CHAD A. READLER
Acting Assistant Attorney General
BRETT A. SHUMATE
Deputy Assistant Attorney General
CARLOTTA P. WELLS
Assistant Director
KATE BAILEY
GARRETT COYLE
STEPHEN EHRLICH
CAROL FEDERIGHI
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Tel.: (202) 514-9239
Email: kate.bailey@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

CITY OF SAN JOSE, *et al.*,

Plaintiffs,

v.

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

Defendants.

Civil Action No. 3:18-cv-2279-RS

DEFENDANTS' REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

As set forth in Defendants' Motion to Dismiss, Plaintiffs' request for an order barring the collection of demographic information through the decennial census should be rejected. Plaintiffs' opposition fails to dispel the weighty justiciability concerns implicated by this challenge to the Secretary's exercise of the broad discretion delegated to him by Congress. In particular, Plaintiffs fail to show why third parties' unlawful choices in failing to respond to the census are fairly attributable to Defendants. Their arguments with regard to injury only serve to underscore the speculative and uncertain nature of their claims—that a purported increase in the undercount of population will lead to losses in representation and funding. As for their remaining arguments concerning the Court's power to review and the existence of an Enumeration Clause claim, Plaintiffs suggest that every census procedure must be designed to maximize accuracy. Pls.' Mem. of Law in Opp'n to Defs.' Mot. to Dismiss, at 25, ECF No. 68 ("Pls.' Opp'n"); *id.* at 33. But neither the Constitution nor the Census Act says that the Census Bureau must pursue maximum accuracy at the expense of other important goals, and there are no workable standards that restrict Defendants' discretion to achieve other legitimate data-gathering ends at the same time. Moreover, there is no allegation that the Secretary is estimating rather than counting the population, nor any allegation that he has failed to establish procedures for counting every person. For these reasons and those set forth in Defendants' previous memorandum, this case should be dismissed.

I. THIS CASE IS NOT JUSTICIABLE

A. Plaintiffs Lack Standing to Maintain this Action.

Plaintiffs fundamentally err in contending that their alleged injuries are "fairly traceable" to Defendants' decision to simply reinstate a question on the census questionnaire. *See* Pls.' Opp'n at 19-22. On the contrary, the injuries Plaintiffs allege are properly attributable to third parties who violate their legal duty to respond to the census. Such *unlawful* action cannot "fairly" be attributable

to the government's otherwise-lawful decision merely to ask a question. In other words, the unlawful acts of third parties should not disable the government from obtaining valuable information.

"When … a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else," "standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992). In such cases, the government's actions must create a "determinative or coercive effect upon the action of" those third parties. *Bennett v. Spear*, 520 U.S. 154, 169 (1997). Plaintiffs' assertion that "there is no requirement that the defendants' conduct comprise the last link in the chain," Pls.' Opp'n at 19, is merely a distraction. The salient fact here is not that additional links in the chain of causation exist; rather, the intervening, independent actions of third parties *break* the chain such that any injury suffered by Plaintiffs cannot be attributed to the decision they challenge.

Here, Defendants' actions do not impose a "determinative or coercive" effect causing persons *not* to respond to the census. On the contrary, the statute coerces persons *to respond to* the census by imposing a legal obligation to do so under criminal penalty. 13 U.S.C. § 221. Plaintiffs' theory of standing thus rests on the assumption that people will not comply with that legal obligation. In light of this legal obligation, Plaintiffs have failed to allege facts indicating that any third party's decision not to respond to the census would cease to be that person's "independent action." *Bennett*, 520 U.S. at 169; *see also United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1541 (2018) (observing that courts "have consistently refused to 'conclude that the case-or-controversy requirement is satisfied by' the possibility that a party 'will … violat[e] valid criminal laws" (quoting *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974)).

The Ninth Circuit's decision in *Mendia v. Garcia*, 768 F.3d 1009, 1012-1014 (9th Cir. 2014), on which Plaintiffs rely, is distinguishable because the purportedly unlawful government action there—the issuance of an immigration detainer—led directly to the *lawful* decision of private bail bondsmen to refuse to do business with the alleged U.S. citizen plaintiff, resulting in prolonged

detention. But here, in contrast, third parties' illegal choices not to respond are simply that—individual choices to violate the law—not consequences fairly attributable to the government.

