UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBYN KRAVITZ, *et al.*

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*

Defendants.

Case No. 18-cv-01041

PLAINTIFFS' MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Ignoring mandatory timelines and other statutory obligations, the Secretary of Commerce (the "Secretary") abruptly jettisoned a sixty-year Census Bureau policy by deciding in May 2018 to use the 2020 decennial census questionnaire to demand information on the citizenship status of every person residing in the United States. Despite compelling evidence that a citizenship question will depress response rates among certain demographic groups, the Secretary made his decision without having conducted a single test to measure the impact of a citizenship question on the accuracy of the census. Though purportedly motivated by the need to enforce the Voting Rights Act, the Secretary has now publicly admitted that he *asked* the Department of Justice to assert such a need after internal political discussions with Trump administration officials. In reality, the Secretary's pretextual justification is a mere figleaf for the decision's true aim: to advance the administration's anti-immigration political agenda.

The Secretary's decision to play political games with the decennial census violates his constitutional duty to conduct the census in a manner reasonably related to obtaining an accurate population count. It runs afoul of clear legal obligations and agency procedures for ensuring an accurate and complete census. And it will impose a concrete harm on Plaintiffs, who live in states and communities that will be disproportionately undercounted, in the form of vote dilution and a loss of benefits from critical federal funding.

In an effort to insulate themselves from any accountability for this unlawful decision, Defendants' motion to dismiss advances two meritless arguments.

First, Defendants contend that Plaintiffs lack standing to seek relief from this Court because their decision to add a citizenship question will not actually lead to an undercount in Plaintiffs' communities, that any undercount cannot be traced to Defendants' actions, and that the alleged consequences of such an undercount are mere speculation. But at best, Defendants'

arguments merely raise factual disputes concerning issues that Plaintiffs plainly have the right to develop through fact and expert discovery and prove at a later stage in this case. At this stage of the litigation, Plaintiffs have provided sufficiently specific factual allegations that the inclusion of a citizenship question creates a substantial risk of a disproportionate undercount in their communities, and that such an undercount will in turn result in the dilution of their votes and the loss of benefits from federal funding that is allocated based on census data.

Second, Defendants claim that the Secretary has limitless discretion regarding the content of the census and that the Court is powerless to review his decisions, even if he deliberately adopts a practice that will result in an undercount and harm affected voters and other U.S. residents. In a related vein, Defendants seek dismissal of Plaintiffs' Enumeration Clause claim because, they claim, that clause does not actually preclude the Secretary from utilizing a census questionnaire that will prevent an actual enumeration. These arguments have been squarely rejected by the caselaw, ignore the limitations on the Secretary's discretion imposed by the Constitution, statutes, and agency standards, and are inconsistent with the Court's institutional role of "say[ing] what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

BACKGROUND

I. The Constitutional, Statutory, and Regulatory Framework Governing the Decennial Census.

The Enumeration Clause of the U.S. Constitution directs Congress to ensure that an "actual Enumeration" of the U.S. population is conducted once every decade by counting "the whole number of persons in each state." U.S. Const. Art. I, § 2, cl. 3; *id.* amend. XIV. The Constitution further directs that decennial census data must be used to apportion congressional seats among the states based on their respective populations. *Id.* Art. I, § 2, cl. 3. States—including those in which Plaintiffs here reside—rely upon federal census data to draw districts

for congressional, state, and local elections. Am. Compl. ¶ 126. Census data also determine the allocation to states and localities of hundreds of billions of dollars in critical funding under myriad federal programs, including transportation funding, Medicaid, and education funding under Title I of the Elementary and Secondary Education Act. *Id.* ¶ 43.

Under the Census Act, Congress delegated its constitutional duty to conduct the decennial census to the Secretary and the Census Bureau, a federal statistical agency within the Department of Commerce. 13 U.S.C. § 2, 4, 141(a). Congress has placed fundamental limits on the Secretary's discretion in conducting the census, declaring it "essential" to obtain a population count that is "as accurate as possible, consistent with the Constitution and laws of the United States," and subordinating the Secretary's authority to collect other information to this paramount goal. Pub. L. No. 105-119, 111 Stat. 2480-81 (codified at 13 U.S.C. § 141 note). The Act also imposed strict statutory deadlines for developing and approving the content of the census questionnaire. Under § 141(f), the Secretary must submit to Congress a final list of subjects to be covered in the census questionnaire at least three years before the census date, and must submit a final list of specific questions two years before the census date. *See* 13 U.S.C. § 141(f)(1), (2). Following the submission of each of these reports, the Secretary has limited discretion to alter their content, and may only do so if "new circumstances exist which necessitate that the subjects, types of information, or questions contained in reports so submitted be modified." *Id.* § 141(f)(3).

Other federal laws prescribe the specific manner in which the census must be planned and conducted. Congress passed the Paperwork Reduction Act of 1995 ("PRA") in order to ensure the "integrity, quality, and utility of the Federal statistical system." 44 U.S.C. § 3501(9). The Census Bureau is designated as a principal statistical agency within the federal statistical

system[1], and the development of the 2020 Census is governed by the PRA.[2] To regulate the activities of federal statistical agencies like the Census Bureau, the PRA directs the Office of Management and Budget ("OMB") to issue "[g]overnment-wide policies, principles, standards, and guidelines" governing "statistical collection procedures and methods," which agencies are required to follow. *Id.* §§ 3504(e)(3)(A), 3506(e)(4); 5 C.F.R. § 1320.18(c). Moreover, each agency must "ensure the relevance, accuracy, timeliness, integrity, and objectivity of the information collected." 44 U.S.C. § 3506(e)(1).

Pursuant to Congress' direction under the PRA, OMB has issued Statistical Policy Directives defining the standards that agencies, including the Census Bureau, must follow in developing and pretesting survey content. Under these Directives, the Bureau must:

- "function in an environment that is clearly separate and autonomous from the other administrative, regulatory, law enforcement, or policy-making activities within their respective Departments" and "conduct statistical activities autonomously when determining what information to collect and process";
- design surveys "to achieve the highest practical rates of response, commensurate with the importance of survey uses";
- pretest survey components, if they have not been successfully used before, to "ensure that all components of a survey function as intended when implemented in the full scale survey" and that "measurement error is controlled"; and
- administer surveys in a way that "maximiz[es] data quality" while "minimizing respondent burden and cost."

See Am. Compl. ¶¶ 53-54.

[1] OMB, *Statistical Programs of the United States Government: Fiscal Year 2018* at 6, https://www.whitehouse.gov/wp-content/uploads/2018/05/statistical-programs-2018.pdf.

[2] 2020 Census Program Memorandum Series 2016:05 at 3-4 (Apr. 29, 2016), https://www2.census.gov/programs-surveys/decennial/2020/program-management/memo-series/2020-memo-2016_05.pdf (describing PRA compliance requirements for the 2020 Census).

The Census Bureau has also issued Statistical Quality Standards that "apply to all information products released by the Census Bureau and the activities that generate those products"—including the decennial census. *Id.* ¶ 55. These standards impose rigorous pretesting requirements on the Bureau, including:

- "Data collection instruments and supporting materials must be pretested with respondents to identify problems . . . and then be refined, prior to implementation."
- "Data collection instruments and supporting materials must be verified and tested to ensure that they function as intended."
- Testing must be done not only in English, but also for the various foreign-language questionnaires that the Census provides.

Id. ¶¶ 58, 61; Census Bureau, Statistical Quality Standards at 10, 18, 20 (rev. July 2013).

II. The Census Bureau's Extensive Preparations for the 2020 Census Without a Citizenship Question.

In order to meet the obligations imposed by Congress, the OMB, and its own survey design standards, the Census Bureau has been preparing for the 2020 Census for several years. Am. Compl. ¶ 62. The Bureau has been conducting content tests for the 2020 Census since at least 2012, including extensive cognitive testing to determine how respondents interpret census questions, formatting, and instructions, in the context of the entire questionnaire. *Id.* ¶¶ 65-68. Not a single one of these tests has included a citizenship question or gathered data on the impact of a citizenship question in the context of the 2020 Census questionnaire. *Id.* ¶ 71. In March 2017, the Census Bureau submitted its report of the Subjects Planned for the 2020 Census and American Community Survey ("Subjects Planned Report") to Congress, as required by 13 U.S.C. § 141(f)(1). *Id.* ¶ 72. Citizenship was not among the subjects that the Secretary identified for the 2020 Census questionnaire. *Id.* ¶ 73. The 2018 final "dress rehearsal" for the 2020

Census, the End-to-End Census Test, was already underway at the time of the Secretary's decision and did not contemplate inclusion of a citizenship question. *Id.* ¶ 69.

