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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al.*,	
Plaintiffs,	Civil Action No. 1:18-cv-2921 (JMF)
v.	
UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,	
Defendants.	

BRIEF OF AMICUS CURIAE FEDERATION FOR AMERICAN IMMIGRATION REFORM IN SUPPORT OF DEFENDANTS AND DISMISSAL

CORPORATE DISCLOSURE STATEMENT

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

INTEREST OF *AMICUS CURIAE*

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

In furtherance of its public interest mission, FAIR has litigated numerous questions and controversies in the field of immigration law since its founding in 1979, including the census and apportionment cases *FAIR v. Klutznick*, 486 F.Supp. 564 (D.D.C. 1980), and *Ridge v. Verity*, 715 F. Supp. 1308 (D. W. Pa. 1989).

The Immigration Reform Law Institute (IRLI) is counsel for, and a supporting organization of, FAIR. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including challenges to *ultra vires* immigration regulations and agency violations of the Administrative Procedure Act ("APA"). *See Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir. filed Sept. 28, 2016); *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013); and *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015). IRLI is considered an expert in immigration law by the Board of Immigration Appeals, and has prepared *amicus* briefs for the Board, at the request of that body, for more than twenty years. *See, e.g.*, *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010); and *In re Q- T- -- M- T-*, 21 I. & N. Dec. 639 (B.I.A. 1996).

ARGUMENT

Plaintiffs, in their First Amended Complaint ("Complaint"), mistakenly allege that the decision of the Secretary of Commerce to include a question on citizenship in the 2020 census

violates the Census Act, 13 U.S.C. § 1 et seq. *See* Complaint, First Claim for Relief, ¶¶ 177-178; Third Claim for Relief, ¶¶ 180-191. Plaintiffs further mistakenly allege that the decision of the Secretary of Commerce to include a question on citizenship in the 2020 census violates the Information Quality Act ("IQA"), 114 Stat. 2763, 106 P.L. 554 § 515 (2000). *See* Complaint, Second Claim for Relief, ¶¶ 184-185. Plaintiffs also restate these arguments as constitutional claims, in violation of the requirement for an "actual enumeration," U.S. Const. Art. I, § 2, cl. 3.

Plaintiffs' claims regarding the Census Act should be dismissed both because plaintiffs cannot establish that the inclusion of a citizenship question on the census will cause it to fall short of any legally-mandated level of accuracy and because whether there will even be any significant loss of accuracy is based on mere speculation. As for plaintiffs' IQA claim, a claim very similar to it has been rejected by this Court, on grounds directly applicable here.

I. The Citizenship Question Will Not Result In Unlawful Inaccuracy.

No one contests that Congress's authority "to take from the States the power to determine methodology [suggests] a strong constitutional interest in accuracy. …." *Utah v. Evans*, 536 U.S. 452, 478 (2002). But plaintiffs support their claims of inaccuracy with mere speculation, and have absolutely failed to allege how existing Census Bureau methodology will fail to provide a legally mandated level of accuracy.

Plaintiffs repeatedly insinuate that personal Presidential bias was a cause for inclusion of the citizenship question on the 2020 census. In claiming that this question will result in inaccuracies, plaintiffs vaguely allege that the Census Bureau has found that "any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count." ¶¶ 38-46. Plaintiffs speculate that such "risks"… "are heightened because of President Trump's anti-immigrant rhetoric and this Administration's pattern of policies and actions that target immigrant

communities " which "has led to significant public distrust and fear of providing information to the federal government," ¶¶ 47-48, as well as an "unprecedented anxiety in immigration communities," ¶ 52. Plaintiffs then must further speculate that these are social trends which "*could* increase non-response rates and adversely affect data quality…." ¶ 77 (emphasis added). These claims are merely amorphous and speculative.

In any event, plaintiffs fail to allege that existing Census Bureau statistical methodologies will not be sufficient to identify and adjust possible undercounts. Under existing census procedure, the original enumeration ("capture") is followed by a limited post-enumeration survey ("recapture") in which representative geographical areas are more intensively surveyed, and the results compared with the original headcount in those areas. *City of Los Angeles v. Evans*, 2001 U.S. Dist. LEXIS 25977, *12-13, (C.D.Ca. 2001). "By itself, this would produce an error rate over the entire population, but would not shed light on the differential undercount." *Id*. But by comparing "post-stratified data" to the results of the initial enumeration, "the Bureau is able to estimate not only an overall undercount rate, but also an undercount rate for each post-strata. This process enables the Bureau to determine whether certain strata, and by extension, certain demographic groups, were undercounted. *Id.* (citing *Wisconsin v. City of New York*, 517 U.S. 1, 10 (1996)). Census results at the national level are also verified by comparison to another population estimate derived through a process known as demographic analysis ("DA"). *City of Los Angeles*, 2001 U.S. Dist. LEXIS 25977, *13. "DA is a calculation of the national population based on the net sum of all records of births, deaths, *legal immigration*, Medicare enrollments, and *estimates of emigration and net undocumented immigration*." *Id.* at *13-14 (emphasis added).

