculation and hence insufficient to establish standing.

19 Second, even to the extent that there may be a chance of a greater undercount because of the
20 citizenship question, Plaintiffs’ allegations that they face a risk of losing representation or funding as
21 a consequence of any such additional hypothetical undercount also are too speculative to satisfy
22 Article III. Plaintiffs allege generally that an increased undercount (assuming one occurs) will impact
23 the number of representatives that California has in the House of Representatives and the Electoral
24 College (apportionment) and will decrease their share of federal funds under a variety of federal
25 programs. FAC ¶¶ 40-47. In neither case, however, are Plaintiffs’ allegations sufficiently concrete and

26 ⁵ This conclusion is confirmed by recent testimony by Dr. Ron Jarmin, performing the
27 nonexclusive duties of the Director of the Census Bureau, who stated that there is no “definitive
28 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.

1 nonspeculative. As to the allegations regarding apportionment, Plaintiffs assert that California risks
2 losing a congressional seat but do not set forth facts explaining how they reached this conclusion or
3 whether it takes into account any potential undercount in other states resulting from the
4 reinstatement of the citizenship question. *Id.* ¶ 40. Apportionment is a complex process that is
5 determined by ranking states in order of priority for seats, based on their populations (multiplied by
6 a multiplier). *See* 2 U.S.C. § 2a(a) (apportionment of existing number of Representatives to occur “by
7 the method known as the method of equal proportions”);
8 <https://www.census.gov/population/apportionment/about/computing.html>; *see generally* *U.S. Dep’t*
9 *of Commerce v. Montana*, 503 U.S. 442, 461 (1992). Thus, each state’s likelihood of gaining or losing
10 seats is affected by its own total population as well as the population of *other* states, which may also
11 be moving up or down in the priority listing. Here, Plaintiffs do not allege that California will remain
12 at risk of losing seats *even if potential undercounts in other states are taken into account*. Their allegations in
13 this regard are therefore too conclusory to establish standing. *See Ridge v. Verity*, 715 F. Supp. 1308,
14 1318 (W.D. Pa. 1989) (finding no standing to bring an apportionment claim when “none of the
15 plaintiffs in this case can show which states would gain and which would lose representation in
16 Congress”); *Fed’n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 570 (D.D.C. 1980) (holding
17 “none of the plaintiffs are able to allege that the weight of his or her vote in the next decade will be
18 affected” where plaintiffs “can do no more than speculate as to which states might gain and which
19 might lose representation” which depends, *inter alia*, on “the interplay of all the other population
20 factors which affect apportionment”); *see also Sharrow v. Brown*, 447 F.2d 94, 97 (2d Cir. 1971) (noting
21 that plaintiff’s claim of standing to challenge method of apportionment “presents difficulty” because
22 plaintiff “would have to show, at least approximately, the apportionment his interpretation ... would
23 yield, not only for New York *but for every other State as well*” (emphasis added)); *cf. Glavin v. Clinton*, 19
24 F. Supp. 2d 543, 548 (E.D. Va. 1998) (finding that plaintiffs had alleged a sufficient injury related to
25 appointment and redistricting resulting from the Commerce Department’s plan regarding statistical
26 adjustment where “they are able to calculate its effects by reference to the results of the Post–
27 Enumeration Survey completed in 1992, which closely mirrors the methodology the Department will
28

1 utilize as part of its plan for Census 2000”), *aff’d sub nom, Dep’t of Commerce v. U.S. House of Representatives*,
2 525 U.S. 316 (1999).

3 As to the funding-related allegations, it is also speculative that a decrease in the count (if any)
4 will affect funding received by the Plaintiffs. Plaintiffs’ allegations (*see* FAC ¶ 42) fail to acknowledge
5 that the allocation of funds under the cited programs is not generally directly proportional to
6 population but is a function of multiple factors including, often, the populations of *other* states. *See*
7 49 U.S.C. § 5305(d)(1) (apportioning public transportation planning funds to states in the relation
8 that the population of urbanized areas in each state bears to the total population of urbanized areas
9 in all states); 20 U.S.C. § 6337 (education funding); 42 U.S.C. § 1301(a)(8)(A) (Medicaid formula
10 measuring a state’s per capita income against the national average per capita income). Given the
11 complexity of these calculations and the interrelationships between all the states’ funding, Plaintiffs’
12 allegations that they may face a loss of federal funds from an increased undercount are (as was the
13 case with their apportionment allegations) too speculative to satisfy Article III’s requirements. *See*
14 *Nat’l Law Ctr. on Homelessness & Poverty, v. Kantor*, 91 F.3d 178, 185 (D.C. Cir. 1996) (finding no
15 standing where court could not determine “what effect any methodology for counting the homeless
16 would have on the federal funding of any particular appellant,” noting that “if a more accurate count
17 would have enlarged some communities’ shares, it likely would have reduced the shares of other
18 communities”).⁶

