No. 23-35166

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MAUREEN MURPHY, individually and on behalf of
a class of similarly situated individuals;
JOHN HUDDLESTON, individually and on behalf of
a class of similarly situated individuals,

Plaintiffs-Appellants,

v.

GINA RAIMONDO, in her official capacity as Secretary of Commerce;
DEPARTMENT OF COMMERCE, a federal agency;
ROBERT SANTOS, in his official capacity as
Director of the Bureau of the Census;
BUREAU OF THE CENSUS, a federal agency,

Defendants-Appellees.

On Appeal from the United States District Court for the
Western District of Washington, No. 3:22-cv-05377,
Honorable David G. Estudillo, District Judge

APPELLANTS' OPENING BRIEF
(ORAL ARGUMENT REQUESTED)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, Plaintiffs-Appellants state that there are no corporations party to this case.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs respectfully request oral argument. The ripeness question in the case depends on the underlying separation-of-powers question of what it means to sue after an agency that does not have adjudicative or prosecuting authority completes taking all enforcement actions it could take against the plaintiff. That is likely a first-impression question in this Circuit. An oral argument comprising 15 minutes per side will significantly aid the Court in resolving this constitutional issue of wide importance. *See* FRAP 34(a).

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GLOSSARY

ACS	American Community Survey
APA	Administrative Procedure Act
DOJ	Department of Justice
EPA	Environmental Protection Agency
FRAP	Federal Rules of Appellate Procedure
FRCP	Federal Rules of Civil Procedure

JURISDICTIONAL STATEMENT

Plaintiffs Maureen Murphy and John Huddleston sued on behalf of themselves and a class of similarly situated individuals. The district court had jurisdiction to grant Plaintiffs relief under 28 U.S.C. §§ 1331, 1343, 2201, 2202, 5 U.S.C. §§ 702, 703, 706, and FRCP 57, 65. ER-061.

The district court dismissed the case as unripe, and it denied Plaintiffs' class-certification motion as moot. ER-017.

The district court entered a final order and judgment on January 3, 2023. ER-017–ER-018. Plaintiffs filed a timely notice of appeal on March 6, 2023. FRAP 4(a)(1)(B); ER-135.

This Court's appellate jurisdiction rests on 28 U.S.C. § 1291.

INTRODUCTION

This case involves an effort by the Census Bureau[1] to force Plaintiffs and thousands of other Americans to disclose to the government personal information they wish to keep private. The Bureau directed Plaintiffs Maureen Murphy and John Huddleston to answer the American Community Survey (ACS). Plaintiffs, like many Americans, refused to answer it. They will continue to refuse to answer the ACS.

The Bureau, in writing, threatened Plaintiffs and others similarly situated with thousands of dollars in criminal fines for refusing to answer

[1] All Defendants collectively are referred to as the Census Bureau or the Bureau.

the ACS. So, Plaintiffs sued, asking for a declaration that the Bureau's demands on Plaintiffs were unlawful.

Each year, the Bureau's agents demand that millions of Americans answer detailed and highly personal questions about their lives. And each year thousands refuse. ACS is not the normal ten-year Census, which is relatively simple, constitutionally authorized, and designed to count people for congressional districting. The ACS is an unrelated survey conducted every year. It asks detailed and personal questions such as the person's sexual orientation, gender identity, fertility history, marital status, and divorce history. It asks about private health information, including the effect of medical and psychological conditions on the individual's daily activities. It asks how much the household pays in taxes and utility bills. It even asks how many beds, cars, and washing machines the household has. ACS contains about 100 such questions. ER-089–ER-108.

Individuals who refuse to answer this detailed questionnaire are subject to fines of up to $5,000 per question. Maureen Murphy and John Huddleston are two such individuals. They understand the importance of the decennial Census. They have in the past and will continue in the future to answer the ten-year Census. But they oppose the highly detailed and personal information the Bureau demands they disclose by answering the ACS. They have openly refused to answer the survey, that is, admitted to having violated the law, 13 U.S.C. § 221. They will

continue to refuse to answer the ACS. As a result, they are subject to monetary fines for doing nothing more than keeping the private details of their lives private.

Nothing authorizes the Bureau to compel ordinary Americans to answer the ACS or to unilaterally criminalize and increase the monetary fine for refusing to answer the ACS contained in 13 U.S.C. § 221 from $100 to $5,000. Furthermore, if relevant statutes can be read to authorize the Bureau to do these things, then those statutes violate Article I's Vesting Clause and the nondelegation and major-questions doctrines. The Bureau has also unconstitutionally invaded their fundamental rights to freedom of speech and privacy.

But the district court did not address the suit's merits. Instead, it dismissed Plaintiffs' claims as not ripe. ER-017. Assuming without deciding that this case involves a pre-enforcement challenge, ER-009, the court concluded that Plaintiffs do not meet this Court's three-factor *Thomas* test for constitutional ripeness, ER-009–ER-014.[2] And, operating under the same assumption, ER-015, the court concluded that Plaintiffs do not meet the fitness-and-hardship prudential test of

[2] *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134, 1139 (9th Cir. 2000) (Weigh "whether the plaintiffs have articulated a concrete plan to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute.").

ripeness, ER-015–ER-017. It then denied Plaintiffs' class-certification motion as moot without explanation, ER-017.

This case is not a pre-enforcement challenge. The federal agencies and officers whose actions Murphy and Huddleston challenge have only specific enforcement authority; they do not have any adjudicative or prosecution authority whatsoever. Plaintiffs filed suit after the Defendants took all enforcement actions they could against Plaintiffs. Nothing about this case is "pre-enforcement." An injunction stopping Defendants from requiring Plaintiffs to answer the ACS in the future, stopping Defendants from forwarding Plaintiffs' names to DOJ for prosecution, and enjoining Defendants to allow Plaintiffs to opt out of answering the Bureau's surveys will provide complete relief to Plaintiffs.

This Court should reverse, because Plaintiffs' claims are ripe for review, and remand to the district court to (1) rule on the class-certification motion and (2) determine the merits.

STATEMENT OF THE ISSUE

When a plaintiff sues for prospective injunctive relief after an agency that has no adjudicative or prosecuting authority has taken all possible enforcement actions it could take against the plaintiff, is the plaintiff's suit to enjoin that agency from taking the same enforcement action against the same plaintiff in the future ripe for judicial review?