Defendants euphemistically refer to their shoehorning of a citizenship question into the 2020 Census as a "reinstatement." But the Census Bureau's omission of a citizenship question in its preparations for the 2020 Census and its Subjects Planned Report conformed with established agency policy and practice over the last six *decades*. Not since the 1950 Census have all U.S. residents been required to report their citizenship status as part of the decennial enumeration of the whole population. *Id.* ¶ 75. For the last five decennial censuses, citizenship information was collected only from a limited subset of the U.S. population. *Id.* Since 2005, citizenship information has been collected solely through the American Community Survey ("ACS") using experienced agency personnel and applying statistically sound methodologies.[3] As detailed more fully in Part I.A below, the Census Bureau and numerous past Census Directors from both Republican and Democratic administrations have consistently opposed adding a citizenship question to the person-by-person census count, warning that such an inquiry would suppress response rates and undermine the accuracy of the census count. *Id.* ¶¶ 76-81.

III. The Trump Administration Uses the 2020 Census for Political Purposes.

While the Census Bureau has spent most of the past decade preparing for a 2020 Census without a citizenship question, the Trump administration has been intent on using the census to advance its anti-immigration political agenda. Within weeks of taking office in January 2017, the

[3] Between 1960 and 2000, citizenship was asked on the long-form questionnaire sent once every decade to approximately 1 in 6 households. The ACS employs a separate survey that is administered by experienced Census Bureau personnel to a sample of the U.S. population on a monthly basis. Am. Compl. ¶¶ 63, 75. The Secretary's decision would recklessly import the multi-part citizenship question designed for use in the ACS directly into the 2020 census questionnaire—without any changes and without any separate pre-testing.

administration prepared a draft Executive Order directing the Census Bureau to add questions regarding immigration status to the decennial census in order to fulfill the President's anti-immigration campaign promises. *Id.* at 83. Kris Kobach, an advisor to the president on immigration issues, also urged him to add a citizenship question to the 2020 Census. *Id.* ¶ 84.[4]

This draft Executive Order was not issued, but on December 12, 2017, the general counsel for the Justice Management Division of the Department of Justice ("DOJ") sent a letter (the "DOJ Letter") to Defendant Jarmin requesting that the Bureau include a citizenship question on the 2020 Census. *Id.* ¶ 85. The purported justification for the request was that ACS data on citizenship were not "ideal" for purposes of enforcing Section 2 of the Voting Rights Act. *Id.* This letter was sent at the request of DOJ leadership, including U.S. Attorney General Jeff Sessions, who has publicly expressed support for including a citizenship question in the census in order to locate undocumented immigrants. *Id.* ¶ 86.[5]

President Trump made his own intentions regarding the citizenship question clear. A fundraising email from his reelection campaign on March 19, 2018 declared: "The President wants the 2020 United States Census to ask people whether or not they are citizens." *Id.* ¶ 87.

[4] As revealed in the administrative record ("AR") filed by Defendants on June 8, 2018, Kobach in fact expressly lobbied Defendant Ross to add a citizenship question in order to exclude "aliens" from being "counted for congressional apportionment purposes." AR at 763-64. Kobach reached out to Defendant Ross "at the direction of Steve Bannon," a former White House advisor. *Id.* at 763.

[5] On June 21, 2018, Defendants supplemented the AR with a memorandum from Defendant Ross which reveals that the Secretary solicited the DOJ Letter to create a pretext for adding the citizenship question. In this memorandum, Defendant Ross discloses that he began considering adding a citizenship question soon after being appointed as Secretary of Commerce in February 2017—almost 10 months before the DOJ Letter. AR at 1321. He further acknowledges that "other senior Administration officials had previously raised" the citizenship question and that, ultimately, he asked the DOJ to submit a letter requesting the citizenship question "as consistent with and useful for" VRA enforcement. *Id.*

One week later, the Secretary issued a memorandum (the "Ross Memo") abrogating 60 years of Census Bureau policy and practice and directing that an untested citizenship question be included on the 2020 census questionnaire. *Id.* ¶ 88; *see* Compl. Ex 1.[6] This decision overrode the recommendation of top Census Bureau officials and the views of the Bureau's Scientific Advisory Committee. Am. Compl. ¶ 88. Within days of the Secretary's decision, President Trump's re-election campaign released another email emphasizing that this was "the President's decision" and that he had "officially mandated that the 2020 United States Census ask people living in America whether or not they are citizens." *Id.* ¶ 89.

IV. The Ross Memo's Pretextual and Arbitrary Justifications for Including a Citizenship Question.

The Ross Memo stated that the Secretary took a "hard look" at the DOJ's request, considered all relevant facts and data, and concluded that the "value" of a citizenship question was "of greater importance than any adverse effect that may result." Ross Memo at 1, 7. However, the Memo simply accepted the DOJ's assertion that it needed citizenship data for VRA enforcement at face value. In fact, a prior analysis by the Census Bureau listed age, race, and Hispanic origin—but not citizenship—as the census block level data necessary for VRA enforcement. Am. Compl. ¶ 92. The Memo did not discuss this prior finding, or any intervening change in the law necessitating the use of citizenship data for voting rights purposes.

The Memo further asserted that the citizenship question has been "well tested." Ross Memo at 2. Yet it went on to state that "no empirical data existed on the impact of a citizenship question on responses" and that the Department was "not able to determine definitively how

[6] By way of comparison, the Census Bureau spent *nine years* developing a combined race and ethnicity question, and stated that testing needed to be completed by December 2017 in order to have adequate time to prepare the 2020 Census systems. Am. Compl. ¶ 99.

inclusion of a citizenship question on the decennial census will impact responsiveness." Ross Memo. at 3, 7. Indeed, because the DOJ's request came so late in the census planning process, none of the decennial census content tests or preparations for the 2020 Census contemplated the inclusion of a citizenship question. Am. Compl. ¶ 71.

On March 29, 2018, the Census Bureau submitted a report of the Questions Planned for the 2020 Census and American Community Survey (the "Questions Planned Report") to Congress, as required by 13 U.S.C. §141(f)(2). Compl. Ex. 2. The report confirmed the Secretary's decision and simply cut-and-pasted the existing ACS citizenship question into planned questions for the 2020 decennial census. *Id.* The Questions Planned Report failed to acknowledge that citizenship was not included in the March 2017 Subjects Planned Report, and did not identify a "new circumstance[]" necessitating the addition of citizenship as a subject for the 2020 Census, as required by § 141(f)(3). *Id.*

V. A Citizenship Question Will Result in a Disproportionate Undercount, Thereby Harming Plaintiffs.

As alleged in the Amended Complaint, there is compelling evidence—including studies performed by the Census Bureau itself—that the inclusion of a citizenship question on the 2020 Census will result in a disproportionate undercount of certain demographic groups, including individuals of Hispanic or Latino origin, immigrants, noncitizens, and those with limited English proficiency ("LEP") (collectively, the "Undercount Groups").

For several decades, the Census Bureau has determined that asking about citizenship on the census questionnaire will lead respondents to mistrust the census and will undermine the accuracy of the population count. *See* Am. Compl. ¶¶ 76-81. The Bureau has categorized questions about citizenship in government surveys as "sensitive" and likely to trigger concerns about the use and confidentiality of respondent data. *Id.* ¶ 106. Moreover, survey tests

undertaken by the Census Bureau in 2017 revealed an unprecedented climate of fear among Hispanics, immigrants, noncitizens, and LEPs. Respondents from these hard-to-count populations often refused to respond or falsified responses to surveys, including questions about citizenship, and repeatedly expressed concern about many of the Trump administration's anti-immigrant policies. *Id.* ¶¶ 109-10. The Bureau itself concluded that these results demonstrated "an unprecedented groundswell in confidentiality and data-sharing concerns among immigrants or those who live with immigrants" that could "present a barrier to participation in the 2020 Census" and could have a "disproportionate impact on hard-to-count populations," particularly LEPs and immigrants *Id.* ¶ 112.