19 In sum, Plaintiffs do not make out a claim which satisfies the Article III requirement that a
20 plaintiff’s threatened injury must be concrete and “certainly impending” and must not rely on a
21 “highly attenuated chain of possibilities.” *Clapper*, 568 U.S. at 410. However, even if Plaintiffs had
22 adequately pled a concrete, non-speculative injury regarding loss of funding and therefore had met
23 their pleading burden for Article III standing, that injury alone would not bring them within the zone
24

25 ⁶ Defendants acknowledge that the court in *National Law Center on Homelessness and Poverty* was
26 ruling on a motion for summary judgment and that a number of courts have found allegations of loss
27 of funding to be sufficient to survive motions to dismiss. *See* 91 F.3d at 185 (citing cases). But most
28 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.

1 of interests protected by the Constitution’s Enumeration Clause, which has no relation to, and was
2 not intended to, ensure that federal grant monies flow equally to all individuals. *See Lujan v. Nat’l*
3 *Wildlife Fed’n*, 497 U.S. 871, 883 (1990) (“[A] plaintiff must establish that the injury he complains of
4 ... falls within the ‘zone of interests’ sought to be protected by the statutory provision whose
5 violation forms the legal basis for his complaint.”); *City of Los Angeles v. Cty. of Kern*, 581 F.3d 841, 846
6 (9th Cir. 2009) (“[A] party’s complaint must fall within the zone of interests to be protected or
7 regulated by the statute or constitutional guarantee in question.”) (internal citation omitted). For
8 prudential standing to exist to assert a claim under the Enumeration Clause, Plaintiffs would have to
9 adequately plead an injury related to apportionment. As shown above, they have not.

10 **2. Plaintiffs’ alleged injuries are not fairly traceable to the challenged action.**

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

22 Even if Plaintiffs’ allegations here were not inherently speculative, and even accepting all well-
23 pleaded facts as true, the allegations rely upon the intervening acts of third parties violating a clear
24 legal duty to participate in the decennial census. *See* 13 U.S.C. § 221. Specifically, Plaintiffs do not
25 claim that their threatened injuries—loss of representation and decreases in federal funding—will
26 result *directly* from the Secretary’s decision to reinstate a citizenship question on the decennial form.
27 Rather, Plaintiffs posit that individuals in their communities who otherwise would comply with their
28 legal obligation to respond to the census will be deterred from participating in the entire survey

1 because of the reinstatement of a single question. But that unlawful failure to respond to a legitimate
2 question simply is not *fairly* traceable to the Secretary. *Salmon Spanning & Recovery All. v. Gutierrez*, 545
3 F.3d 1220, 1228 (9th Cir. 2008) (finding causation lacking because “[t]he excessive harvesting
4 permitted under the Treaty is not fairly traceable to the United States’ failure to withdraw from the
5 Treaty”). Moreover, it likely would be impossible to isolate and quantify the number of individuals
6 who would have responded but for addition of the citizenship question, both because every census
7 undercounts the population to some degree, *see Wisconsin*, 517 U.S. at 6, and because there will be no
8 reliable method to exclude from the total undercount individuals who would refuse to respond
9 regardless of the citizenship question because of any number of other factors, such as a general
10 reluctance to provide information to the government or the current political climate.

11 **B. Plaintiffs’ Suit is Barred by the Political Question Doctrine.**

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

23 This case implicates only the latter question because it does not involve whom to count, how
24 to count them, or where to count them. Indeed, Plaintiffs themselves admit that the Secretary will
25 conduct a person-by-person headcount of population, *see* FAC ¶ 35; *Senate of the State of Cal. v.*
26 *Mosbacher*, 968 F.2d 974, 978 (9th Cir. 1992) (noting that the census “is generally expected to be a
27 head count rather than a mere statistical manipulation”), and Plaintiffs’ theory of harm relies on the
28 Secretary putting procedures in place to reach every individual in the country, *see* FAC ¶¶ 35-46.