Other cases cited by Plaintiff are equally unhelpful. Contrary to Plaintiffs' assertion, *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958), did *not* "hold[] that violence against NAACP members by private third parties did not defeat the causation element of standing," Pls.' Opp'n 21. The Court's opinion in *NAACP* did not even *mention* causation; it stood only for the unremarkable proposition that forced disclosure of membership could act as a prior restraint on an advocacy organization's members' speech, and that the organization could bring that claim on behalf of its members. That inquiry is far afield from the question whether the government is liable for the unlawful acts of individuals flouting their legal duty to respond to the census.

Plaintiffs' opposition also fails to cure the defects in their attempt to establish the injury-in-fact prong of the standing inquiry. First, Plaintiffs still have not alleged or pointed to sufficient facts demonstrating that an *ultimate* differential increase in the undercount resulting from the addition of a citizenship question is anything more than speculative. In response to Defendants' arguments in this regard, Plaintiffs point to forty-year-old assertions made by the Bureau in previous litigation, opinions from outside experts serving on the Scientific Advisory Committee, an internal report documenting difficulties in obtaining data on hard-to-count populations, and Secretary Ross's testimony before Congress acknowledging the possibility of a 1% decline in initial responses. Pls.' Opp'n at 14-15. Even setting aside the fact that the agency cannot be forever bound by dated statements in previous litigation, none of these allegations plausibly establish that the *final* count will be negatively affected.

Plaintiffs fail to distinguish between "self-response," which occurs when a household responds online or returns the paper questionnaire, and "response," which includes both self-response and response obtained through Census Bureau follow-up methods. The estimated decrease mentioned by the Secretary in his decision memo refers to an estimated decrease in the initial *self*-response rate, not the total *final* response. Plaintiffs have not pleaded facts indicating that a lower

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

Plaintiffs' suggestion that their conclusory allegations of "the growing culture of fear and intimidation in the current political climate, and the deterrent effect of the citizenship question on response rates" fares no better. This is because they merely suggest, without support, that the purported political climate will cause individuals who otherwise would answer the census not to do so *and* that this will occur in sufficient numbers to cause concrete harm. *See* Pls.' Opp'n at 15. Even at the pleading stage, a "plaintiff must clearly … allege facts demonstrating" how it will suffer a "concrete and particularized" injury caused by the challenged conduct, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016) (citations omitted), and cannot rely on "conclusory statements and legal conclusions" to establish the necessary injury-in-fact. *See Maxson v. Mosaic Sales Sols. Holding Co., LLC*, 2016 WL 973248, at *4 (D. Nev. March 7, 2016); *see also Ctr. For Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1159 (D.C. Cir. 2005) (dismissing case at pleading stage where plaintiff "offered this Court no actual demonstration of increased risk").

Moreover, it is insufficient for Plaintiffs to plead only a sufficiently nonspeculative disproportionate undercount; they must allege facts indicating that the level of the disproportionate undercount will be *material* to their claimed injury. Plaintiffs do not dispute that there would be no

effect on representation or funding merely if there were some levels of undercount somewhere. Yet their assertions connecting the level of the purported undercount to changes in their representation and funding are entirely conclusory. *See* Pls.' Opp'n at 17 ("Disproportionately low response rates resulting from a citizenship question on the census *could* decrease the enumeration counts for San Jose and its immediate surrounding area below the level required to maintain its three congressional seats") (emphasis added). It is not enough merely to claim that harm *could* result, and although Plaintiffs contend that they face the "threat of vote dilution," they utterly fail to set forth specific facts demonstrating that such a result is anything beyond hypothetical. Similarly, it is not enough to simply point to federal programs "that are dependent on census data," *id.* at 16, without specifically alleging that any eventual undercount would be of such magnitude, in proportion to other recipient jurisdictions, as to affect Plaintiffs' receipt of federal funds.