The Ross Memo itself cites additional evidence that a citizenship question will result in a disproportionate undercount. It notes that for the 2000 Census, the drop-off in response rates between the long form questionnaire (which asked about citizenship) and the short form (which did not) was 3.3% greater for noncitizens than for citizens. *Id.* ¶ 107. The Ross Memo also points to ACS data from 2013 through 2016 showing that nonresponse rates for the ACS question about citizenship are materially higher for Hispanics than for non-Hispanic whites, suggesting that Hispanics are less likely to respond to survey questions about citizenship. *Id.* ¶ 107. Although the Memo also claimed that the Nielsen survey agency had found that sensitive survey questions do not reduce response rates, this was incorrect, and Nielsen has recently stated that it "does not support the inclusion of a question on citizenship for the 2020 U.S. census because we believe its inclusion could lead to inaccuracies in the underlying data." *Id.* ¶ 97. Moreover, since the Ross Memo was issued, Defendant Jarmin publicly affirmed that the citizenship question, if retained,

will cause more than a "minimal" decline in participation, and that the decline "would be largely felt in various sub-groups, in immigrant populations [and] Hispanic populations." *Id.* ¶ 114.[7]

This disproportionate undercount will harm Plaintiffs, who live in geographic areas that have a higher percentage of the demographic groups that will be undercounted. *See id.* ¶¶ 116-124, 130-134. Because of their demographic composition, these geographic areas will have a lower census population count *in relation to other areas* than they would have in the absence of the citizenship question. Consequently, political representation and economic resources will be diverted away from Plaintiffs' communities in favor of communities with smaller percentages of Hispanics, immigrants, non-citizens, and non-English speakers. Specifically, plaintiffs will likely suffer three discrete kinds of injuries.

First, because Congressional seats are apportioned based on states' relative population counts, and because four of Plaintiffs' states (Arizona, Texas, Florida, and Nevada) have higher percentages of the Undercount Groups than the nationwide average, a disproportionate undercount threatens to skew the apportionment of congressional seats away from these states. Am. Compl. ¶¶ 116-124. In particular, based on recent population growth and apportionment projections and the specific demographic composition of Arizona, Texas, and Florida, there is a substantial risk that a disproportionate undercount will deprive those three states of at least one congressional seat after 2020, thereby diluting the votes of Plaintiffs from those states. *Id.* ¶ 125.

[7] Documents disclosed in the AR reveal that the Chief Scientist and Associate Director for Research and Methodology for the Census Bureau, John Abowd, conducted a Technical Review of the Citizenship Question and concluded that asking a citizenship question "harms the quality of the census count" *and will likely cause a significant decline in response rates from noncitizen households*. AR at 1277, 1280-82. Dr. Abowd submitted his findings to Defendants Ross, Kelley, Jarmin, and Lamas. *Id.* at 1277.

Second, Plaintiffs will certainly suffer vote dilution due to the impact of the undercount on intra-state redistricting. All five of Plaintiffs' states use census data to draw congressional and state legislative districts of equal population. *Id.* ¶ 125. Because Plaintiffs reside in areas of those states that have higher percentages of the Undercount Groups relative to the rest of the state, the use of census data to draw district lines will place Plaintiffs in overpopulated districts, thereby diluting their votes. *Id*.

Finally, Plaintiffs depend on various federally funded programs—including Title I funding for public schools, transportation funding, Medicaid, and the Federal Foster Care Program—which are all allocated in part based on census population data. *Id.* ¶¶ 43, 128-142. The Amended Complaint specifically alleges that each of the Plaintiffs resides in a relevant geographic area (a state, urbanized area, or school district, depending on the funding formula in question) with comparatively higher percentages of the Undercount Groups and will therefore be harmed by the reduction of federal funding, including for critical programs from which Plaintiffs personally benefit. *Id.* ¶¶ 128-141.

ARGUMENT

Faced with Plaintiffs' detailed allegations regarding the Secretary's arbitrary conduct and the concrete injury that they will suffer if a citizenship question is included in the 2020 Census, Defendants claim that this court has no jurisdiction to adjudicate Plaintiffs' claims. Defendants first argue that Plaintiffs lack standing to challenge the Secretary's decision. Even if Plaintiffs do have standing, Defendants contend, the Secretary's decision regarding the content of the census is an inherently political question committed to his unfettered discretion, and is therefore beyond this court's power to review. Finally, Defendants argue that Plaintiffs claims under the Enumeration Clause fail because the Clause vests judicially unreviewable discretion in the

Secretary to ask about citizenship, or anything else. As demonstrated below, these arguments are meritless.

I. Plaintiffs Have Article III Standing To Challenge the Secretary's Unlawful Determination to Insert a Citizenship Question Into the 2020 Census Questionnaire.

To allege standing, Plaintiffs' complaint must state facts sufficient to demonstrate: (1) injury in fact; (2) a sufficient causal connection between the alleged injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision. *See, e.g.*, *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 207 (4th Cir. 2017). Defendants argue that Plaintiffs have not alleged an injury in fact or a sufficient causal connection between the alleged injury and Defendants' conduct. Defs.' Mem. at 13-22.

As Defendants acknowledge, to defeat a motion to dismiss for lack of standing, "plaintiffs are required only to state a *plausible* claim that each of the standing elements is present." *Attias v. Carefirst, Inc.*, 865 F.3d 620, 625 (D.C. Cir. 2017) (emphasis in original); *see* Defs.' Mem. at 12, 14. In deciding this issue, the court must "accept as true all well-pleaded facts in the complaint and construe them in the light most favorable to the plaintiff." *Wikimedia*, 857 F.3d at 208. Furthermore, "general factual allegations of injury resulting from the defendant's conduct may suffice" because courts must "'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 889 (1990)). As the well-pleaded allegations in the Amended Complaint make clear, Defendants' arguments have no merit and should be rejected.

A. Plaintiffs' Allegations Plausibly Allege an Imminent or Substantial Risk of Concrete and Particularized Harm Resulting from the Secretary's Action.

"To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not

conjectural or hypothetical." *Wikimedia*, 857 F.3d at 207 (citation and internal quotation marks omitted). Allegations of future injury are sufficiently "imminent" to establish an injury-in-fact "if the threatened injury is 'certainly impending,' *or* there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, --- U.S. ----, 134 S. Ct. 2334, 2341 (2014) (emphasis added) (quoting *Clapper v. Amnesty Int'l*, 568 U.S. 398, 409, 414 n.5 (2013)); *see also Kenny v. Wilson*, 885 F.3d 280, 287 (4th Cir. 2018); *Attias*, 865 F.3d at 626-27. In cases involving the threat of future injury, courts should be mindful of whether waiting for the risk to materialize would subject plaintiffs to an irremediable injury. For example, in *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999), the Court held that plaintiffs challenging a proposed census procedure had met the injury in fact requirement based on the "threat of vote dilution," noting that delaying consideration of plaintiffs' claims "would result in extreme—possibly irremediable—hardship." *Id*. at 332.[8]

Plaintiffs do not face a high burden in establishing a risk of future injury at the pleading stage. "[W]hat may perhaps be speculative at summary judgment can be plausible on a motion to dismiss," and courts should not "recast[] 'plausibility' into 'probability'" by demanding predictive certainty. *Wikimedia,* 857 F.3d at 208, 212; *see also District of Columbia v. Trump*, 291 F. Supp. 3d 725, 738 (D. Md. 2018) (alleging injury-in-fact at the pleading stage is not akin to climbing "Mount Everest"). Here, Plaintiffs have plausibly alleged that the Secretary's decision to demand citizenship information places them at a substantial risk of injury.