STATEMENT OF THE CASE

A. Maureen Murphy

A Census Bureau field agent showed up at Maureen Murphy's home on a December night around 7 o'clock. ER-037. It is pitch dark in the Pacific Northwest at that time of the year. *Id.* The field agent rang Ms. Murphy's doorbell multiple times; she chose not to answer the door. *Id.* After some time, the field agent left, leaving behind a letter that said, "You are required by U.S. law to respond to th[e American Community S]urvey (Title 13, United States Code Sections 141, 193, and 221)." *Id.*; ER-082.

The following Saturday afternoon, the agent returned. ER-037. The agent "rang the doorbell" and "pounded" Ms. Murphy's door "several times." *Id.* The agent "lurked on" Ms. Murphy's "front porch for about 30 minutes." Ms. Murphy "felt threatened" by a federal agent camping at her front door for half an hour. *Id.* Eventually, Ms. Murphy mustered the courage to tell the agent "to go away and not come back." *Id.*

Six days later, the agent landed at Ms. Murphy's doorstep for a third visit, this time, at 8:00 p.m. ER-037. Despite it being "dark outside" and not quite looking forward to the prospect of directing a federal agent off her property, Ms. Murphy told the agent she "had no intention of answering the American Community Survey." *Id.* She told the agent "to leave and not return." *Id.*

That wasn't the end of it. Three days before Christmas, Ms. Murphy received a FedEx'ed letter from the Census Bureau and "a brochure and printed adverts." ER-037–ER-038; ER-084; ER-110–ER-115. "They all contained the same threat." ER-037. The letter directed Ms. Murphy to look at the Bureau's website for more information, which she did. ER-037. The website said that the ACS is "mandatory." ER-086. It then said, citing 13 U.S.C. § 221, that "persons who do not respond *shall be* fined not more than $100." ER-087 (italics supplied). And citing 18 U.S.C. §§ 3571, 3559, the website said anyone "who refuses or willfully neglects to complete" the ACS "or answer questions posed by census takers" shall be fined "not more than $5,000." ER-087.[3]

Despite these written threats, Ms. Murphy stood firm. She "refused to answer" the ACS and "will continue to refuse to answer" the ACS. ER-038. She has answered the actual ten-year Census and will continue to answer it in the future. ER-038.

B. John Huddleston

Mr. Huddleston also received a letter from the Bureau warning him that his "response to t[he American Community S]urvey is required by law." ER-035; ER-134. The Bureau directed him to "respond now." ER-

[3] At least one federal court has concluded that the Census Act monetary fines under 13 U.S.C. § 221 accumulate for "each unanswered question," meaning that the fines for not answering the 100-odd ACS questions can be as high as $500,000. *National Urban League v. Ross*, 489 F. Supp. 3d 939, 975 (N.D. Cal. 2020).

035. The Bureau also directed Mr. Huddleston to peruse the Bureau's website, ER-135, where the Bureau informed him that the ACS is "mandatory" and he could be fined $5,000 per question for refusing to answer the ACS. ER-086–ER-087. Mr. Huddleston understood the Bureau's writings to be "a clear threat, a command." ER-035.

Mr. Huddleston refused to give the Bureau any personal information other than the ten-year Census. ER-035. He maintains that the Bureau should not force him to give up his "constitutional rights to privacy and to remain silent." ER-035.

C. Individuals Who Refuse to Answer the ACS

Others submitted sworn affidavits stating that they refused, and if asked again in the future, will not answer the ACS questions. ER-019–ER-033.

Everyone who refuses to answer the ACS can be called upon by the Census Bureau once every five years to answer the ACS. ER-086 ("no address should be selected more than once every five years"). The statute of limitations for the DOJ to criminally prosecute Murphy, Huddleston, or anybody else who refuses to answer the ACS is five years. 18 U.S.C. § 3282. They all have an interest in enjoining the Census Bureau from forwarding their names to DOJ for prosecution. And they all have an interest in ensuring the Bureau does not in the future (other than the decennial census) attempt such a warrantless gathering of their personal information.

D. Defendants' Admissions

The Bureau admits, "the Census Bureau is not a law enforcement agency." ER-043. It admits that "the decision to prosecute a non-responding household would be at the discretion of the DOJ." *Id.* So, after it fails to obtain answers to the ACS, the Bureau "close[s] out" the non-responsive addresses. ER-045. That is, the "clos[ure]" of the Bureau's information-gathering process for each shortlisted ACS respondent, ER-042–ER-043, ER-045, marks the "consummation" of agency action against those who refuse to answer the ACS. *Sackett v. EPA*, 566 U.S. 120, 127 (2012). The Bureau admits that it has taken any and all actions it could have taken against Ms. Murphy and Mr. Huddleston: the Bureau, under its "standard process," "closed out both Plaintiffs' addresses." ER-045.

Defendants have stated on their website,[4] in an FAQ-style brochure,[5] and in guidance documents[6] that answering the ACS is mandated by law and refusal to answer the ACS is punishable by criminal fines—Defendants have relied on and interpreted 13 U.S.C. §§ 141, 193, 221, and 18 U.S.C. §§ 3559, 3571, to so conclude.

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[4] https://perma.cc/RWG3-TR77.

[5] ER-086–ER-087.

[6] ER-117–ER-122; IRS Technical Assistance Memorandum, TAM CC-TAM-PMTA-00063, 1995 WL 17844611 (undated document).

Defendants randomly select one out of 480 households each month to answer the ACS, or about 3.5 million persons every year.[7] The purpose of ACS is to provide "demographic, social, economic, and housing estimates" "needed to assess a variety of programs," ER-086, so that government entities, nongovernmental organizations, and businesses can "distribute resources," ER-111.

The Bureau endeavors to fulfill these goals without congressional approval, justified only by questionable historical inertia, under self-proclaimed authority to issue a general warrant to search and seize everyone's personal information, and by invading people's fundamental rights to speech and privacy. ER-062–ER-080. The means do not justify the end.

E. The District Court's Decision

Plaintiffs filed a motion for class certification. ER-006. And the parties filed cross-motions for summary judgment, ER-005, without undergoing discovery, ER-049.

Despite specific evidence of in-person and written threats that Murphy, Huddleston, and others showed in sworn affidavits (which is "taken to be true," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), and which remains uncontroverted by Defendants), despite the admission by Defendants that all actions they could have taken against

[7] ER-041; American Community Survey Information Guide, https://bit.ly/3rQ8c9S, at 1, 6.