At bottom, Plaintiffs' claimed injuries, which they contend will occur more than two years in the future after an unknown number of people in unknown jurisdictions refuse to be counted, simply do not rise above the speculative level. Plaintiffs' insistence that they "will be 'disproportionately affected' by the census undercount", Pls.' Opp'n 16, necessarily relies on conclusory assumptions that, after *all* operations for the 2020 census are completed, and despite the efforts of both the Bureau and Plaintiffs themselves to ensure a full and accurate count, the increase in incorrect enumerations will be sufficient in comparison to other jurisdictions to *actually* affect their representation or funding. Even taking well-pleaded allegations as true, this chain of speculation is simply too attenuated to establish an injury that satisfies Article III. *See Nelson v. King Cnty.*, 895 F.2d 1248, 1252 (9th Cir. 1990) ("Both the Supreme Court and our circuit have repeatedly found a lack of standing where the litigant's claim relies upon a chain of speculative contingencies, particularly a chain that includes the violation of an unchallenged law"); *Munns v. Kerry*, 782 F.3d 402, 412 (9th Cir. 2015) (upholding dismissal for lack of standing on ground that claimed future injury was "too speculative to constitute injury in fact") (citing *Lujan*, 504 U.S. at 564).

Accordingly, Plaintiffs fail to meet their burden of demonstrating Article III standing, and this case should be dismissed for lack of jurisdiction.

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

Plaintiffs' argument that "[c]ourts have uniformly held that the Enumeration Clause does not textually commit exclusive, non-reviewable control over the census to Congress," Pls.' Opp'n at 23, is merely subterfuge designed to obscure the fact that this suit is fundamentally unlike any previous census challenge. Plaintiffs do not dispute that no direct challenge to the *content* of the census questionnaire ever has been maintained—and that distinction is critical, given that there is no allegation here that the Secretary will not be conducting a person-by-person headcount. Because the Constitution's text commits the manner of conducting the census to Congress and this Court lacks judicially manageable standards for judging the propriety of reinstating a citizenship question, this suit presents a nonjusticiable political question.

Plaintiffs attempt to conflate the only judicially enforceable line drawn by the Enumeration Clause—impermissible estimation versus lawful enumeration—with the manner by which that count is conducted. That argument fails because this case has nothing to do with whom to count, how to count them, or where to count them. And it has nothing to do with the Secretary's procedures for counting every person. Instead, Plaintiffs challenge the Secretary's information-gathering decision to include a question on the census questionnaire that will be used to enumerate inhabitants almost two years from now. This is a challenge to the "[m]anner" of the census, which the Constitution expressly commits to Congress (and that Congress has expressly delegated to the Secretary). And Plaintiffs' portrayal of this argument as "inconsistent with decades of precedent in which challenged census procedures have been considered part of the 'manner' in which the census was conducted," Pls.' Opp'n at 24, is meaningless, because the fact that decisions related to whom and how to count individuals may be reviewable does not establish that *all* challenges to the manner of conducting the census are similarly justiciable.

Plaintiffs' reliance on *Utah v. Evans*, 536 U.S. 452, 474 (2002), and *Wisconsin v. City of NY*, 517 U.S. 1, 17 (1996)), also is misplaced. *See* Pls.' Opp'n at 24. Neither *Utah* nor *Wisconsin* cast any doubt on Defendants' argument because both cases focused on calculation methodologies rather than pre-census information-gathering decisions. In *Utah*, the Supreme Court analyzed whether "hot-deck imputation"—a calculation methodology that infers characteristics of individuals based upon the characteristics of neighbors, resulting in inclusion of individuals who otherwise would be excluded—violated the Enumeration Clause. *Utah*, 536 U.S. at 457-58. The Court explicitly stated that "Utah's constitutional claim rests upon the words 'actual Enumeration' as those words appear in the Constitution's Census Clause." *Id.* at 473. *Wisconsin* is similarly inapposite because there the Supreme Court considered whether the Secretary's refusal to correct a census undercount with data from a post-enumeration survey (*i.e.*, a calculation methodology) violated the Enumeration Clause. *Wisconsin*, 517 U.S. at 10. True, the *Wisconsin* court cited the "manner" prong in discussing Congress' broad authority, but that does not change the fact that that decision dealt with a calculation methodology, and nothing in the decision establishes that judicially manageable standards exist for assessing determinations concerning the manner in which that enumeration is conducted.

Plaintiffs' attempt to locate judicially manageable standards also falls flat. They first point to the text of the Constitution itself and argue that the command to "conduct an 'actual Enumeration' of the people," Pls.' Opp'n at 25, provides the standard for this Court to apply. But recitation of the constitutional text itself cannot be enough—were that the case, courts would not need to devise and apply standards to *interpret* the Constitution. Nothing would ever present a political question if literal application of the relevant constitutional text sufficed.