1 Thus, only the Enumeration Clause’s “[m]anner” prong is at issue here, as this case concerns simply
2 the “[m]anner” by which the Secretary performs the information-gathering function of the census.
3 Judicial review of that question is barred by the political question doctrine.

4 The political question doctrine is “primarily a function of the separation of powers,” *Baker v.*
5 *Carr*, 369 U.S. 186, 210 (1962), and “is designed to restrain the Judiciary from inappropriate
6 interference in the business of the other branches of Government,” *United States v. Munoz-Flores*, 495
7 U.S. 385, 394 (1990). The doctrine “excludes from judicial review those controversies which revolve
8 around policy choices and value determinations constitutionally committed for resolution to the halls
9 of Congress or the confines of the Executive Branch.” *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478
10 U.S. 221, 230 (1986). The functional nature of this doctrine requires a case-by-case inquiry into “the
11 precise facts and posture of the particular case.” *Baker*, 369 U.S. at 217; *Republic of Marshall Islands v.*
12 *United States*, 865 F.3d 1187, 1200 (9th Cir. 2017).

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

14 [1] a textually demonstrable constitutional commitment of the issue
15 to a coordinate political department; or [2] a lack of judicially
16 discoverable and manageable standards for resolving it; or [3] the
17 impossibility of deciding without an initial policy determination of a
18 kind clearly for nonjudicial discretion; or [4] the impossibility of a
19 court’s undertaking independent resolution without expressing lack
20 of the respect due coordinate branches of government; or [5] an
21 unusual need for unquestioning adherence to a political decision
22 already made; or [6] the potentiality of embarrassment from
23 multifarious pronouncements by various departments on one
24 question.

25 *Baker*, 369 U.S. at 217; *see Republic of Marshall Islands*, 865 F.3d at 1200. While the first two factors are
26 most important, *see Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (examining only the
27 first two factors); *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (observing that the factors are “probably
28 listed in descending order of both importance and certainty”), the presence of any one of these factors
can render a case nonjusticiable. *Republic of Marshall Islands*, 865 F.3d at 1200 (“[T]o find a political
question, we need only conclude that one factor is present, not all.” (quoting *Schneider v. Kissinger*, 412
F.3d 190, 194 (D.C. Cir. 2005))). This case presents not one, but at least three factors that render this
controversy nonjusticiable.

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

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

7 By using the phrase “in such Manner” to modify the phrase “[t]he actual Enumeration shall
8 be made,” the Constitution makes clear that Congress fully controls the manner in which the
9 decennial census is conducted. Dictionaries roughly contemporaneous with the ratification of the
10 Constitution demonstrate that the “[m]anner” of conducting the Census necessarily includes control
11 over the census questionnaire.⁷ The census questionnaire is quite literally the “form” of the census,⁸
12 and it is the “method” by which an “actual Enumeration” is conducted—*i.e.*, the census is completed
13 by inhabitants filling out the census questionnaire. Plaintiffs’ challenge to the content of census
14 questions thus goes directly to the “way of performing or executing” the census itself, a determination
15 that is constitutionally entrusted to Congress.

16 Accordingly, the remedy for an unwise census question lies not in the courts, but in Congress.
17 It is Congress to whom the Constitution entrusts the “[m]anner” of conducting the census, and only
18 Congress can overturn the Secretary’s decision to reinstate the citizenship question. The Census Act
19 even requires the Secretary to report census questions to Congress two years prior to the Census for
20 exactly this reason: to allow the Legislative Branch adequate time to consider the propriety of these
21 questions. 13 U.S.C. § 141(f)(2). That congressionally established process further underscores what
22 the Constitution’s text makes clear: that Congress, not the courts, determines the form of the census.
23 This case should therefore be dismissed as a nonjusticiable political question.

24
25 ⁷ Noah Webster’s 1828 American Dictionary of the English Language defines “manner” as
26 “form; method; way of performing or executing,” and Thomas Sheridan’s 1796 Complete Dictionary
27 of the English Language (6th ed.) defines “manner” as “form, method” or “habit, fashion.” *See Dep’t*
28 *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).

⁸ *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”).