[8] *See also Central Delta Water Agency v. U.S.*, 306 F.3d 938, 950 (9th Cir. 2002) (plaintiff need not wait for harm to occur where such harms are "difficult or impossible to remedy"); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc).

1. Plaintiffs provide detailed factual support for their allegation that a citizenship question will result in a disproportionate undercount.

Defendants first attempt to denigrate as "entirely speculative" Plaintiffs' allegation that the addition of a citizenship question to the 2020 Census questionnaire will lead to a disproportionate undercount of certain demographic groups. *See* Defs.' Mem. at 15. But Defendants completely ignore the extensive allegations in the Amended Complaint detailing the myriad prior statements of the Census Bureau and numerous former Bureau directors which affirm that the addition of a citizenship question will produce just such a result. Am. Compl. ¶¶ 76-81. For example:

- In 2016, four former Census Bureau Directors appointed by presidents of both parties stated in an amicus brief to the U.S. Supreme Court that "a one-by-one citizenship inquiry would invariably lead to a lower response rate to the Census in general," including "a reduced rate of response overall and an increase in inaccurate responses." *Id.* ¶ 81.

- In 2009, eight former Census Bureau Directors who served both Republican and Democratic administrations predicted that a citizenship question would create "problems during door-to-door visits to unresponsive households, when a legalized 'head of household' would avoid enumerators because one or more other household members are present unlawfully." *Id.* ¶ 80.

- In 2005, the Census Bureau Director who oversaw the 2000 decennial census opposed the use of a citizenship question on the ground that such an attempt to distinguish noncitizens from citizens "will be treated with suspicion" and cause "many American citizens as well as noncitizens" to avoid responding. *Id.* ¶ 79.

- The Bureau itself publicly opposed the inclusion of any question concerning citizenship on the 1990 short-form questionnaire, warning that both undocumented immigrants and legal residents might "misunderstand or mistrust the census and fail or refuse to respond," resulting in reduced census counts for some cities and states. *Id.* ¶ 77.

Moreover, Defendant Jarmin acknowledged just last month that the inclusion of a citizenship question will likely impact census response rates, which "would be largely felt in various sub-groups, in immigrant populations [and] Hispanic populations." *See id.* ¶ 114. Indeed, the Bureau's findings show that the risk of an undercount has only intensified during the Trump

administration. During fieldwork conducted in 2017, the Bureau found that respondents often refused to respond or falsified responses to other surveys, including to questions about citizenship, while expressing concern about many of the Trump Administration's anti-immigrant policies. *Id.* ¶ 109-10. The Bureau concluded that there is "an unprecedented groundswell" of concern that could "present a barrier to participation in the 2020 Census" and have a "disproportionate impact on hard-to-count populations," particularly immigrants and non-English speakers. *Id.* ¶ 112. Taken together, these allegations more than meet plaintiffs' burden. They suggest not only that a substantial risk of a disproportionate undercount due to the citizenship question is plausible, but make clear that this risk is virtually certain to materialize.

Rather than grappling with Plaintiffs' detailed allegations, Defendants attempt to dispute them by pointing to the Ross Memo's supposedly contrary conclusions. *See* Defs.' Mem. at 15-16. But at the pleading stage, Plaintiffs' allegations must be accepted as true and construed broadly in their favor. Defendants cannot simply rely on statements in the Ross Memo to refute those allegations, particularly when that is the very agency document that, Plaintiffs allege, misstates facts and understates the potential impact of a citizenship question. *See* Am. Compl. ¶¶ 90-104. Furthermore, even if it were appropriate for the Court to credit the Ross Memo's assertions, it does not actually suggest that a disproportionate undercount is unlikely. To the contrary, it cites evidence showing that Hispanics and immigrants are less likely to participate in the census if it includes a citizenship question. Ross Memo. at 3. The Secretary concludes that this evidence does not "definitve[ly]" establish that there will be an undercount, but Plaintiffs need only allege a substantial risk of an undercount. Equally meritless is Defendants' reliance on their stated intention to develop procedures to "meet the non-response challenge." Defs.' Mem. at 16. Even if the Court could properly rely upon such unsubstantiated factual assertions in

Defendants' Brief—and it cannot—these vague assurances do nothing to contravene the allegations suggesting a substantial risk of an undercount.[9]

2. The alleged harmful impacts resulting from a disproportionate undercount are not overly attenuated or speculative.

Defendants also argue that Plaintiffs' allegations regarding the various injuries they will suffer due to a disproportionate undercount are "too attenuated and speculative" to plausibly plead standing. Defs.' Mem. at 16. To secure dismissal of Plaintiffs' claims on this basis, Defendants must show that not a *single* Plaintiff has plausibly alleged that they face a substantial risk of a *single* injury due to the disproportionate undercount. *See Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014) ("'[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.'") (quoting *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)). Here, the complaint plausibly alleges that numerous Plaintiffs will suffer three different types of injury: (1) vote dilution from malapportionment of congressional representatives; (2) vote dilution from state-level redistricting; and (3) loss of federal funding to their states and communities, including for programs on which they directly rely.

First, Defendants argue that Plaintiffs have not plausibly alleged a substantial risk that their states will lose congressional representation because "Plaintiffs do not allege that their states will remain at risk of losing seats *even if potential undercounts in other states are taken into account*." Defs.' Mem. at 17. This is flatly untrue. The complaint specifically alleges that

[9] Defendants' assurances that they will "meet any non-response challenge," Defs.' Mem. at 16, are especially dubious given widespread concerns about funding shortfalls and staffing deficiencies that have led the Bureau to drastically reduce its capabilities for outreach and nonresponse follow-up. *See, e.g.*, Letter from 28 National Business Groups in Support of Census Funding (May 15, 2018), https://censusproject.files. wordpress.com/2018/05/final-census-biz-groups-fy19.pdf (noting that the accuracy of the census "is threatened by several years of funding shortfalls . . . and reduced field testing").

Plaintiffs' states are at risk of losing a congressional seat precisely because they will suffer a "disproportionate undercount" of their population "relative to the rest of the country." Am. Compl. ¶¶ 116, 119, 121, 123, 125; *see also U.S. House of Representatives*, 525 U.S. at 330-31 (finding standing for individual plaintiff based on projected loss of congressional seat resulting from proposed census procedure).[10]

Second, Defendants' assertion that Plaintiffs' claims of injury based on state-level redistricting are "merely conclusory" and not sufficiently "concrete," Defs.' Mem. at 18, fails for the same reason. Plaintiffs specifically allege that they each "reside in areas of [their] states where the residents will be disproportionately undercounted relative to the rest of the state due to the inclusion of the citizenship question," Am. Compl. ¶ 126, and that the drawing of "equal population" districts based on 2020 Census data tainted by the inclusion of a citizenship question "will result in the over-population of Plaintiffs' congressional and state legislative districts, thereby diluting Plaintiffs' votes." *Id*. Under well-established law, these allegations are sufficient to plead an injury based on vote dilution. *See U.S. House of Representatives*, 525 U.S. at 333-34 (finding that plaintiffs had adequately pled they would be injured by a proposed census procedure because their votes will be diluted relative to other areas of the state); *Glavin*, 19 F.

[10] Defendants' reliance on certain cases is misplaced because those rulings were issued on motions for summary judgment, *after* the parties had conducted discovery and plaintiffs were put to their proof. *See*, *e.g., Ridge v. Verity*, 715 F. Supp. 1308, 1318 (W.D. Pa. 1989) (plaintiffs failed at summary judgment to establish that alleged inaccurate count would affect specific states in which plaintiffs resided); *FAIR v. Klutznick*, 486 F. Supp. 564, 570 (D.D.C. 1980) (plaintiffs failed at summary judgment to demonstrate which states would gain or lose congressional seats); *cf. Glavin v. Clinton*, 19 F. Supp. 2d 543, 548 (E.D. Va. 1998) (plaintiffs established at summary judgment injury related to apportionment and redistricting), *aff'd sub nom Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999). Here, no discovery (other than designation of the administrative record) has yet taken place; and Plaintiffs have already engaged and are working with third-party experts on apportionment and related subjects to meet their ultimate evidentiary burden in this case.