Plaintiffs next attempt to locate the applicable standard in *Wisconsin v. City of NY*, 517 U.S. 1 (1996),[1] a case concerning whether the Secretary's refusal to correct a census undercount with data

[1] Additionally, even under Plaintiffs' own standard, their claim fails as a matter of law. Plaintiffs hypothesize that a citizenship question may cause an inaccurate population count, but

from a post-enumeration survey (*i.e.*, a calculation methodology) violated the Enumeration Clause's requirement of an "actual Enumeration." Pls.' Opp'n at 25-26. But the Supreme Court's decision in *Wisconsin* says nothing about standards applicable to the "[m]anner" of conducting the census. And with good reason: The Secretary's decision to correct (or not correct) a census undercount implicates an affirmative constitutional command to count, rather than estimate, the population. Hence, a court may adjudicate challenges to calculation methodologies using *Wisconsin*'s standard even before the census. *See, e.g.*, *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) (holding that the Secretary's pre-census decision to use statistical sampling violates the Census Act, 13 U.S.C. § 195, and declining to reach the Enumeration Clause claim). But once a court ventures beyond that affirmative constitutional command into the manner of conducting the census, there simply is no law to apply.

Plaintiffs' additional arguments essentially rest on disagreement with the Secretary's policy choices in balancing the need for citizenship information with the cost and effectiveness of efforts to mitigate non-responses, the possibility of lower response rates, the cost of increased non-response follow-up procedures, and the completeness and cost of administrative records. But that decision rests with the Secretary, subject to oversight only by Congress, and, as with every pre-count information-gathering procedure, there are no judicially manageable standards for balancing those factors and a myriad of others. Plaintiffs further argue that because "Ross exceeds the constitutional bounds of his discretion when he makes decisions that will affirmatively undermine the constitutional purpose" of the census, "this Court may review whether Ross exceeded his discretion … without running afoul of the political question doctrine." Pls.' Opp'n at 26. But that argument is entirely circular; this Court cannot determine whether or not jurisdiction is barred by the political question doctrine by referencing the *merits* of Plaintiffs' claims.

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advance no allegation that the Secretary is doing anything other than pursuing a complete and accurate count using the census questions he submitted to Congress.

The Constitution envisions a nuanced process by an institution capable of weighing the numerous factors that must be considered in such policy choices—Congress. The Secretary's decision to reinstate the citizenship question on the 2020 Census is therefore a "policy choice[] and value determination[] constitutionally committed for resolution to the halls of Congress [and] the confines of the Executive Branch," *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1996), and this case is barred by the political question doctrine.

C. The Secretary's Decision is not Subject to Review Under the APA.

Agency actions are insulated from judicial review under the APA where "statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971(citation omitted). Plaintiffs' search for law cabining the Secretary's discretion in devising the census questionnaire is in vain; no meaningful standards exist in the relevant statutes or regulations for a court to apply to the Secretary's judgment, thus demonstrating that the decision is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

As the Supreme Court has emphasized, the "text of the Constitution vests Congress with virtually unlimited discretion in conducting" the census, and "Congress has delegated its broad authority over the census to the Secretary." *Wisconsin*, 517 U.S. at 19. This decision illustrates the breadth of the Secretary's authority. And more importantly, perhaps, the text of the Constitution itself contains *no* limiting language that may be read to provide a standard by which to judge a decision as fundamental as the form of the questionnaire itself.

Plaintiffs insist that "[r]eviewability of the challenged action is further evident in light of the decades of precedent supporting judicial review of Bureau actions," Pls.' Opp'n at 30-31. But none of these cases addressed the question at issue here: whether the Census Act provides any standards by which to judge the questionnaire content. *See, e.g.*, *District of Columbia v. Dep't of Commerce*, 789 F. Supp. 1179, 1189 (D.D.C. 1992) (challenging the decision to count inmates of a particular prison as residents of Virginia rather than the District of Columbia); *Carey v. Klutznick,* 637 F.2d 834 (2d Cir.