1
2 **2. The Court has no judicially manageable standards to make the necessarily policy-**
3 **based determinations regarding the content of the census questionnaire.**

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

7 The text and history of the Enumeration Clause unequivocally demonstrate that decisions
8 regarding the information-gathering procedures of the census are fully committed to Congress’s
9 discretion. The reason for this constitutional delegation is axiomatic: each census procedure—from
10 the types of advertising and the use of different languages to promote the census, to the number of
11 regional census offices and the particular systems used to tabulate responses, to the number of
12 enumerators to hire and the process for in-person enumeration visits—requires a careful balancing
13 of considerations such as cost, testing, training, effectiveness, timing, informational need, and
14 accuracy.⁹

15 These considerations are quintessentially policy choices outside the province of the judiciary.
16 In this case, for example, the Secretary balanced the need for citizenship information with the cost
17 and effectiveness of efforts to mitigate non-responses, the possibility of lower response rates, the
18 cost of increased non-response follow-up, and the completeness and cost of administrative records.
19 There are no judicially manageable standards for determining how to weigh these factors, which do
20 not implicate the affirmative constitutional command to count, rather than estimate, the population.
21 Once a court ventures beyond that affirmative constitutional command, there is no law to apply; it is
22 in the realm of cost/benefit analyses and value judgments constitutionally entrusted to
23 representatives of the people and executive officials confirmed by the same. *Japan Whaling*, 478 U.S.
24 at 230.

25 The census-related cases decided by the Supreme Court are distinguishable. All have
26 concerned calculation methodologies, not pre-count information-gathering functions or content
27 determinations. *See, e.g., Utah v. Evans*, 536 U.S. 452, 452 (2002) (“hot-deck imputation”—a non-

28 ⁹ 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.

1 sampling process which infers characteristics of individuals based upon the characteristics of
 2 neighbors, resulting in inclusion of individuals who otherwise would be excluded—did not violate
 3 the Enumeration Clause); *Dep’t of Commerce*, 525 U.S. at 316 (holding that statistical sampling violates
 4 the Census Act, 13 U.S.C. § 195, and declining to reach the Enumeration Clause claim); *Wisconsin*,
 5 517 U.S. at 1 (holding that Secretary did not violate Enumeration Clause by failing to correct a census
 6 undercount with data from a post-enumeration survey); *Franklin v. Massachusetts*, 505 U.S. 788 (1992)
 7 (confirming that the method used to count federal employees serving overseas did not violate
 8 Enumeration Clause). The Constitution supplies a simple judicial standard for determining the
 9 constitutionality of such practices—the Secretary must perform a person-by-person headcount,
 10 rather than an estimate, of population. There is nothing incomprehensible about that standard.¹⁰

11 In stark contrast, there is no judicially discernible standard for determining whether the
 12 Secretary’s decision to reinstate the citizenship question on the 2020 Census is unconstitutional. This
 13 is a “policy choice[] and value determination[] constitutionally committed for resolution to the halls
 14 of Congress [and] the confines of the Executive Branch.” *Japan Whaling*, 478 U.S. at 230. Thus, this
 15 case is barred from judicial consideration by the political question doctrine.

16 **C. The Secretary’s Decision Is Not Subject to Judicial Review Under the**
 17 **Administrative Procedure Act.**

18 The APA bars judicial review of certain categories of decisions that “courts traditionally have
 19 regarded as ‘committed to agency discretion.’” *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quoting 5
 20 U.S.C. § 701(a)(2)). Agency action is committed to agency discretion by law where “‘statutes are
 21 drawn in such broad terms that in a given case there is no law to apply,’” *Citizens to Preserve Overton*

22 ¹⁰ The Court’s apportionment cases are also inapposite. The Supreme Court has routinely
 23 decided cases involving congressional districting by States on the theory that the Constitution
 24 requires “equal representation for equal numbers of people.” *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).
 25 And the Court similarly has decided that challenges to the way in which Congress allocates
 26 congressional seats are justiciable. *See U.S. Dep’t of Commerce v. Montana*, 503 U.S. at 459 (noting
 27 Congress is granted more deference than states in apportionment). But the nature of those
 28 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”).