Supp. 2d at 550 (same).[11] The cases cited by Defendants, meanwhile, are plainly inapposite. In *National Law Center on Homelessness and Poverty v. Kantor*, 91 F.3d 178, 186 (D.C. Cir. 1996), the court held that the plaintiffs did not have standing because they did not show, *at the summary judgment stage*, what Plaintiffs plausibly allege here: that the challenged census conduct disproportionately undercounted plaintiffs' communities relative to others. And in *Strunk v. U.S. Department of Commerce*, No. 09-1295 (RJL), 2010 WL 960428, at *3 (D.D.C. Mar. 15, 2010), the court dismissed a *pro se* plaintiff's complaint because his assertion that the Census Bureau's plan to count tourists caused him "spiritual and temporal injuries," including dilution of his vote, was insufficient to establish standing.

Finally, contrary to Defendants' contention, *see* Defs.' Mem. at 26-28, Plaintiffs have alleged sufficient facts to establish a concrete injury resulting from the loss of federal funding to Plaintiffs' states and communities. Once again, Defendants erroneously claim that Plaintiffs have not considered that the allocation of federal funds may not depend only on the population count of the area in which they live, but on the population count of other areas. In fact, Plaintiffs expressly allege that (i) the funding formulas for several federal programs depend on the census population count for certain areas (states, school districts, urbanized areas) relative to the rest of the country or state, and (ii) the relevant areas in which Plaintiffs reside (states, school districts, urbanized areas) will suffer a reduction in federal funds because they will suffer a greater undercount than the rest of the country and their state due to their comparatively higher percentages of Undercount Groups. Am. Compl. ¶¶ 127-142.

[11] Indeed, Plaintiffs' have alleged the "district specific" injury called for by *Gill v. Whitford*, No. 16–1161 (June 18, 2018), when stating their "alleged harm [from] the dilution of their votes." Slip. op. at 14.

Courts have consistently held that individual plaintiffs have standing where they allege a loss of federal funding to their states and localities resulting from a census undercount. *See Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (holding that "citizens who challenge a census undercount on the basis, inter alia, that improper enumeration will result in loss of funds to their city have established . . . an injury in fact traceable to the Census Bureau"); *Glavin*, 19 F. Supp. 2d at 550 (holding that plaintiffs had standing because they established that the proposed census methodology would "directly result in a decrease of federal funding to the states and counties in which Plaintiffs reside"); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980) **(**concluding that plaintiffs had standing even if they did not personally receive federal aid allocated to the City of Philadelphia because "all enjoy the benefits yielded when the City is enabled to improve quality of life through the receipt of this money"). Here, Plaintiffs have gone even further, alleging that they individually rely on the projects and programs that are supported by the funding in question and will therefore suffer an even more direct injury as a result of underfunding. Am. Compl. ¶¶ 127-142. Even if such a showing were legally required to establish their injury, Defendants' protest that the complaint does not provide exacting detail on how each plaintiff's daily "experience" would be impacted by the underfunding of their roads, schools, and health insurance coverage is unavailing on a motion to dismiss where courts must "'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Defenders of Wildlife*, 504 U.S. at 561 (internal quotation marks omitted).[12]

[12] Defendants also argue in passing that loss of federal funding does not provide Plaintiffs standing to bring their Enumeration Clause claim because loss of funding is outside the "zone of interest" protected by the Enumeration Clause. This argument applies only to Plaintiffs' Enumeration Clause claim to the extent it relies on loss of funding; the reach of Defendants' argument is extremely limited at best. In any event, courts have repeatedly recognized that accurately allocating federal funding is an important use of census data. *See, e.g.*, *Wisconsin*, 517 U.S. at 5-6; *City of Detroit*, 4 F.3d at 1374; *Carey*, 637 F.2d at 838. Plaintiffs easily satisfy the

B. Plaintiffs' Injuries Are Fairly Traceable to Defendants' Decision to Include a Citizenship Question on the 2020 Census.

Defendants also dispute Plaintiffs' standing on the ground that the alleged harms depend upon "the intervening acts of third parties violating a clear legal duty to participate in the decennial census" and are therefore not "fairly traceable" to the Secretary's decision to insert a citizenship question into the 2020 Census questionnaire. Defs.' Mem. at 21. This argument also has no merit, and the Court should reject it.

Plaintiffs are not required to allege that the Secretary's action was "the very last step in the chain of causation." *Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC*, 713 F.3d 187, 197 (4th Cir. 2013). Rather, "[t]he causation element of standing is satisfied not just where the defendant's conduct is the last link in the causal chain leading to an injury, but also where the plaintiff suffers an injury that is "produced by [the] determinative or coercive effect" of the defendant's conduct "upon the action of someone else." *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 169 (1997)). The key question is simply whether the alleged injury "can be fairly traced through the third party's intervening action back to [the defendants]." *District of Columbia*, 291 F. Supp. 3d at 749.

In *Landsdowne*, the plaintiffs challenged certain arrangements by defendant cable service providers that caused competing cable providers not to offer services to the plaintiffs. *See* 713 F.3d at 197. The court held that plaintiffs had standing even though the causal chain traveled through the actions of a third party. *See id*. That is directly analogous to what Plaintiffs have alleged here—that Defendants' actions will result in an injurious undercount because it will cause third parties not to participate in the census. Defendants contend that the third party

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zone-of-interests test, which "is not meant to be especially demanding." *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 399 (1987); *District of Columbia*, 291 F. Supp. 3d at 754.

conduct in this case would be unlawful, but they do not explain why that is relevant to the "fairly traceable" analysis if, as Plaintiffs have plausibly alleged, that conduct is the predictable and likely consequence of Defendants' actions.

The injuries alleged by Plaintiffs here bear no resemblance to those at issue in *Clapper*, on which Defendants principally rely. In *Clapper*, the Supreme Court affirmed a summary judgment ruling that a group of lawyers and human rights and other organizations lacked standing to challenge the authorization of certain foreign surveillance under 50 U.S.C. § 1881a, because, as U.S. persons, the plaintiffs could not be targeted directly under the statute and they could not say whether the Government would ever target any of plaintiffs' foreign contacts. *See* 568 U.S. at 411-12. Moreover, plaintiffs had no reasoned basis for predicting how the Attorney General and the Director of National Intelligence would exercise their discretion under the statute, nor whether any FISA court would authorize any future surveillance application. *Id.* at 412-13. In other words, the challenged action authorized certain government officials to undertake acts injurious to the plaintiffs, but plaintiffs were unable to show that those officials were likely to exercise that authority. The Court rejected the plaintiffs' standing theory because it hinged upon "guesswork as to how independent decisionmakers will exercise their judgment" pursuant to a statutory delegation of authority. *Id.*

No such guesswork is required here. To the contrary, the Secretary's decision has already been made. And as described above, numerous top Census Bureau officials and the Bureau itself have concretely affirmed the predictable impact of a citizenship question on respondents—even before the Trump Administration embarked upon a highly public program of fear-mongering and persecution against non-citizens which increases the imminence of that impact. The alleged harms Plaintiffs will suffer follow ineluctably from the disproportionate undercount of particular

demographic groups that the Secretary's unlawful decision on the citizenship question makes certainly imminent. Beyond doubt, these alleged harms are fairly traceable to that decision.[13]

As for Defendants' suggestion that allegations of vote dilution resulting from state-level redistricting are insufficient because "states are not required to use unadjusted census figures in such actions," Defs.' Mem. at 22, the Supreme Court has squarely rejected this argument. In *U.S. House of Representatives*, the Court held that it was substantially likely that individual plaintiffs would suffer vote dilution from intrastate redistricting, particularly in states where the use of census data is required or contemplated by state law—as is the case for all five of Plaintiffs' states. Am. Compl. ¶ 126[14]; *see U.S. House of Representatives*, 525 U.S. at 332-33; *see also Glavin*, 19 F. Supp. 2d at 550 (state's choice to use census data in determining congressional districts was not an "intervening action" sufficient to make vote dilution not fairly traceable to defendants' conduct for standing purposes).