Plaintiffs have been taken, ER-045, and despite the fact that the Defendants have been given only specific enforcement power, which they admittedly completed exercising against Plaintiffs, ER-045, the court, without explanation, categorized Plaintiffs' suit as a pre-enforcement challenge. ER-009.

Laboring under that assumption, the court went on to apply the three-factor *Thomas* test for constitutional ripeness. ER-009; *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134, 1139 (9th Cir. 2000) (*en banc*). The first factor—whether the plaintiff has articulated a concrete plan to violate the law in question—"is satisfied here," the court correctly concluded, because Murphy and Huddleston violated 13 U.S.C. § 221(a) when they "refused to complete the ACS." ER-009–ER-010. The court also correctly noted that "[t]he parties do not dispute the first *Thomas* factor." ER-010.

As to the second factor—whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings—the court concluded that the "Bureau and its agents never subjected Plaintiffs to a specific threat of enforcement." ER-010. Using "enforcement" and "prosecution" interchangeably, the court agreed with Defendants that "Plaintiffs are not subject to a genuine threat of prosecution." ER-011. But "enforcement," ER-010, "prosecution," *id.*, and "a specific warning or threat to initiate proceedings," *Thomas*, 220 F.3d at 1139, are vastly different legal concepts, and whether the

government's communication constitutes a "threat" and the nature of that threat are legal questions that should take into account the sworn, undisputed fact of Defendants threatening Plaintiffs. No matter, the court below concluded the Plaintiffs failed to meet the second *Thomas* factor because there is "no specific threat that the Census Bureau or the DOJ intends to prosecute the Plaintiffs." ER-013.

As to the third *Thomas* factor—"history of past prosecution or enforcement," 220 F.3d at 1139—the district court once again conflated "prosecution" with "enforcement," ER-013, and concluded Plaintiffs do not meet this factor. ER-013–ER-014.[8] With two of the three *Thomas* factors resolved against Plaintiffs, the court concluded that Plaintiffs have not met the constitutional component of the ripeness doctrine. ER-015.

The court then addressed the prudential component of ripeness. ER-015. Operating under the same assumption that Plaintiffs' suit is a "preenforcement challenge," ER-015, the court concluded that Murphy and Huddleston presented a "generalized grievance," ER-016. The court concluded that Murphy and Huddleston have not shown their claims are "fit for judicial resolution." ER-016. According to the court, "Plaintiffs have not established they will suffer significant hardship if [the court] withholds a decision on their claims." ER-016.

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[8] The court also rejected other injuries, including "economic injuries," that the Plaintiffs alleged as grounds to show ripeness. ER-014–ER-015.

In sum, the court decided that "in an effort to avoid issuing an unconstitutional advisory opinion, … Plaintiffs' claims are not ripe for resolution at this time." ER-017.

The court also denied as moot Plaintiffs' motion for class certification without explanation, presumably because of its conclusion that Plaintiffs' claims are unripe. ER-017.

Judgment was issued on the same day as the court's order. ER-018.

The district court's mistaken assumptions and category errors merit reversal. Plaintiffs' case is not a pre-enforcement challenge. They sued after Defendants completed taking all actions they could under operative statutes. Plaintiffs have an interest in enjoining the Census Bureau from forwarding their names to DOJ for criminal prosecution until the five-year statute of limitations expires, 18 U.S.C. § 3282. And they have an interest in enjoining the Census Bureau from requiring them to answer the ACS in the future, which the Defendants can do once every five years.

This Court should reverse, because Plaintiffs' claims are ripe for review, and remand to the district court to (1) rule on the class-certification motion and (2) determine the merits.

STANDARD OF REVIEW

"Standing and ripeness, like the doctrine of mootness, predominantly present questions of law that we review de novo." *Wolfson v. Brammer*, 616 F.3d 1045, 1053 (9th Cir. 2010). "The party invoking

federal jurisdiction," that is, Plaintiffs here, "bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561. At summary judgment, Plaintiffs "must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true." *Id.* (simplified).

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FRCP 56(a). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

SUMMARY OF THE ARGUMENT

The Census Bureau only ever had enforcement power that it could—and did—exercise against Maureen Murphy and John Huddleston. The Bureau has no adjudicative or prosecution power. It has the enforcement power to "obtain," 13 U.S.C. § 141(a), and "collect," 13 U.S.C. § 193, personal information "[i]n connection with" the ten-year census, 13 U.S.C. § 141(a), but it does not have the prosecution power to institute criminal proceedings against those who refuse to answer the American Community Survey.

Murphy and Huddleston sued after the Bureau took all possible enforcement actions it could take against the Plaintiffs. But the district court categorized this *post-enforcement* suit as a "pre-enforcement"

challenge to agency action and dismissed it as unripe. ER-009, ER-015. That constitutes reversible error.

Sackett v. EPA, 566 U.S. 120 (2012) (*Sackett I*) informs the analysis the Court should employ in evaluating ripeness. *See* Part I(A) *infra.* The Bureau points to the DOJ's prosecution power to claim that the suit should be categorized as pre-enforcement as to the Bureau, but the difference between "prosecution" and "enforcement" powers clarifies the vacuousness of the Bureau's assertion. *See* Part I(B) *infra*. As Plaintiffs show below, prosecution and enforcement are separate and distinct powers. *See* Part I(C) *infra*; *Thomas*, 220 F.3d at 1139. A simple application of *Sackett I* keeps the constitutional ripeness analysis grounded in the Constitution's separation of powers, and in 28 U.S.C. § 1331 and 5 U.S.C. § 702. *See* Part I(D) *infra*.

The *Thomas* test on which the Bureau and the court below principally rely does not apply given the post-enforcement nature of this suit. *See* Part II(A) *infra*. But if it does, Murphy and Huddleston satisfy that constitutional ripeness test. *See* Part II(B) *infra*. Plaintiffs also satisfy the fitness-and-hardship prudential ripeness test, should the Court feel the need to address prudential ripeness. *See* Part III *infra*.

The Court should reverse the district court's decision and remand for the district court to rule on the Plaintiffs' class-certification motion and reach the merits.

ARGUMENT

I. The Bureau's Enforcement Power

The Bureau fully exercised against Plaintiffs the only power it could—enforcement power.[9] The Bureau has *no* adjudicative, and *no* prosecution authority. The Bureau cannot conduct in-house adjudication of refusal-to-answer cases. It does not file original actions in federal court to prosecute criminally or civilly those who refuse to answer the ACS or any other survey—that authority lies solely in the hands of the DOJ, ER-043, which is not a party to this case, and whose exercise of prosecutorial discretion is neither relevant nor at issue here.