1 *Park, Inc., v. Volpe*, 401 U.S. 402, 410 (1971) (internal citation omitted). These decisions are not
2 amenable to judicial review because there exists “no meaningful standard against which to judge the
3 agency’s exercise of discretion” in these areas. *Webster v. Doe*, 486 U.S. 592, 600 (1988); *see also Ctr. for*
4 *Policy Analysis on Trade & Health v. Office of the U.S. Trade Rep.*, 540 F.3d 940, 945 (9th Cir. 2008)
5 (applying § 701(a)(2) to bar judicial review where relevant statutes “are devoid of standards suggesting
6 what Congress intended”); *Abdelhamid v. Ilchert*, 774 F.2d 1447, 1449 (9th Cir. 1985) (confirming that
7 determination whether §701(a)(2) applies must be made “in the context of a particular complaint”).
8 This bar applies, moreover, even when “the agency gives a ‘reviewable’ reason for otherwise
9 unreviewable action.” *Interstate Commerce Comm’n v. Bhd. of Locomotive Eng’rs (“BLE”)*, 482 U.S. 270, 283
10 (1987).

11 As the Supreme Court repeatedly has emphasized, application of § 701(a)(2)’s bar on judicial
12 review “requires careful examination of the statute on which the claim of agency illegality is based,”
13 *Webster*, 486 U.S. at 600, along with whether the matter traditionally has been viewed as committed
14 to agency discretion, *BLE*, 482 U.S. at 282, or whether the challenged action manifests a “general
15 unsuitability” for judicial review because it involves a “complicated balancing of a number of factors,”
16 difficult judgments concerning the proper allocation of agency resources, or matters uniquely
17 committed to another branch of government, *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). These
18 factors compel the conclusion here that the Secretary’s decision to reinstate on the decennial census
19 a request for citizenship data is—just like the conduct of the census generally—a classic example of
20 a discretionary determination that is committed to the discretion of the Secretary of Commerce and
21 thus not subject to judicial review.

22 In the first place, the applicable section of the Census Act, 13 U.S.C. § 141(a), contains no
23 standards against which to assess the Secretary’s exercise of discretion, particularly with regard to a
24 matter as fundamental as the form and content of the questionnaire itself. Far from confining the
25 Secretary’s discretion, the statute delegates it in broad terms: “The Secretary shall . . . take a decennial
26 census of population . . . in such form and content as he may determine,” and, “[i]n connection with
27 any such census, the Secretary is authorized to obtain such other census information as necessary.”
28 13 U.S.C. § 141(a). This plain language confers discretion as broad as that granted by the statute at

1 issue in *Webster*, 486 U.S. at 600, which allowed the CIA Director to terminate an employee whenever
2 he “shall *deem* such termination necessary or advisable in the interests of the United States.” The
3 language of § 141(a) contains similar “deeming” language—the census is to be conducted as the
4 Secretary “may determine.” And, just as the CIA Director’s decision that terminating an employee is
5 “necessary or advisable” is immune from judicial review, *id.*, so too is the Secretary’s decision to
6 collect information through the decennial census “as necessary” and “in such form and content as
7 he may determine.” 13 U.S.C. § 141(a). As in *Webster*, this statutory scheme embodies deference to
8 the Secretary, and forecloses the application of any meaningful judicial review. *See Or. Nat. Res. Council*
9 *v. Thomas*, 92 F.3d 792, 796-99 (9th Cir. 1996) (affirming dismissal for lack of subject-matter
10 jurisdiction where agency action committed to agency discretion under § 701(a)(2)).

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

14 The text of the Constitution vests *Congress* with virtually unlimited
15 discretion in conducting the decennial “actual Enumeration,” *see* Art.
16 I, § 2, cl. 3, and notwithstanding the plethora of lawsuits that inevitably
17 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.

18 *Wisconsin*, 517 U.S. at 19 (emphasis added). The Supreme Court’s explication of the political branches’
19 virtually unlimited discretion is highly probative of whether the Secretary’s decisions exercising that
20 discretion are subject to judicial review.¹¹

21 Similar concerns led the Seventh Circuit to conclude that the absence of “guidelines for an
22 accurate decennial census” from the Constitution, the Census Act, and the APA itself creates “the
23 inference . . . that these enactments do not create justiciable rights.” *Tucker*, 958 F.2d at 1417-18 (“So
24 nondirective are the relevant statutes that it is arguable that there is no law for a court to apply in a

25 _____
26 ¹¹ Although Justice Stevens’s concurrence in *Franklin*, 505 U.S. at 816-20, concluded that the
27 conduct of the census is not committed to agency discretion by law, this opinion failed to garner a
28 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.