II. Defendants' Decision to Add a Citizenship Question to the Census is Subject to Judicial Review.

Contrary to Defendants' assertions, neither the political question doctrine nor the exception to APA review under § 701(a)(2) exempt the Secretary's arbitrary, last-minute decision to add a citizenship question to the 2020 census from judicial review. Courts have consistently held that these narrow, rarely-applied exceptions do *not* bar claims challenging the Secretary's conduct of the decennial census. Ignoring this overwhelming legal authority,

[13] Defendants' reliance on *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) and *Warth v. Seldin*, 422 U.S. 490, 506 is likewise misplaced. There, plaintiffs' claims were dismissed because they did not plausibly allege that their past injuries were caused by defendants' conduct rather than some *unrelated* independent factor. They did not suggest that plaintiffs cannot establish standing simply because they allege that defendants have harmed them by influencing the actions of a third party.

[14] Fla. Stat. § 11.031(1); Texas Const. art. 3, § 26; Nev. Const. art. 15, § 13; Md. Const. art III, § 5; Ariz. Const. art. IV, Pt. 2 §§ 1(3), 1(14).

Defendants ask this Court to reach the unprecedented conclusion that the Secretary has unlimited, unreviewable discretion to conduct the census however he chooses, even where such conduct violates constitutional commands, runs afoul of statutory and regulatory constraints, breaches agency standards, and is driven by improper political motivations.

A. Plaintiffs' Claims Are Not Barred by the Political Question Doctrine.

Defendants contend that Plaintiffs' claims are barred by the political question doctrine—a "narrow exception" to judicial review, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012)—because (i) the Constitution textually commits the content of the Census questionnaire to the discretion of Congress, and (ii) there are no judicially manageable standards for evaluating the Secretary's decision. Defs.' Mem. at 22-27. Both arguments are meritless. Plaintiffs' claims simply require the Court to "engage in the traditional judicial exercise of determining whether particular conduct complied with applicable law," *Al Shimari v. CACI Premier Tech. Inc.*, 840 F.3d 147, 158 (4th Cir. 2016), and therefore are properly before the Court.

1. The Constitution does not textually commit the conduct of the census to the sole, exclusive authority of Congress.

To bar review under the political question doctrine, a constitutional delegation of authority must clearly vest discretion in a political branch "and nowhere else." *See, e.g.*, *Nixon v. U.S.*, 506 U.S. 224, 229 (1993) (holding that Article I, § 3 cl. 6 effected a textual commitment because it vested "*sole*" authority over impeachment in the Senate); *Morgan v. United States*, 801 F.2d 445, 447 (D.C. Cir. 1986) (Scalia, J.) (concluding that Article I, § 5, cl. 1 was a textual commitment because it required that each house "shall be *the* Judge" of the election of its members, to the "exclusion of other[] . . . judges" (emphasis in original)). Just because a case "touches on" a power delegated to another branch does not mean that it "lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962); *see also In re KBR, Inc., Burn Pit*

Litigation, 744 F.3d 326, 334 (4th Cir. 2014) ("[I]n determining whether [a] question . . . belong[s] to another branch of government, we remain mindful of the fact that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" (quoting *Marbury*, 5 U.S. (1 Cranch) at 177)).

Here, Defendants argue that the clause "in such Manner as [Congress] shall by law direct" establishes a "textually demonstrable constitutional commitment" to Congress of unreviewable discretion over the census. Defs.' Mem. at 23-25 (quoting *Baker*, 369 U.S. at 217). Tellingly, Defendants do not cite a single case in support of their argument. In fact, courts have uniformly held that the Enumeration Clause does *not* textually commit exclusive control over the conduct of the census to Congress. All the Enumeration Clause "does is impose on Congress the responsibility to provide for the taking of a decennial census. It does not say that Congress and Congress alone has the responsibility to decide the meaning of, and implement, Article 1, Section 2, Clause 3." *Young v. Klutznick*, 497 F. Supp. 1318, 1326 (E.D. Mich. 1980), *rev'd on other grounds* 652 F.2d 617 (6th Cir. 1981); *see Tucker*, 958 F.2d at 1415 ("[t]he accuracy of the decennial census is not" a political question); *see also District of Columbia v. U.S. Dep't of Commerce*, 789 F. Supp. 1179, 1181-82 (D.D.C. 1992); *State of Texas v. Mosbacher*, 783 F. Supp. 308, 312 (S.D. Tex. 1992); *Carey v. Klutznick*, 508 F. Supp. 404, 411 (S.D.N.Y. 1980); *City of Philadelphia*, 503 F. Supp. at 674 (all holding that the Enumeration Clause does not textually commit authority over the census to Congress).

It is thus no surprise that the Supreme Court has, on at least three occasions, adjudicated the merits of disputes regarding the "manner" by which the census is conducted. *See Utah v. Evans*, 536 U.S. 452 (2002) (holding that use of "hot deck" imputation to infer information about certain addresses was permissible under the Enumeration Clause); *Wisconsin v. City of New*

York, 517 U.S. 1 (1996) (upholding Secretary's decision not to use a post-enumeration survey); *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (upholding the Secretary's method of counting federal employees serving abroad).

Defendants seem to suggest that these earlier census challenges are different from this case because they implicated only the requirement of an "actual Enumeration," which allows judicial review of "whom to count, how to count them, [and] where to count them," whereas this case challenges the "manner" in which the actual Enumeration is done. Defs.' Mem. at 22. This strained parsing of the constitutional text fails for several reasons. First, it is illogical on its face; by definition, a challenge to the conduct of the census based on the "actual Enumeration" requirement is a challenge to the "manner" in which the "actual Enumeration" is undertaken. Second, it is inconsistent with the above Supreme Court decisions, which expressly considered the challenged census procedures to be part of the "manner" in which the census was conducted. *See Utah*, 536 U.S. at 474 (noting that use of imputation fell within the grant of "congressional methodological authority" conferred by the "in such Manner" language of the Enumeration Clause); *Wisconsin*, 517 U.S. at 17 ("[T]he Secretary's decision [not to use a post-enumeration survey] was made pursuant to Congress' direct delegation of its broad authority" to "conduct the census 'in such Manner as they shall by Law direct.'"); *cf. Carey*, 637 F.2d at 836, 838-39 (holding that challenge to the "manner" in which the Census Bureau assembled address registers for the census was not a political question).[15] Third, Plaintiffs *do* challenge "how" the Secretary has chosen to count the population—*i.e.*, by using an untested questionnaire that demands information regarding the citizenship status of every household member. Indeed, Plaintiffs allege

[15] Indeed, the methodological decisions adjudicated in *Utah, Wisconsin*, and *Franklin* fall within the very definitions of "manner" on which Defendants rely. *See* Defs.' Mem. at 24 n.8 (defining "manner" as "form; method; way of performing or executing" or "form, method.").

that because this will lead to a disproportionate undercount of the population, the Secretary's decision runs afoul of the "actual Enumeration" requirement. Am. Compl. ¶¶ 143-153.

2. Judicially manageable standards allow the court to review Defendants' conduct of the census.

Contrary to Defendants' argument, the Secretary's conduct of the census, including the selection of questionnaire content, is constrained by constitutional and statutory requirements, as well as binding agency standards and internal guidance. The courts are thus fully equipped to review the Secretary's decision to add a citizenship question to the census without making policy determinations outside the scope of their constitutional authority.

First, as the Supreme Court has held, the Constitution itself provides a straightforward, judicially administrable standard for reviewing Defendants' conduct of the census: it must bear a "reasonable relationship to the accomplishment of an actual enumeration of the population." *Wisconsin*, 517 U.S. at 19-20; *see also id*. at 24 (holding that Secretary's determination of which method would achieve a more accurate census was within the "constitutional bounds of discretion over the conduct of the census provided to the Federal Government"); *Utah*, 536 U.S. at 478 (concluding that the "interest in accuracy" favored the Census Bureau's use of imputation in conducting the census). The Secretary exceeds the constitutional bounds of his discretion when he makes decisions that will affirmatively undermine the constitutional purpose of an actual Enumeration—as Plaintiffs plausibly allege he did in this case. *See* Am. Compl. ¶¶ 143-153 ; *see also* Argument, Part III, *infra*.