1980) (reviewing challenge to *process* used to count minority New York residents); *City of Phila. v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980) (challenging the counting accuracy of a specific city); *City of Camden v. Plotkin,* 466 F. Supp. 44, 46 (D.N.J. 1978) (same); *Borough of Bethel Park v. Stans*, 319 F. Supp. 971, 972 (W.D. Pa. 1970) (challenging the allocation of college students, members of the Armed Services, and inmates in relation to their colleges, military bases, and institutions), *aff'd,* 449 F.2d 575 (3d Cir. 1971). Given that the relevant inquiry under the APA depends on both the statutory language and "the nature of the administrative action at issue," *Speed Mining v. Fed. Mining Safety & Health Review Comm'n*, 528 F.3d 310, 317 (4th Cir. 2008), such cases are inapposite.

Plaintiffs next rely on the Census Act to contend that Congress's direction that "the decennial enumeration of the population be as accurate as possible" supplies law to apply for purposes of APA review. Pls.' Opp'n at 28 (citing 13 U.S.C. § 141). But it cannot be that any action that balances accuracy with other legitimate purposes, such as the longstanding historical practice of collecting demographic information, violates the Constitution; were that the case, any question that might cause some individuals not to respond, such as questions on race, age, or relationship status—not to mention the previous practice of using a long-form questionnaire—would all be unconstitutional. And an ill-defined "accuracy standard" would prove unworkable by engaging the courts in a complex balancing of factors committed to the Secretary's discretion. For example, has the Secretary violated the Constitution if he employs 550,000 enumerators for in-person visits instead of 560,000, because he values cost, training, testing, and timing over accuracy? Or if the census questionnaire is distributed in 12 non-English languages instead of 13? Or if the Secretary opens six regional census centers instead of seven? Just as with the content of the census questionnaire, each of these determinations are pieces of a much larger puzzle, all of which involve a careful consideration of myriad factors. The courts are ill-equipped to second-guess the Secretary's consideration of those factors.[2]

[2]As Defendants previously noted, Defs.' Mem. at 20, Congress reserved responsibility for oversight of the Secretary's performance, requiring the Secretary to submit to Congress "not later

Plaintiffs also set forth amorphous requirements of other statutes and regulations, although they fail to explain how any of them provide specific standards establishing the propriety of judicial review under the APA. *See* Pls.' Opp'n at 29-30. For example, Plaintiffs cite the Bureau's Statistical Quality Standards, which require pretesting and refinement of survey questions. *Id.* But even setting aside the fact that the citizenship question at issue here has been extensively pretested on the American Community Survey, Plaintiffs fail to explain how an open-ended directive to pretest questionnaire content can supply "law to apply" sufficient to transform the nature of the agency action from an exercise of "virtually unlimited discretion," *Wisconsin*, to one that is reviewable. Plaintiffs' citation to the Paperwork Reduction Act ("PRA"), Pls.' Opp'n at 4, 33, suffers from the same fatal flaw, as the PRA contains no judicially enforceable private right of action *or* any standards for a court to apply. *Springer v. IRS ex rel. U.S.*, 231 F. App'x 793, 800 (10th Cir. 2007); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 844 (9th Cir. 1999). And Plaintiffs cite no cases in which courts have applied the PRA's "accuracy" and "objectivity" instructions, the OMB's guidelines to "maximize[ing] data quality," or the Census Bureau's questionnaire pretest procedures to agency actions under the APA. The reason is axiomatic: None of the administrative guidance referenced by Plaintiffs provides any law by which courts could judge the Secretary's exercise of discretion over questionnaire content.

As a last-ditch effort, Plaintiffs seek to distinguish persuasive contrary authority. This Court should disregard *Tucker v. Department of Commerce*, 958 F.2d 1411 (7th Cir. 1992), Plaintiffs insist, because that opinion predated *Utah*, *Wisconsin*, and *Franklin*, as well as the PRA and OMB guidelines discussed above. Pls.' Opp'n at 31 n.11. But those Supreme Court opinions did not address the question here—whether the Census Act provides meaningful standards against which to gauge the

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than 2 years before the appropriate census date, a report containing the Secretary's determination of the questions proposed to be included in such census." 13 U.S.C. § 141(f)(2). This reporting requirement underscores that it is for Congress, not the courts, to review the Secretary's content determinations.