1 case like this, that you might as well turn it over to a panel of statisticians and political scientists and
2 let them make the decision, for all that a court could do to add its rationality or fairness.”) (internal
3 citations omitted); *see also id.* at 1419 (Ripple, J., concurring) (“[T]he plain language of the governing
4 statute makes it clear that the matter is committed to agency discretion.”); *Senate of the State of Cal. v.*
5 *Mosbacher*, 968 F.2d 974, 977-79 (9th Cir. 1992) (finding “no law to apply” under the Constitution
6 and Census Act); *City of Phila. v. Klutznick*, 503 F. Supp. 663, 677 (E.D. Pa. 1980) (recognizing danger
7 of permitting local governments to manipulate conduct of census through judicial review).

8 Nor can Plaintiffs identify any meaningful standards derived from any other statute,
9 regulation, or historical practice against which to judge the Secretary’s choice of content for the
10 census questionnaire, further demonstrating that there is no law to apply in this case. To the contrary,
11 the long history of decennial censuses since ratification of the Constitution establishes a tradition of
12 commitment of the *general* conduct of the census to the Secretary’s discretion, subject to oversight
13 only by Congress. Furthermore, the longstanding historical practice of including citizenship, dating
14 back to 1820, *see supra*, Background § II, coupled with the fact that no challenge to the subject matter
15 of the census questions has ever been attempted (much less successfully maintained), strongly
16 countenances the conclusion that this matter traditionally has been viewed as discretionary.

17 Tellingly, Congress has reserved to itself the responsibility for oversight of the Secretary’s
18 performance and correction of any perceived defects in the census without the intrusive and
19 fragmenting involvement of numerous—and often competing—lawsuits. Section 141(f) of the
20 Census Act requires the Secretary to submit to Congress “not later than 2 years before the appropriate
21 census date, a report containing the Secretary’s determination of the questions proposed to be
22 included in such census.” Plaintiffs’ challenge here arises from the Secretary’s decision to include in
23 that report a planned question regarding citizenship. FAC ¶¶ 26, 35.

24 But the fact that the challenged final agency action challenged here takes the form of a
25 statutorily mandated report to Congress only underscores that Congress intended that *it* would
26 address any defects in those questions, not courts in suits brought against Executive Branch officers
27 after the report has been transmitted. By expressly reserving to itself the power to review the
28 Secretary’s exercise of his discretion, Congress foreclosed the courts from second-guessing his

1 judgment as to the content of the census questionnaire. *Cf. Armstrong v. Bush*, 924 F.2d 282, 290-91
2 (D.C. Cir. 1991) (holding that Presidential Records Act impliedly precludes judicial review because it
3 “would upset the intricate statutory scheme Congress carefully drafted to keep in equipoise important
4 competing political and constitutional concerns”). In the end it is for Congress, not this Court, to
5 review the Secretary’s exercise of his delegated discretion to determine which demographic questions
6 to ask in the census.

7 **II. PLAINTIFFS FAIL TO STATE A CLAIM UNDER THE ENUMERATION** 8 **CLAUSE**

9 Even if this case were justiciable, Plaintiffs’ Enumeration Clause claim should be dismissed.
10 The Constitution does not forbid the census from asking whether a person is a U.S. citizen. The
11 Constitution’s reference to “actual Enumeration” is simple: population is to be determined through
12 a person-by-person headcount, rather than through estimates or conjecture. There is no allegation
13 that the Secretary is estimating rather than counting the population, nor any allegation that he has
14 failed to establish procedures for counting every resident of the United States. The Enumeration
15 Clause is therefore satisfied. Moreover, the Secretary’s decision to reinstate a citizenship question is
16 consistent with historical practice dating back to the founding era. The census has collected
17 demographic information since its first iteration in 1790, and it asked citizenship-related questions as
18 early as 1820, and in many enumerations thereafter. The Secretary has complied fully with the
19 Constitution, and Plaintiffs’ Enumeration Clause claim should be dismissed.