The power at issue here is the Bureau's *enforcement* power. As shown below, Murphy and Huddleston sued *after* the Bureau completed taking all possible enforcement actions it could take against Murphy and Huddleston.

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[9] The Bureau has rulemaking power, 13 U.S.C. § 4, but this case is not a challenge to a rulemaking, nor has the Bureau exercised rulemaking power with respect to requiring Plaintiffs to answer the ACS. The Bureau has used the rulemaking power given to it by 13 U.S.C. § 4 to issue notice-and-comment rules not relevant in this case. *See, e.g.*, 78 Fed. Reg. 255 (Jan. 3, 2013) (rule regarding population estimates challenge program); 83 Fed. Reg. 5525 (Feb. 8, 2018) (2020 Census Residence Criteria).

The Bureau has the power to "prepare questionnaires" under 13 U.S.C. § 5, and it has done so. It has prepared the ACS questionnaire and hundreds of other surveys. But the Bureau has never engaged in notice-and-comment or formal rulemaking to issue rules relating to the ACS.

But the court below categorized this *post-enforcement* suit as a *pre-enforcement* challenge to agency action. ER-009, ER-015. The category error finds no mooring in the operative statutes; the court did not even pause to explain why it is categorizing the case thusly. The decision should therefore be reversed.

A. Defendants Took All Actions They Could Against Plaintiffs

Plaintiffs sued after Defendants finished acting against Plaintiffs. That makes the case ripe for review. The Census Bureau has already enforced the operative statutes (13 U.S.C. §§ 141, 193, 221; 18 U.S.C. § 3559, 3571) against Plaintiffs to the extent possible. As shown below, that makes this case a post-enforcement case.

Given the post-enforcement nature of this case, *Sackett I* is instructive and resolves the constitutional ripeness question in Plaintiffs' favor. Defendants' communications determined rights or obligations, legal consequences flow from them, the letters and in-person visits mark the consummation of the agency's decisionmaking process, and there is no further agency review or reconsideration possible.

- Defendants' communications to Plaintiffs, especially the mailing of multiple letters to the Plaintiffs, "determined rights or obligations," 566 U.S. at 126 (simplified). Upon receipt, Plaintiffs are "required by law," ER-082, ER-115, ER-134, to answer the ACS or else they face up to $5,000 in fines.

- "By reason of" these communications, Plaintiffs "have the legal obligation" to answer the ACS, which they willfully violated by refusing to answer the survey questions. 566 U.S. at 126.
- "Legal consequences flow," *id.* (simplified), from Defendants' communications—"according to the Government's current litigating position," refusing to answer the ACS "exposes [Plaintiffs] to … penalties in a future enforcement proceeding." *Id.*
- The in-person and written communications from the Bureau to Plaintiffs "marks the consummation of the Agency's decisionmaking process"; the letters saying Plaintiffs are "required by law" to answer the ACS "[a]re not subject to further Agency review." *Id.* at 127.
- Like the letter at issue in *Sackett*, the Bureau's letters contain language "invit[ing Murphy and Huddleston] to engage in informal discussions." *Id.* at 127 (simplified); ER-082 (handwritten "please call me"); ER-084 ("If you have further concerns or questions call … . For additional information about the [ACS] visit our website … ."); ER-134 ("If you … have questions, please call … ."). But "that confers no entitlement to further Agency review." 566 U.S. at 127. In fact, no such further review is possible because the Bureau, unlike the EPA, does not conduct in-house adjudications, nor does it have the power to commence criminal prosecution.

- There is no mechanism for the Bureau to "reconsider in light of informal discussion," *id.*, that Murphy and Huddleston have violated the law by refusing to answer the ACS.
- Murphy and Huddleston "cannot initiate th[e] process" of paying a $100 fine or commence a federal criminal action against themselves. *Id.* "Each day they wait for the Agency to drop the hammer, they accrue, by the Government's telling, [monetary] liability." *Id.*
- "The other possible route to judicial review"—waiting for DOJ to bring criminal charges against them, and the "remedy" of dismissal of a DOJ-initiated criminal action—"does not … provide an adequate remedy for action already taken by [the Census Bureau]." *Id.* (simplified).

A *post-enforcement* challenge like *Sackett I* cannot, by definition, be a *pre-enforcement* challenge. Murphy and Huddleston admitted they violated 13 U.S.C. § 221(a), and the Bureau neither disputes that admission, nor disavows the possibility of future criminal prosecution within the five-year statute of limitations, 18 U.S.C. § 3282, nor a future demand to answer ACS questions once every five years, ER-086.

Reversal and remand are appropriate for this reason alone.

B. Plaintiffs' Case Is a Post-Enforcement Challenge

Lest there be any doubt about the post-enforcement nature of this case, considering the differences between "enforcement" and

"prosecution" sheds light on the question. Even if the concepts "enforcement" and "prosecution" can sometimes overlap, there are some notable differences between the two that are dispositive here.

"Enforce" simply means "[t]o give force or effect to (a law, etc.); to compel obedience to." *Black's Law Dictionary* 668 (11th ed. 2019). And "enforcement" means "[t]he act or process of compelling compliance with a law, mandate, command, or agreement." *Id.* at 669. Defendants *enforced* 13 U.S.C. §§ 141, 193, 221 by ordering Murphy and Huddleston to answer the ACS. Defendants *enforced* the law when they told Murphy and Huddleston that their response is "required by law." ER-082, ER-115, ER-134. Defendants "compel[ed] compliance," *Black's Law Dictionary* at 669, by informing Murphy and Huddleston that failure to respond subjects them to criminal fines. Murphy and Huddleston sued *after* Defendants took these enforcement actions against them. That makes this a *post-enforcement* challenge.

"Prosecute," on the other hand, means, "[t]o institute and pursue a criminal action against (a person)." *Id.* at 1476. And "prosecution" means "[a] criminal proceeding in which an accused person is tried." *Id.* Neither the Department of Commerce nor the Census Bureau claims any power to prosecute Murphy and Huddleston. That discretionary power lies in the hands of the Department of Justice.