For non-constitutional purposes, Congress expressly intended the Census Act to grant the Secretary broad statutory discretion to select alternative methodologies, such as the statistical

procedures described above. Allocation of federal funds expressly linked to census data, at issue here, is one such non-constitutional purpose. For example, the Act delegates to the Secretary authority to determine the content of census questionnaires "... in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. § 141(a). In 1976, Congress amended the Census Act to provide: "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." Pub. L. No. 94-521, § 10, 90 Stat. 2459, 2464 (1976), codified as 13 U.S.C. § 195. Questions concerning citizenship, for the purposes of enforcement of the Voting Rights Act, are clearly "special surveys" for non-apportionment purposes within the meaning of the Act.

The Department of Commerce itself acknowledges and fully regulates the public interest in census accuracy:

> It is the policy of the Census Bureau to provide the most accurate population estimates possible given the constraints of time, money, and available statistical techniques [and] to provide governmental units the opportunity to seek a review and provide additional data to these estimates and to present evidence relating to the accuracy of the estimates.

15 CFR§ 90.2. Pursuant to Congress's broad delegation of discretion to the Secretary in developing the methodology to be used for new enumeration, Census Act statutes and regulations provide "a procedure for a governmental unit to request a challenge of a population estimate of the Census Bureau." 15 CFR § 90.4. "'Population estimate' means a statistically developed calculation of the number of people living in a governmental unit to update the preceding census or earlier estimate." 15 CFR § 90.3(d). "'Population Estimates Challenge' means, in accordance with this part, the process a governmental unit may use to provide additional input data for the

Census Bureau's population estimate and the submission of substantive documentation in support thereof." 15 CFR § 90.3(b). "A request for a challenge of a population estimate generated by the Census Bureau may be filed only by the chief executive officer or highest elected official of a governmental unit." 15 CFR § 90.5. A request "may be filed any time up to 90 days after the release of the estimate by the Census Bureau, [or]… any time up to 90 days after the date the Census Bureau, on its own initiative, revises that estimate." 15 CFR § 90.6(a).

> The governmental unit shall provide whatever evidence it has relevant to the request at the time of filing. … The evidence submitted must be consistent with the criteria, standards, and regular processes the Census Bureau employs to generate the population estimate. … In the revised challenge process, the Census Bureau will only accept a challenge when the evidence provided identifies the use of incorrect data, processes, or calculations in the estimates.

15 CFR § 90.7(a). "The Census Bureau, upon receipt of the appropriate documentation, will attempt to resolve the estimate with the governmental unit." 15 CFR § 90.4. "[T]he Census Bureau shall respond in writing with a decision to accept or deny the challenge. In the event that the Census Bureau finds that the population estimate should be updated, it will also post the revised estimate on the Census Bureau's Web site." 15 CFR § 90.9.

This detailed regulatory scheme, 13 C.F.R. § 90.1 *et seq.*, is clearly intended to be the Department's procedure for correcting undercounts or other inaccurate results. Plaintiffs have failed even to allege that the Secretary's reliance on it, as a means to correct any theoretical impermissible undercounting occasioned by the citizenship question, would be misplaced.

II. This Court Lacks Jurisdiction To Hear Plaintiffs' Claims Based On The Information Quality Act.

The IQA does not require either the Secretary of Commerce or the Director of the Bureau of the Census to adopt plaintiff's view as to the accuracy and reliability of the final data, set prior

to the "actual" data collection activity at issue. The IQA, moreover, does not provide plaintiffs with a private cause of action.