20 Plaintiffs themselves recognize that the Secretary will conduct a headcount of population, *see*
21 FAC ¶ 35, and Plaintiffs’ theory of harm relies on this fact, *see id.* ¶¶ 35-46. As described above at
22 Background § IV, the Census Bureau has comprehensive procedures in place for non-response
23 follow up and will attempt to contact nearly every person in the country, utilizing up to six mailings
24 and an in-person visit by an enumerator. 2020 Census Operational Plan, at 88-92, 112-21. These
25 operations in place for 2020 are more wide-ranging and more advanced than the operations
26 performed in any previous decennial census. Indeed, the FAC contains no allegations that the
27 Secretary has failed to establish procedures for counting every resident of the United States. *See Prieto*
28 *v. Stans*, 321 F. Supp. 420, 423 (N.D. Cal. 1970) (denying a preliminary injunction challenging the

1 content of the 1970 questionnaire where robust census procedures demonstrated no “convincing or
2 even reasonable showing” of success on the merits). As the extensive 2020 census operations make
3 clear, a complete and accurate person-by-person enumeration of the population is fully contemplated.

4 Furthermore, while the possibility of an undercount exists in every census, the Constitution
5 does not require perfection. *See Utah*, 536 U.S. at 504 (Thomas, J., concurring in part and dissenting
6 in part) (canvassing the history of census undercounts, including the first Census in 1790); *Wisconsin*,
7 517 U.S. at 6 (“Although each [of the 20 past censuses] was designed with the goal of accomplishing
8 an ‘actual Enumeration’ of the population, no census is recognized as having been wholly successful
9 in achieving that goal.”); *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973) (census data “are inherently
10 less than absolutely accurate”); *Senate of the State of Cal.*, 968 F.2d at 979 (describing the 1990 Census
11 as “one of the best ever taken in this country” despite counting “approximately 98 percent of the
12 population”); *City of Los Angeles v. Evans*, No. 01-cv-1671, 2001 WL 34125617, at *2 (C.D. Cal. Apr.
13 25, 2001) (“Like all of its predecessors, Census 2000 produced less than perfect results.”). As long as
14 the Secretary has established procedures for counting every resident of the United States—and there
15 is no allegation he has not—any undercount is the constitutionally permissible result of attempting
16 to enumerate upwards of 325 million people across 3.8 million square miles.
17 *See* <https://www.census.gov/popclock/>.

18 Historical practice confirms that the Secretary’s decision to reinstate a citizenship question
19 on the 2020 Census cannot convert an otherwise constitutional headcount into a violation of the
20 Enumeration Clause. *See Wisconsin*, 517 U.S. at 21 (noting the importance of historical practice when
21 examining Enumeration Clause issues); *Franklin*, 505 U.S. at 803-06 (same). Despite the
22 Constitution’s reference only to “the whole number of persons in each State,” *see* U.S. Const. amend.
23 XIV, § 2, every census since 1790 has collected demographic information beyond the number and
24 location of inhabitants. *Morales v. Daley*, 116 F. Supp. 2d 801, 809 (S.D. Tex. 2000), *aff’d*, 275 F.3d 45
25 (5th Cir. 2001). In fact, the First Census in 1790 asked about age, race, and sex. Census Act of 1790,
26 § 1, 1 Stat. 101 (1790). Further, a wide range of demographic questions were asked in subsequent
27
28

1 decennial censuses and will be asked in 2020.¹² As detailed above, Background § II, these broad
 2 demographic questions included citizenship-related questions as early as 1820 and continuing (on the
 3 long-form questionnaire) through the 2000 Census. Although the long-form questionnaire was
 4 discontinued after the 2000 Census, citizenship questions have been asked on the ACS to a sample
 5 of the population—about one in 38 households—every year since 2005. *See* ACS Questionnaire
 6 Archive, <https://www.census.gov/programs-surveys/acs/methodology/questionnaire-archive.html>
 7 (noting citizenship questions on every ACS questionnaire). Thus, citizenship questions have a long
 8 and established history in the census.¹³

9 Plaintiffs’ theory, taken to its logical conclusion, would mean that the Enumeration Clause
 10 prohibits any demographic questions on the census questionnaire that may theoretically reduce
 11 response rates and cause some entirely speculative undercount. Under that standard, the long-form
 12 questionnaire would have been unconstitutional, given that the long-form questionnaire *replaced* the
 13 short form for a subset of population in previous censuses and elicited a substantially lower response
 14 rate. *See* Census Topic Report No. 11, Response Rates and Behavior Analysis, at 9,
 15 <https://www.census.gov/pred/www/rpts/TR11.pdf> (concluding that mail-back response rate for
 16 2010 long form was 9.6% lower than short form). And many of the questions on the current and
 17 prior short forms—such as questions about sex, Hispanic origin, race, and relationship status—would
 18 also be called into question, as some people may prefer not to answer those questions as well.