The statutes conferring federal-question jurisdiction on district courts do not require plaintiffs to bring only post-enforcement or post-

prosecution claims. *Cf. Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 208 (1994) (discussing "preenforcement and postenforcement challenges"). To the contrary, the general statute, 28 U.S.C. § 1331 (italics added), confers subject-matter jurisdiction on district courts in "*all* civil actions arising under the Constitution, laws, or treaties of the United States." And 5 U.S.C. § 702 states simply that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Murphy and Huddleston's civil action against the Bureau arises under the Constitution and laws of the United States, 28 U.S.C. § 1331, and they are suffering legal wrong because of agency action, 5 U.S.C. § 702. So their claims are entitled to judicial review. These statutes faithfully implement Article III's case-or-controversy requirement.

Thus, conflating prosecution with enforcement is a fundamental category error that the court below committed. And the court offered no reasoned explanation to support that assumption. *Pre-prosecution* is very different from *pre-enforcement*. This Court should say so and reverse.

C. Prosecution and Enforcement Are Separate and Distinct

On "jurisdictional" questions such as ripeness, the Supreme Court has cautioned federal courts against employing "terminology" that is "less than meticulous." *Fort Bend Cnty., Tex. v. Davis*, 139 S. Ct. 1843, 1848 n.4 (2019). Conflating enforcement with prosecution led the court

below to issue the type of "drive-by jurisdictional rulin[g]" that the Supreme Court has worked hard to avoid. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006). Courts have sometimes conflated prosecution with enforcement. Clarification from this Court is necessary—and that clarity should resolve this case.

To be sure, portions of *Thomas*, an en banc decision of this Court, conflate prosecution with enforcement. But while court opinions are not to be read as statutes, language in *Thomas* itself shows that enforcement and prosecution are separate and distinct powers of administrative agencies. For example, in *Thomas*, the relevant agencies had not "initiated an *investigation*," not "commenced a civil *enforcement* action or criminal *prosecution*," and "no enforcement action or prosecution [wa]s either threatened or imminent." 220 F.3d at 1137 (italics added). Thus, because "a generalized threat of *prosecution*" does not satisfy the case-or-controversy requirement, *Thomas* articulated the three-factor test to "evaluat[e] the genuineness of a claimed threat of *prosecution*." *Id.* at 1139 (italics added). And the three-factor test itself shows the specific sense in which the Court referred to "prosecution" by drawing a distinction between "prosecution" on the one hand to denote court proceedings, and on the other hand "enforcement" to denote the use or application of the challenged statute against complaining parties: "whether the *prosecuting authorities* have communicated a specific

warning or threat to *initiate proceedings*," and "the history of past prosecution *or* enforcement." *Id.* (italics added).

Here, the Defendants are not the "prosecuting authorit[y]"; the DOJ is. *Id.* The Bureau has completed enforcing the challenged statutes against Plaintiffs, and there is a robust history of past "*enforcement* of the challenged statute" by the Bureau against millions of Americans each year. *Id.* (italics added).

It is easy to explain why *Thomas* does not clarify this point. The landlord plaintiffs in *Thomas* did not distinguish enforcement from prosecution. The defense had no incentive to call the question to the Court's attention. And the *Thomas* Court did not deem it necessary to address the differences between those two types of agency authority. Since the issue was "not … raised in briefs or argument nor discussed in the opinion of the Court," *Thomas* cannot be viewed as a "binding precedent on this point." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). In other words, *Thomas* has "no precedential effect" with respect to arguments "neither challenged nor discussed in that case." *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996). It remains an open question that a three-judge panel can and should address because the en banc Court did not address it in *Thomas*.

Also, even if the parties or the Court sua sponte had addressed the issue, such clarification would have been neither relevant nor outcome-determinative in *Thomas*. It is here. In *Thomas*, the same defendant (the

Alaska Commission for Human Rights, 220 F.3d at 1137) had the power to enforce, commence prosecution, and adjudicate challenges brought under the operative statutes. *See* Alaska Stat. §§ 18.80.010–18.80.300. Not so here. The Bureau has only ever *enforced* the operative Census Act provisions against Plaintiffs or anybody else. It has no authority to *prosecute* (that authority belongs to the DOJ), and it has no authority to adjudicate disputes in-house or file federal-court actions against those refusing to answer the ACS. So, the distinction between enforcement and prosecution is important and outcome-determinative here in ways it never was in *Thomas*. That makes *Thomas* neither definitive nor precedential on the question at issue here.

It was plain error for the court below to categorize this case as a pre-enforcement challenge. That error requires reversal. Clarification from this Court on the point is necessary to resolve this case. The narrow scope of authority (enforcement but not prosecution) given by Congress to the Census Bureau and the Department of Commerce is rather unique. Some agencies are given both (e.g., the Securities and Exchange Commission has enforcement and prosecution authority), and sometimes two agencies are given the same prosecution power (e.g., Federal Trade Commission and DOJ can both commence specific categories of proceedings). But Defendants here have only ever been given enforcement power (and rulemaking power that is not at issue here), which they have finished exercising against Plaintiffs. The Court should

account for the practical implications of that plain and perhaps unique feature of the scope of agency power and determine that the claims in this case are ripe for judicial review.

D. Plaintiffs Suffered Legal Wrong Because of Agency Action

Yet another reason shows why this case is ripe for review. Maureen Murphy and John Huddleston are "entitled to judicial review" because they are "person[s] suffering legal wrong because of agency action" and they are "adversely affected or aggrieved by agency action." 5 U.S.C. § 702. The Administrative Procedure Act broadly defines "agency action." 5 U.S.C. §§ 551(13), 701(2). And Defendants do not suggest that the actions they did take against Murphy and Huddleston are *not* "agency action" within the meaning of APA Section 702.

Defendants sent correspondence, their agents showed up at Ms. Murphy's home to demand answers to the ACS, and language on Defendants' website clearly and plainly states that Plaintiffs are subject to thousands of dollars in fines if they do not answer the ACS. Murphy and Huddleston suffered legal wrongs because of agency action.

They also suffered the kind of "here-and-now injury" the Supreme Court has held "can be remedied by a court" without regard to eventual prosecution or the eventual outcome of such prosecution. *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2196 (2020). Murphy and Huddleston seek to avoid answering the ACS now and in the future; they seek to estop the Bureau from prosecuting them for refusing

to answer the ACS now and in the future; they seek to opt out of answering the ACS now and in the future. The legal wrongs Murphy and Huddleston suffered because of agency action can be remedied by federal courts by awarding declaratory and injunctive relief.