Defendants contend that the constitutional standard articulated by the Supreme Court is inapplicable here because Plaintiffs do not challenge a "calculation methodology." Defs.' Mem. at 25 n.10, 26. As an initial matter, this artificial distinction finds no support in the relevant case law. The requirement of a "reasonable relationship to the accomplishment of an actual

enumeration" applies to the Secretary's "conduct of the census" generally; it is not limited to the Secretary's choice of calculation methodologies. *See Wisconsin*, 517 U.S. at 19-20. Moreover, there is no sensible reason to read the Constitution as allowing review of calculation methodologies, while exempting from review any other decision by the Secretary on how to conduct the census regardless of its impact on the constitutional purpose of an accurate count. If Defendants' interpretation were accepted, the Secretary would be free to engage in any information-gathering procedures that undermine an actual count of the population—for example by sending out questionnaires with thousands of questions, asking highly intrusive personal questions, or issuing questionnaires only in a foreign language—without consequence. Defendants offer no cogent explanation for why such arbitrary decisions, however antithetical to the constitutional duty of an accurate population count, should not be reviewable while nuanced and technical questions regarding calculation methodologies are subject to judicial examination.

Second, as described in greater detail *supra* at pp. 3-5, a robust set of statutes, regulations, and agency standards governing the collection of statistical information further constrain the Secretary's discretion and provide judicially manageable standards for reviewing his last-minute decision to add an untested citizenship question to the census. For example, under the PRA, agencies must ensure the "accuracy" and "objectivity" of their data, 44 U.S.C. § 3506(e)(1). Further, under OMB standards issued pursuant to the PRA, statistical agencies such as the Census Bureau must act "autonomously when determining what information to collect," design surveys to "achieve the highest practical rates of response," pretest survey components to ensure that "they function as intended when implemented in the full scale survey," and administer surveys to "maximiz[e] data quality." *See* Am. Compl. ¶¶ 53-54. In addition, under the Census Bureau's own standards, questionnaires "must be pretested with respondents to identify

problems" and "must be verified and tested to ensure that they function as intended," among other requirements. *See* Am. Compl. ¶ 58.[16] In light of these detailed requirements, the Court need not "supplant a . . . decision of the political branches with the courts' own unmoored determination." *Zivotofsky*, 566 U.S. at 196. Indeed, the relevant policy determinations regarding the paramount importance of census accuracy and the procedures needed to ensure that the census is designed to achieve that goal have already been made.

B. The Secretary's Decision to Add a Citizenship Question to the Census is Reviewable Under the APA.

Defendants contend that the Court lacks jurisdiction over Plaintiffs' APA claim under § 701(a)(2) of the APA because the Census Act commits the conduct of the census to agency discretion. Defs.' Mem. at 27-30.

Section 701(a)(2) is a "narrow exception" to judicial review applicable in "rare instances" where there is "no meaningful standard against which to judge the agency's exercise of discretion." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). As Defendants concede, courts may derive such standards not only from the Census Act, but from "any other statute, regulation, or historical practice." Defs.' Mem. at 29. As explained above, *see supra* pp. 3-5, there are numerous authorities—including constitutional, statutory, and regulatory constraints as well as agency standards and established practice—that constrain Defendants' discretion and allow the Court to judge their decision to add an untested citizenship question to the census. *See Salazar v. King*, 822 F.3d 61, 76 (2d Cir. 2016) ("To determine whether there is 'law to apply' . . . for judging an agency's

[16] Congress has also passed the Information Quality Act, which obligates agencies to adopt standards to maximize the "quality, objectivity, utility, and integrity" of the data they gather. *See* Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 515(a).

exercise of discretion, the courts look to the statutory text, the agency's regulations, and informal agency guidance"); *Inova Alexandria Hosp. v. Shalala*, 244 F.3d 342, 347-49 (4th Cir. 2001) (finding judicially manageable standards based on a Medicare guidance manual).

Defendants entirely ignore these standards and instead argue that the Census Act, by directing the Secretary to conduct the decennial census "in such form and content as he may determine," insulates the Secretary's conduct of the census from judicial review. Defs.' Mem. at 28. This argument has been roundly rejected by almost every court that has considered it. *See District of Columbia*, 789 F. Supp. at 1188 n.16 ("[A]lmost every court that has considered the issue has held that 13 U.S.C. § 141 does not preclude judicial review." (citing cases)); *City of New York*, 713 F. Supp. at 53 ("The overwhelming majority of cases considering this issue[] have concluded that § 701(a)(2) of the APA is inapplicable to the census statute"); *see, e.g.*, *City of Philadelphia*, 503 F. Supp. at 675; *City of Camden v. Plotkin*, 466 F. Supp. 44, 52 (D.N.J. 1978); *Borough of Bethel Park v. Stans*, 319 F. Supp. 971 (W.D. Pa. 1970), *aff'd* 449 F.2d 575 (3d. Cir. 1971); *West End Neighborhood Corp. v. Stans*, 312 F. Supp. 1066, 1068 (D.D.C. 1970). Although Defendants seem to imply that the Supreme Court endorsed their position in *Wisconsin*, the Court did not actually consider the issue, and a concurrence by Justice Stevens in *Franklin* directly rejected Defendants' argument. *See Franklin*, 505 U.S. at 816 n.16 (Stevens, J., concurring in part) (concluding that there was "no support . . . whatsoever" for the proposition that Congress "intended to effect a new, unreviewable commitment to agency discretion").

This court should likewise reject Defendants' argument. The mere fact that the Census Act tasks the Secretary with determining the form and content of the census does not mean that

there is no limit on, or standard by which to judge, how the Secretary exercises this discretion.[17] *See, e.g.*, *Barlow v. Collins*, 397 U.S. 159, 165–66 (1970) (statute authorizing Secretary of Agriculture to promulgate regulations "as he may deem proper" does not preclude judicial review); *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1401 (D.C. Cir. 1995) (use of "a permissive term such as 'may' . . . does not mean the matter is committed exclusively to agency discretion").[18] Congress has not relieved (and indeed could not relieve) the Secretary of the constitutional duty to conduct the census in a manner that is designed to achieve an accurate count of the population. *See* 13 U.S.C. § 141 note ("[I]t is essential that the decennial enumeration of the population be as accurate as possible, consistent with the Constitution and laws of the United States."); *City of Willacoochee v. Baldridge*, 556 F. Supp. 551, 555 (S.D. Ga. 1983) ("Necessarily implicit in the Census Act is the command that the census be accurate."); *Franklin*, 505 U.S. at 819-20 (Stevens, J., concurring) (observing that the Census Act "embodies a duty to conduct a census that is accurate"). Nor does the Census Act exempt Defendants from the statutory and regulatory constraints on their conduct of the census that are described above. *See supra* pp. 3-5. Indeed, to ensure timely and adequate census preparations, the Census Act

[17] At least one court has held that that the Secretary's discretion with respect to the questions on the census form is not absolute and may be set aside if the Secretary's actions are "irrational, arbitrary or capricious." *United States v. Little*, 321 F. Supp. 388, 391 (D. Del. 1971).