Secretary's determination of census questionnaire content—and nothing in those later opinions undermines Judge Posner's observation that the governing statue is "[s]o nondirective … that you might as well turn it over to a panel of statisticians and political scientists and let them make the decision, for all that a court could do to add its rationality or fairness." *Tucker*, 958 F.2d at 1417-18. And Plaintiffs' attempt to distinguish *Senate of the State of California v. Mosbacher*, 968 F.2d 974 (9th Cir. 1992), on the ground that "it pertains to the release of adjusted census data—not the conduct of the census," Pls.' Opp'n at 31 n.11, is a distinction without a difference, given the Ninth Circuit's conclusion that the Constitution and Census Act provided "no law to apply."

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

II. PLAINTIFFS FAIL TO STATE AN ENUMERATION CLAUSE CLAIM.

Even if this case were justiciable, Plaintiffs' Enumeration Clause claim should be dismissed for three straightforward reasons: (1) the Enumeration Clause mandates only a person-by-person headcount, and there is no allegation that the Secretary has failed to establish procedures for counting every person; (2) the Secretary is granted "virtually unlimited" discretion in conducting the census, and he exercised that discretion to reinstate a citizenship question with a long historical pedigree; and (3) Plaintiffs' theory, if accepted, would invalidate demographic questions on nearly every decennial census since 1790. *See* Defs.' Mem. at 26-30.

As an initial matter, Plaintiffs' assertion that "to prevail on their Motion, Defendants must prove that a Secretary does not violate the Enumeration Clause as a matter of law when he rejects the Bureau's expert findings, fails to test census content according to agency standards, and intentionally depresses the response rates of a politically disfavored group by adding a question that will decrease their responses," is absurd. Pls.' Opp'n at 34. Defendants are not required to *disprove* the

truth of Plaintiffs' specious allegations to secure dismissal of a deficient complaint, and this Court should flatly reject their attempt to shift their burden.

Plaintiffs contend that the "reasonably related" standard from *Wisconsin*, coupled with a "good-faith" standard invented out of whole cloth by Plaintiffs, Pls.' Opp'n at 33, should determine whether the Secretary's decision violates the Enumeration Clause. But as thoroughly explained above, *see supra* § I.C, *Wisconsin* is inapplicable because it dealt with the familiar question of counting methodology, and Plaintiffs' "good-faith" standard is utterly unmoored to existing case law or the constitutional text. But even applying the inapt "reasonably related" standard, Plaintiffs' claim should be dismissed. The Complaint sets forth no allegation that the Secretary is using "estimates" or "conjecture" rather than a headcount, nor any allegation that he has failed to establish procedures for counting every person. Because the Secretary will do precisely what the Constitution commands, his decision to collect additional, important demographic information through reinstatement of a citizenship question cannot be said to lack a "reasonable relationship" to an actual enumeration. Plaintiffs' claim fails as a matter of law even under their own standard.

Plaintiffs' final argument—that, in considering the "historical practice" of conducting the census, this Court should ignore the scores of censuses in which citizenship *was* collected and focus instead on the most-recent seventy years—is nonsensical. Pls.' Opp'n at 35. First, the question was asked on the long-form questionnaire in the 2000 census. Second, Plaintiffs offer no reason, and indeed none exists, why the Secretary's discretion should be limited by whether the question has been asked on only the most recent questionnaires.

Defendants note also that Judge Furman recently dismissed the Enumeration Clause claim in the citizenship-question challenges currently pending in the Southern District of New York, ruling that the conclusion "that the citizenship question is a permissible … exercise of the broad power granted to Congress and, in turn, the Secretary" is "particularly compelled … by historical practice."

See Order on Motion to Dismiss, No. 1:18-cv-02921-JMF, Doc. 215, at 46-60 (S.D.N.Y. July 26, 2018).[3]

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

Date: July 31, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Director, Federal Programs Branch

CARLOTTA P. WELLS
Assistant Director

/s/ Kate Bailey
KATE BAILEY
GARRETT COYLE
STEPHEN EHRLICH
CAROL FEDERIGHI
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Tel.: (202) 514-9239
Fax: (202) 616-8470
Email: kate.bailey@usdoj.gov

Attorneys for Defendants

[3] Defendants respectfully disagree with Judge Furman's decision to permit plaintiffs' other claims to proceed in the related citizenship challenges pending in New York.