What is "agency action" that is subject to "judicial review," 5 U.S.C. § 702, is a legal question that this Court decides *de novo*. Because of the uniquely narrow scope of agency actions the Bureau can take, the Court should evaluate whether the actions Defendants took against Plaintiffs is "agency action" subject to "judicial review." If they are, then the case is ripe for review, and no excursion into the minutiae of the ripeness test(s) is necessary.

Instead, the Court should simply apply *Sackett I*, 566 U.S. 120. There, as here, the agency has "consummat[ed]" action against Plaintiffs. *Id.* at 127. That constitutes final agency action under the APA that has all the "hallmarks of APA finality," *id.* at 126, that is subject to judicial review. Nothing in the Census Act "precluded judicial review," *id.* at 128, and "there is no adequate remedy other than APA review," *id.* at 131. So, there is no impediment to the district court hearing this case. Under a straightforward APA judicial-review analysis, *Department of Commerce v. New York*, 139 S. Ct. 2551, 2556 (2019), concluded that the Bureau's decision to ask a particular question to millions of people is reviewable under the APA. So too here; the ability and decision of the Bureau to ask close to one hundred highly intrusive and personal questions to millions

of people is likewise subject to judicial review under the APA. The court below erred in concluding otherwise. That is reversible error.

II. The *Thomas* Test

A. The *Thomas* Test Does Not Apply

Given the post-enforcement nature of this suit, the *Thomas* test does not even come into play. In *San Luis & Delta-Mendota Water Authority v. Salazar*, 638 F.3d 1163, 1173 (9th Cir. 2011), this Court concluded that "the familiar pre-enforcement analysis articulated in *Thomas* does not apply" because the *San Luis* plaintiffs were "unlike plaintiffs in most pre-enforcement cases." *Id. San Luis* concluded that the plaintiffs' claims there were ripe for review. *Id.* at 1173. First, the *San Luis* plaintiffs were "not the target of enforcement," so it made little if any sense to evaluate whether the plaintiffs "articulated a concrete plan to violate the law in question" (the first *Thomas* factor). *Id.* And second, the *San Luis* plaintiffs "would not be injured if the challenged statute [were] enforced" against somebody else. *Id.* The *San Luis* plaintiffs' "injury derive[d] from the [agency's] coercive power to enforce [the operative statute], not enforcement itself." *Id.*

"These differences [we]re important" to the *San Luis* Court. *Id.* As a result, *San Luis* "d[id] not apply" "the familiar pre-enforcement analysis articulated in *Thomas*." *Id.* It instead applied "the more general ripeness standard the Supreme Court first articulated in *Abbott Laboratories v. Gardner*, [387 U.S. 136 (1967)]." 638 F.3d at 1173.

So here as well. Murphy and Huddleston have already violated the law—they are well past any "concrete plan to violate the law." *Id.* And their "injury derives from the [Census Bureau's] coercive power to *enforce* [13 U.S.C. §§ 141, 193, 221]," *id.* (italics added)—a power the Census Bureau has fully exercised against Murphy and Huddleston. This case is well beyond any "threat" of enforcement; enforcement has already occurred. *Thomas*, 220 F.3d at 1139. Given the nature of the power the Bureau can and has exercised, it makes little if any sense to apply *Thomas* factors that were designed to probe the "genuineness of a claimed threat of prosecution," *id.*, to an agency that has no power to prosecute. In *San Luis* as here, "[t]hese difference are important" and, consequently, the *Thomas* test "does not apply." 638 F.3d at 1173.

Even if one were to assume that the "coercive power to enforce" that the Court discussed in *San Luis* involved the power to *prosecute* the *San Luis* plaintiffs, here the Defendants do not have the panoptic rulemaking and adjudicative and prosecution authorities as the agencies sued in *San Luis* and *Thomas* had. The Bureau only has the power to "obtain," 13 U.S.C. § 141(a), and "collect," 13 U.S.C. § 193, personal information; it does not have the power to obtain or collect personal information under compulsion. So, again, it makes little if any sense to apply the *Thomas* factors that are designed for a markedly different scenario. Murphy and Huddleston are not like the plaintiffs one typically sees in true pre-enforcement cases where the *Thomas* test applies—in contrast, Murphy

and Huddleston openly admit to violating the law. And the Census Bureau and the Department of Commerce are not like the typical defendant agencies with enforcement plus prosecutorial powers that one sees in pre-enforcement cases. These differences make *Thomas* doubly inapplicable here.

Another reason *Thomas* is ill-suited to the circumstances of this case is that *Thomas* is an offshoot of *Younger* abstention. *See Thomas*, 220 F.3d at 1140 (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)). *Younger* abstention protects federalism by requiring federal courts to abstain in cases challenging the constitutionality of *state* statutes to leave states free from federal interference with state criminal prosecutions. That concern is irrelevant in cases like this one where federal enforcement of federal statutes by federal agencies and agents against Murphy and Huddleston has already taken place. *Thomas* itself involved a challenge to *state* and *city* housing-discrimination ordinances by landlord plaintiffs who had every intention of violating the state or local law except that the intent would not come to fruition until an unmarried couple applied to rent their properties to then prompt the landlord plaintiffs to refuse to rent to such couples. Here, Murphy and Huddleston not only have every intent to refuse to answer the ACS in the future but they have already violated 13 U.S.C. § 221(a) by not answering the ACS. That should suffice to make *Thomas* inapplicable to the situation presented in this case.

The court below committed reversible error when it applied an inapplicable and ill-suited test to evaluate the ripeness of Murphy and Huddleston's suit against the Bureau. The applicable test is the "general ripeness standard" as established by the Supreme Court. *San Luis*, 638 F.3d at 1173. This Court can and should reverse the decision below because *Thomas* does not apply and the Plaintiffs satisfy the general ripeness standard.

B. If the *Thomas* Test Applies, Plaintiffs Satisfy It

If the Court is still inclined to apply the three *Thomas* factors to the unique circumstances of this case, then Murphy and Huddleston submit they satisfy the test. This Court designed the *Thomas* factors to evaluate the "genuineness of a claimed threat of prosecution." 220 F.3d at 1139. For the *Thomas* test to apply, this Court must first conclude that "enforcement" and "prosecution" are interchangeable concepts. They are not, and that difference is important in this case, as explained above. But if those concepts are interchangeable, the Court must then evaluate three factors: (1) "whether the plaintiffs have articulated a concrete plan to violate the law in question," (2) "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings," and (3) "the history of past prosecution or enforcement under the challenged statute." *Id.*

The first factor, without dispute, goes in Murphy and Huddleston's favor—Defendants did not dispute that factor below, and the district

court correctly concluded that Plaintiffs satisfied that factor because they have already violated the law. ER-010.