[18] Defendants' attempt to analogize § 141(a) of the Census Act to the statute at issue in *Webster v. Doe*, 486 U.S. 592 (§ 102(c) of the National Security Act) is unpersuasive. The two statutes contain different language, and the Census Act does not implicate the national security concerns that motivated the Court's decision in *Webster*. *See Franklin*, 505 U.S. at 817 (Stevens, J., concurring in part) (noting the difference in statutory language between the Census Act and the National Security Act and the national security context of *Webster*, and concluding that "[i]t is difficult to imagine two statutory schemes more dissimilar than the National Security Act and the Census Act."). Defendants' citation to *Angelex Ltd v. United States*, 723 F.3d 500 (4th Cir. 2013) is similarly inapt. The statute in that case authorized the Secretary of the Coast Guard to take certain actions that he deemed "satisfactory," which is hardly comparable to the Secretary's limited discretion over the form or content of the constitutionally required census.

itself imposes concrete deadlines by which the Secretary must submit the final subjects and questions for the decennial census to Congress. 13 U.S.C. § 141(f)(1), (2). Once either of these reports are submitted, the Secretary may only alter the census content if he identifies "new circumstances" which "necessitate" a change. *Id.* § 141(f)(3).[19]

As other courts have explained, allowing the Secretary to evade judicial review would inappropriately deprive courts of their authority to vindicate important constitutional and statutory rights. *See, e.g.*, *Carey*, 637 F.2d at 836 (finding that judicial review of allegations related to the "mismanagement of the census" was available because the alleged infringement of plaintiffs' "right to a vote free of arbitrary impairment" could not be foreclosed by § 701(a)(2) of the APA); *see also Young*, 497 F. Supp. at 1335. If judicial review were unavailable, the Secretary would be free to adopt census procedures "regardless of bias, manipulation, fraud or similarly grave abuse, which is exactly the type of conduct and temptation the Framers wished to avoid . . . ." *City of Philadelphia*, 503 F. Supp. at 675.[20]

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[19] That the Secretary must submit reports regarding the subjects and questions for the census to Congressional committees is not indicative of exclusive Congressional oversight over the census. *Armstrong v. Bush*, 924 F.2d 282, 292-93 (D.C. Cir. 1991) ("[T]hat Congress retains some direct oversight over agencies' compliance . . . does not necessarily indicate an intent to preclude judicial review."). The government's argument "would create an enormous exception to judicial review: Congress exercises oversight over all agencies, gets reports from many, and is often consulted by the executive branch before specific actions are taken." *Id.* at 293 (internal quotation omitted); *see also Specter v. Garrett*, 971 F.2d 936, 954 (3d Cir. 1992), *judgment vacated on other grounds*, 506 U.S. 969 (1992).

[20] Faced with clear legal authority establishing the justiciability of Plaintiffs' claims, Defendants rely on two inapposite cases. First, they point to *Tucker*, which concluded that a post-census challenge to require the Government to use statistics to adjust undercounts was non-justiciable because of a lack of judicially administrable standards. *See*, 958 F.2d at 1418. But *Tucker* was decided before (i) Congress passed the PRA of 1995 and the OMB and Census Bureau issued standards that govern census content development, and (ii) the Supreme Court's decisions in *Utah*, *Wisconsin*, and *Franklin*, which found challenges to census procedures to be justiciable and emphasized the constitutional limits on the Secretary's discretion. Moreover, the *Tucker* court explicitly recognized that claims of the kind Plaintiffs in this case raise—i.e. a challenge to

Finally, even if there were any merit to Defendants' argument that the Secretary's conduct of the census is committed to agency discretion by law, his decision to add a citizenship question to the census is still reviewable because Plaintiffs have plausibly alleged that the Secretary acted *ultra vires* based on improper political motives. The Fourth Circuit has held that, "even where action is committed to absolute agency discretion by law, courts have assumed the power to review allegations that an agency exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations." *Garcia v. Neagle*, 660 F.2d 983, 988 (4th Cir. 1981); *see also Electricities of N.C., Inc. v. Se. Power Admin.*, 774 F.2d 1262, 1267 (4th Cir. 1985) (stating that discretionary agency decisions are "not completely shielded from judicial review"). In particular, "a court should hear a claim that an agency rested an action on 'considerations that Congress could not have intended to make relevant' such as the political considerations alleged by plaintiffs." *Electricities of N.C., Inc.*, 774 F.2d at 1267. Here, Plaintiffs allege that the Secretary's decision was motivated by improper political considerations. *See* Am. Compl. ¶¶ 82-89. Therefore, judicial review is still available over Plaintiffs' claims even if the Secretary's decision is otherwise committed to his discretion.

III. Plaintiffs Have Plausibly Alleged a Violation of the Enumeration Clause.

A motion to dismiss for failure to state a claim must be denied if Plaintiffs "allege 'enough facts to state a claim to relief that is plausible on its face.'" *Matrixx Inits., Inc. v. Siracusano*, 563 U.S. 27, 45 n.12 (2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570

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the Secretary's "categorical judgment of inclusion or exclusion" argued to be in violation of "history, logic, and common sense"—are justiciable. 958 F.2d at 1418.

Defendants' reliance on *Senate of State of California v. Mosbacher*, 968 F.2d 974 (9th Cir. 1992) is similarly misplaced. The Secretary's actual conduct of the census was not at issue in that case. Rather, plaintiffs sought to compel the Secretary to release internal calculations to the public—an issue not presented here. 968 F.2d at 966-67. Therefore the court's finding of a lack of law to apply to that dispute is irrelevant to Plaintiffs' claims.

(2007)). The court "must accept as true all of the factual allegations contained in the complaint," and from those facts must "draw all reasonable inferences in favor of the plaintiffs." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011).

As detailed above, *see supra* Argument, Part II.A.2, the Enumeration Clause requires the Secretary's conduct of the census to bear "a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purposes of the census." *Wisconsin*, 517 U.S. at 19. Although this does not require Defendants to *achieve* a perfect count, it clearly requires Defendants to conduct the census in a manner that is reasonably *designed* to achieve accuracy, particularly distributive accuracy. *See Utah*, 536 U.S. at 477; *Wisconsin*, 517 U.S. at 20-21. Here, Plaintiffs have amply alleged that Defendants violated this constitutional mandate by adding, at the eleventh hour, an untested citizenship question that will produce a disproportionate undercount. *See supra* Background, Parts III-V; Am. Compl. ¶¶ 105-114.

Defendants nonetheless argue that Plaintiffs have failed to state a claim on the basis of a completely fictitious legal standard. Without citing a single legal authority, Defendants assert that the Enumeration Clause requires only that the population be determined through a "person-by-person headcount, rather than through estimates or conjecture." Defs. Mem. at 31. That is a clear misstatement of the law. Indeed, in approving the use of "hot-deck imputation," a methodology that fills gaps in the person-by-person headcount in order to achieve greater accuracy, the Supreme Court expressly rejected the argument that the Enumeration Clause requires the Bureau to "seek out each individual." *See Utah*, 536 U.S. at 473-75, 478-79. Moreover, it is plainly incompatible with the actual standard cited above. By Defendants' logic, the Secretary is free to utilize a census questionnaire that would preclude an actual enumeration as long as he seeks to count people "person by person."

Defendants try to bolster their baseless legal argument by conflating the specific addition of a citizenship question with the general practice of asking demographic questions as part of the census. Defs.' Mem. at 32-34. Contrary to Defendants' assertions, Plaintiffs' claim does not challenge, and would not open the door to challenging, the inclusion of *any* demographic question that might "theoretically" cause an inaccurate count. Defs.' Mem. at 33. Rather, Plaintiffs challenge the addition of a citizenship question because there is specific grounds to conclude that it likely *will* lead to an inaccurate count. *See supra*, Argument, Part I.A.1. If Plaintiffs' claim appears unprecedented, as Defendants suggest, that is only because the challenged conduct is unprecedented. At the eleventh hour, Defendants have decided to add a question which (i) is unusually sensitive, especially in the current climate of unprecedented fear resulting from the government's controversial immigration policies, (ii) has not been used for the last six decades precisely because of its likely impact on the accuracy of the census count, (iii) is highly likely to produce a disproportionate undercount based on compelling evidence, including the government's own findings, and (iv) has not *once* been tested for use on the decennial census, in violation of federal law and agency standards.[21] To suggest that a challenge to this decision is equivalent to challenging the use of *any* demographic question is plainly not credible.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied.

Date: June 22, 2018

Respectfully submitted,

/s/

Daniel Grant (Bar Number: 19659)

[21] For the same reasons, Defendants' appeal to historical practice, Defs. Mem. at 32-33, not only fails to support their case, but rather directly undermines it given their clear departure from their own policies, practices, and procedures.

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CERTIFICATE OF SERVICE

I certify that on this 22nd day of June, 2018, I caused a copy of the foregoing document to be sent to all parties receiving CM/ECF notices in this case.

/s/
Daniel Grant (Bar Number: 19659)