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

The IQA further requires "that each Federal agency to which the guidelines apply – (A) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency" and "… (B) establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a)." IQA §515(b). In other words, the Department of Commerce must to provide an administrative complaint system wherein any of the plaintiffs might "seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines…." *Id.*

On information and belief, none of the plaintiffs has made the requisite administrative complaint. Even if such a complaint had been filed, the IQA limits the administrative remedy to "correction of information maintained and disseminated by the agency that does not comply with the guidelines…." Since DOC has not yet "maintained or disseminated" final information from the 2020 census, plaintiffs' claims that "Defendants have failed to act in a manner consistent with" IQA standards, *see, e.g.*, ¶¶ 184, 190-192, "by failing to adequately test the citizenship demand,

[or] minimize the burden such a demand imposes on respondents, [or] maximize data quality," ¶ 184, are at best unripe.

Furthermore, the IQA only directs the OMB to draft guidelines concerning information quality, and specifies what those guidelines should contain. It creates no legal rights in any third parties. *Salt Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006). The *Salt* plaintiffs had alleged a data error similar to that of the plaintiffs in this case: that Department of Health and Human Services ("HHS") public health findings on sodium consumption "had to be qualified according to such factors as race, history of hypertension, sex, age, body-mass index, and education level." *Id.* The U.S. Court of Appeals for the Fourth Circuit upheld the district court's dismissal of an Administrative Procedure Act ("APA") claim against HHS after the agency denied an administrative petition challenging, under the IQA, HHS's refusal to correct "information disseminated by [sub-agency] NHLBI, which directly states and otherwise suggests that reduced sodium consumption will result in lower blood, pressure in all individuals," on the ground that "the studies' findings do not meet the standards for data quality set out in the IQA…." *Id.; see also Harkonen v. United States DOJ*, 2012 U.S. Dist. LEXIS 171415, *27-29 (N.D. Ca. 2012) (affirming that courts "that have reviewed the IQA have uniformly found that it "does not create any legal right to information *or its correctness*" and "that, as a result, the agencies' actions did not determine the plaintiff's rights or cause any legal consequence, and thus that there was no final agency action [for APA jurisdictional purposes]," and noting that "[p]laintiff offers no cases in which a court has held to the contrary."); *Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 185, (D.C. Cir. 2015) (dismissing challenge that agency failed to use the best scientific methods and data analysis available because the IQA "does not constitute a statutory mechanism by which

the EPA's *conclusions* reached while making its nonattainment determinations can be challenged.").

Like the Fourth and D.C. Circuit, this Court lacks jurisdiction over plaintiffs' IQA claims, because the IQA does not create a private cause of action. This Court has expressly so found:

> Plaintiffs are mistaken that the IQA provides any limit on the types of information on which an agency may rely in reaching its decision. Rather, the IQA applies only to the quality of information "disseminated" by federal agencies. 114 Stat. 2763, 2763A-153; see also 67 Fed. Reg. 8460 ("'Dissemination' is defined to mean 'agency[-]initiated or sponsored distribution of information to the public.'").

Habitat for Horses v. Salazar, 2011 U.S. Dist. LEXIS 107267, *21 (S.D. N.Y. 2011) (dismissing IQA claim for lack of jurisdiction).

> In any event, … the statute "creates no legal rights in any third parties." *Salt Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006); *see also Single Stick, Inc. v. Johanns*, 601 F. Supp. 2d 307, 316 (D.D.C. 2009), *rev'd on other grounds sub nom. Prime Time Int'l Co. v. Vilsack*, 599 F.3d 678, 686 (D.C. Cir. 2010); *Ams. for Safe Access v. U.S. Dep't of Health & Human Servs*., No. 07-01049 (WHA), 2007 U.S. Dist. LEXIS 55597, 2007 WL 2141289, at *3-4 (N.D. Cal. July 24, 2007); *In re Operation of the Mo. R. Sys. Litig.*, 363 F. Supp. 2d 1145 (D. Minn. 2004) ("Absent any 'meaningful standard' against which to evaluate the agency's discretion, the Court finds that Congress did not intend the IQA to provide a private cause of action."), *aff'd in part and vacated in part on other grounds*, 421 F.3d 618 (8th Cir. 2005).

Id. at *21-22. "Nor has this Court located any authority supporting Plaintiffs' contention that they may bring such a claim under the APA. Absent such authority, this Court declines to fashion a new remedy." *Id.* This Court accordingly lacks jurisdiction over plaintiffs' IQA claims.

CONCLUSION

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

DATED: June 7, 2018

Respectfully Submitted, *Amicus Curiae*,

By its Attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2018, I electronically filed a copy of the foregoing Brief *Amici Curiae* using the CM/ECF System for the United States District Court for the Southern District of New York, which will send notification of that filing to all counsel of record in this litigation.

Dated: June 7, 2018

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