Murphy and Huddleston also satisfy the second factor, "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings." 220 F.3d at 1139. Defendants communicated these "specific[s]":

- The ACS is "mandatory," ER-086, ER-119,
- "[R]esponse to t[he American Community S]urvey is required by law," ER-035, ER-134,
- "[P]ersons who do not respond *shall be* fined not more than $100" under 13 U.S.C. § 221(a), ER-087 (italics added),
- Anyone who "refuses or willfully neglects to complete" the ACS "or answer questions posed by census takers" shall be fined "not more than $5,000," under 18 U.S.C. §§ 3571, 3559, ER-087, and
- "[F]ailure to answer questions on any survey conducted by the Bureau" "subjects recipients of a survey to monetary penalties for failure to answer questions," ER-119.

These specifics are a "warning or threat" that the Defendants communicated to Plaintiffs. "Threat" simply means "[a] communicated intent to inflict harm or loss on another or on another's property, esp. one that might diminish a person's freedom to act voluntarily or with lawful consent." *Black's Law Dictionary* at 1783. As a legal matter, the specific warnings bulleted above constitute a threat—they communicate an

"intent to inflict" monetary harm or loss on Plaintiffs. Communicating an intent to inflict harm does not require actually intending to inflict the threatened harm or actually inflicting that harm; otherwise, inchoate offenses or conspiracies to commit offenses would not be cognizable as crimes. Similarly, a federal agency does not have to commence a criminal case to complete threatening a person that bad legal consequences will follow should the person not do the federal agent's bidding. The Bureau plainly communicated to Murphy and Huddleston more than one specific "warning or threat to initiate proceedings." 220 F.3d at 1139.

Also, Plaintiffs understood these warnings to be threats. ER-035, ER-037. Defendants issued not one but *three* written warnings to Ms. Murphy. ER-082, ER-084, ER-110–ER-115. Defendants' agent showed up not once but *three* times, at odd hours, one time camping at her doorstep for 30 minutes. ER-037. Defendants do not dispute that a federal agent with a federal badge banging Ms. Murphy's door at night and remaining stationed at her front door for half an hour is inherently and specifically threatening behavior. Defendants issued *five* written threats to Brenda Hiniker and her husband and called each of them several times. ER-033. And Defendants issued *four* official written threats to John Lawton. ER-028–ER-029. Defendants admit that this conduct is consistent with Defendants' customary practices, ER-042, ER-044, thereby admitting to a robust history of communicating specific warnings and threats to millions of Americans every year. These indicia

are more than sufficient for the Court to conclude that Plaintiffs meet the second *Thomas* factor.

Another perspective on the second *Thomas* factor is salient. Defendants did not merely communicate "a specific warning or threat to initiate proceedings." 220 F.3d at 1139. They initiated—and then completed—proceedings against Plaintiffs. From the universe of "proceedings," *id.*, the Bureau is statutorily authorized to commence against Plaintiffs, the Defendants completed or exhausted all possible actions they could take against Plaintiffs. The circumstances here are thus well beyond a mere "threat to initiate proceedings." That threat was made and followed through. The second *Thomas* factor is therefore met.

Murphy and Huddleston also easily meet the third *Thomas* factor, "the history of past prosecution or enforcement under the challenged statute." 220 F.3d at 1139. Defendants admit to a full decades-long history, starting in at least 2005, ER-040, ER-043–ER-044, of enforcing the Census Act by conducting the ACS using coercive methods described throughout this brief.

The third *Thomas* factor requires either history of past "prosecution *or* enforcement." 220 F.3d at 1139 (italics added). The third factor, therefore, acknowledges the inherent differences between the two concepts of prosecution and enforcement. The Defendants themselves are careful in distinguishing "enforcement" from "prosecution." The "Daily Declaration" Defendants submitted uses "prosecution" in the sense

defined in the *Black's Law Dictionary* ("[t]o institute and pursue a criminal action against (a person)," *id.* at 1476) when it notes that "[t]he decision on whether to prosecute the failure to respond to the ACS would be made by the DOJ." ER-045. Thus, given the vast history of enforcement of the Census Act by the Defendants against Murphy, Huddleston, and millions of other persons, the third *Thomas* factor is easily satisfied.

This Court has held that where, as here, the governmental defendant "refus[es] to disavow enforcement," that is "strong evidence" that the governmental defendant "intends to enforce the law and that [Plaintiffs] face a credible threat." *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 653 (9th Cir. 2021). This Court has also held that there is sufficient intent to enforce a law when the governmental defendant "sent letters to businesses notifying them" of its interpretation of the law. *Arizona v. Yellen*, 34 F.4th 841, 850 (9th Cir. 2022). Multiple letters and multiple personal visits of Defendants' agents to Plaintiffs' homes form a far stronger showing of intent to enforce than was present in *California Trucking* where the mere sending of letters with a failure to disavow enforcement satisfied *Thomas*.

Where criminal provisions are at issue—as Defendants admit they are here—the third *Thomas* factor favors concluding the case is ripe. In *Babbitt v. United Farm Works National Union*, 442 U.S. 289 (1979), the governmental litigant argued that the criminal penalties had never been

applied, so the case was not ripe. *Id.* at 301–02. The Supreme Court rejected that argument. There, as here, "to avoid criminal prosecution, [Plaintiffs] must curtail their [rights], and thus forgo full exercise of what they insist are their First Amendment rights" to remain silent, fundamental constitutional right to privacy, and the right not to divulge details of their and their loved ones' personal lives to the government without a warrant or probable cause. *Id.* at 301. The parties in *Babbitt* thus were "sufficiently adverse" due to the governmental litigant's failure to "disavo[w] any intention of invoking the criminal penalty provision." *Id.* at 302; *Arizona v. Yellen*, 34 F.4th at 850 (same). Defendants here refuse to take future enforcement or prosecution off the table. Indeed, they cannot make such a commitment because prosecution decisions are up to the DOJ, which, despite representing the Bureau in this case, did not produce any affidavit agreeing not to prosecute respondents that refuse to answer the ACS. ER-043.