19 But courts have universally approved the historical practice of gathering demographic
 20 information. *See, e.g., Legal Tender Cases*, 79 U.S. 457, 536 (1870) (“Congress has repeatedly directed
 21 ... not only an enumeration of persons but the collection of statistics respecting age, sex, and
 22 production. Who questions the power to do this?”); *abrogated on other grounds, Taboe-Sierra Pres. Council*,

23
 24 ¹² Throughout the Nineteenth Century, demographic information on the Census expanded
 25 to include questions such as the number of persons “engaged in agriculture, commerce, and
 26 manufactures,” Census Act of 1820, 3 Stat. 548 (1820), the “[p]rofession, occupation, or trade of
 27 each person over 15 years of age,” the “value of real estate owned,” and whether persons over age
 28 20 could read and write, Census Act of 1850, 9 Stat. 430 (1850).

¹³ 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.

1 *Inc. v. Taboe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Dep't of Commerce*, 525 U.S. at 341 (such
2 questions, the Court has recognized, serve as “a linchpin of the federal statistical system by collecting
3 data on the characteristics of individuals, households, and housing units throughout the country.”
4 (quoting Nat'l Research Council, *Counting People in the Information Age* 1 (D. Steffey & N.
5 Bradburn eds. 1994))).¹⁴ And the Supreme Court has consistently held that such longstanding
6 historical practice is powerful evidence of constitutionality. *See Nat'l Labor Relations Bd. v. Noel Canning*,
7 134 S. Ct. 2550, 2559 (2014). As noted above, all decennial censuses have included demographic
8 inquiries, and the 2020 questionnaire is no different.

9 Plaintiffs do not challenge any aspect of the 2020 census that might infringe the Enumeration
10 Clause's command to conduct a person-by-person headcount of the population. Instead, Plaintiffs'
11 challenge focuses entirely on the Secretary's information-gathering decision to reinstate a citizenship
12 question on the 2020 Census. This is as meritless as it is unprecedented. Even when the Supreme
13 Court struggled to distinguish between unconstitutional estimates and acceptable enumeration in
14 calculation-methodology cases,¹⁵ it recognized that the Clause “vests Congress with virtually
15 unlimited discretion in conducting the decennial” census. *Wisconsin*, 517 U.S. at 19; *see Utah*, 536 U.S.
16 at 474 (explaining that the Clause's language indicates “the breadth of congressional methodological
17 authority, rather than its limitation”). And in light of this discretion, the Supreme Court has never
18 invalidated the Secretary's population count on Enumeration Clause grounds. *See Utah*, 536 U.S. at
19 474 (holding hot-deck imputation permissible under the Enumeration Clause); *Dep't of Commerce*, 525
20 U.S. at 344 (holding that statistical sampling violates the Census Act and declining to reach
21 Enumeration Clause claim); *Wisconsin*, 517 U.S. at 1; *Franklin*, 505 U.S. at 788. This case presents no
22 reason to break from those precedents.

23
24
25 ¹⁴ On the rare occasions that census questions have been challenged as unconstitutional, lower
26 courts have dismissed such contentions out of hand. *United States v. Rickenbacker*, 309 F.2d 462, 463
27 (2d Cir. 1962) (Marshall, J.); *Morales*, 116 F. Supp. 2d at 814-15; *United States v. Little*, 321 F. Supp.
28 388, 392 (D. Del. 1971); *United States v. Moriarity*, 106 F. 886, 891 (S.D.N.Y. 1901).

¹⁵ *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).

1 The Secretary’s decision to reinstate a citizenship question was well within his discretion and
2 is fully consistent with the Constitution’s text, longstanding historical practice, and judicial precedent.
3 Plaintiffs’ theory, by contrast, would deem virtually every census questionnaire in the Nation’s history
4 unconstitutional. The choice between those options is clear: Plaintiffs’ Enumeration Clause claim
5 should be dismissed.

6 **CONCLUSION**

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

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Respectfully submitted,

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