In fact, when the ACS was called the "long form," at least five people were criminally prosecuted for refusing to answer it. ER-045. And Defendants admit they can and do *enforce* the mandatory ACS against thousands of people, including Plaintiffs, once every five years when they tell ACS recipients that they are "required by law" to answer the survey. Defendants, far from disavowing prosecution, used the possibility of prosecution as a threat, a Sword of Damocles to obtain answers to the ACS from Plaintiffs. For the next five years until the statute of

limitations runs, they face the ever-present peril of DOJ prosecution, or the prospect of another round of the Bureau's agents harassing them through letters and in-person visits to fill out this or some other survey under the guise that they are "required by law" to abandon their personal and private details to the government.

In sum, Plaintiffs satisfy all three *Thomas* factors. The court below erred when it concluded that Plaintiffs failed to satisfy the second and third *Thomas* factors. This Court should reverse for that reason.

III. The Fitness-and-Hardship Ripeness Test

As explained above, Plaintiffs satisfy the constitutional ripeness test. Murphy and Huddleston's injury is not "conjectural or hypothetical," *Lujan*, 504 U.S. at 560, and a ruling in their favor can give them meaningful relief. Their injury "is being subjected to a law that requires or encourages [them] to" give federal agents information about themselves and their loved ones against their will, to speak when they wish to remain silent, and permit the federal government to invade their private affairs without cause. *Meland v. Weber*, 2 F.4th 838, 849 (9th Cir. 2021). That injury is "ongoing" because Murphy and Huddleston have a continuing obligation to fill out the ACS, they have a continuing obligation to answer the ACS once every five years, the Bureau has neither disavowed prosecution, nor categorically confirmed that it will not forward Murphy or Huddleston's names to the DOJ for prosecution within the five-year statute of limitation, 18 U.S.C. § 3282, nor do

Murphy and Huddleston have any mechanism to opt out from filling out the Bureau's surveys. That makes this case ripe. *Meland*, 2 F.4th at 849.

If the constitutional ripeness test is met (as it is here), that should be the end of the matter for that is a necessary and sufficient basis for reversing the ripeness decision below. But if the Court feels compelled to also evaluate the prudential ripeness test, Plaintiffs pass that test as well.

Susan B. Anthony noted that the prudential ripeness test "is in some tension with our recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (simplified). But *Susan B. Anthony* did "not resolve the continuing vitality of the prudential ripeness doctrine … because the fitness and hardship factors are easily satisfied here." *Id.* (simplified).

So too here. Murphy and Huddleston satisfy the fitness-and-hardship test. Their claims present issues that are "purely legal, and will not be clarified by further factual development." *Id.* (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985)). And denying judicial review "would impose" hardship on Murphy and Huddleston, "forcing them to choose between refraining from" exercising their rights to remain silent and keep their personal information from compelled disclosure to the government on the one hand, or exercising

those rights and thereby becoming a federal criminal for violating 13 U.S.C. § 221(a) and 18 U.S.C. §§ 3571, 3559.

Defendants downplay their letters and in-person visits of their agents to Plaintiffs' homes. Any letter issued on official federal-agency letterhead that instructs the recipient that they are "required by law" to do something brings the federal agency's heft and power to bear on the recipient. Be it an IRS letter,[10] a letter from the Social Security Administration, a letter informing a person that they might be called for jury duty, a letter from EPA informing a landowner that the damp land on their parcel of property is a navigable water of the United States (*see Sackett I*), or a letter from the Census Bureau, they all carry the inherent imprimatur of official action. And all such letters are issued with the legal backdrop of some federal statute (like 13 U.S.C. § 221) that denotes varying degrees of legal consequences—fines, penalties, punishment, or loss of benefits, loss of right to appeal, etc.—that would come to bear on the person for not complying with the instructions given in the official government correspondence. And precisely because everyone knows they are *required* to answer the decennial census conducted by the Census Bureau, any letter the Bureau sends saying that the recipient is

[10] *See Harper v. Rettig*, 46 F.4th 1, 4 (1st Cir. 2022) (holding the district court has jurisdiction to determine the merits in a challenge brought after the plaintiff "received a letter from the IRS … warn[ing plaintiff] that he could face civil or criminal enforcement action if he failed to accurately report his virtual currency transactions").

"required by law" to answer this other survey called the ACS carries with it that unmistakable "or else." It is reasonable for people like Murphy and Huddleston, therefore, to take the Bureau's letter seriously. In fact, the Bureau wants people to take their letters seriously because otherwise, as they admit, many thousands will exercise their rights to speech and privacy by refusing to answer the ACS. ER-043–ER-044. Murphy and Huddleston meet the fitness-and-hardship test because Defendants plainly threatened Plaintiffs.

Since our nation's founding, privacy has been a legally protected interest at the local, state, and federal levels. "Privacy rights have long been regarded as providing a basis for a lawsuit in English and American courts." *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1271–72 (9th Cir. 2019) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)) (simplified). And "[v]iolations of the right to privacy have long been actionable at common law." *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 983 (9th Cir. 2017). Murphy, Huddleston, and thousands of Americans get letters and knocks on their doors by federal agents who purportedly "prefe[r] to work cooperatively with the public." ER-043. But that "cooperation," ER-043, requires Murphy, Huddleston, and thousands of others to divulge highly personal and private information about themselves and their loved ones, ER-089–ER-108, under the threat that they are "required by law" to give the federal agent this information, ER-086, and they "shall be fined … not more than $5,000" if they "refus[e] or willfully neglec[t] to complete

the questionnaire or answer questions posed by census takers." ER-087. This suit brought by Murphy and Huddleston to put a stop to this federal invasion of their privacy is ripe for review.

CONCLUSION

The Court should reverse and remand to the district court to (1) rule on the class-certification motion and (2) determine the merits.

Dated: June 9, 2023.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The undersigned attorney states that he is unaware of any related cases currently pending in this Court.

Dated: June 9, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

9th Cir. Case No. 23-35166

I am the attorney for Plaintiffs-Appellants.

This brief contains 8,845 words, excluding items exempted by FRAP 32(f).

The brief's type size and typeface comply with FRAP 32(a)(5), (a)(6).

The brief complies with the word limit of Cir. R. 32-1(a) because it does not exceed 14,000 words.

Dated: June 9, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 9, 2023.

Respectfully submitted,

/s/ Aditya Dynar
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United States Court of Appeals for the Ninth Circuit

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