Hon. David G. Estudillo

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

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, 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.	Civil Action No. 3:22-cv-05377-DGE **Plaintiffs' Combined Cross-Motion for Summary Judgment and Response to Defendants' Motion for Summary Judgment** **Note on motion calendar: September 30, 2022** **ORAL ARGUMENT REQUESTED**

Pacific Legal Foundation, 255 South King Street, Suite 800
Seattle, Washington 98104 | (425) 576-0484

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Introduction

This case involves an effort by the Census Bureau to force Plaintiffs and thousands of other Americans to disclose personal information they wish to keep private. Defendants 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 survey. Defendants, in writing, have threatened Plaintiffs and others similarly situated with criminal fines for refusing to answer the ACS. The Court should rule in Plaintiffs' favor because Plaintiffs ask the Court to decide a pure question of law: declare the meaning of 13 U.S.C. §§ 141, 193, 221, and 18 U.S.C. §§ 3559, 3571. The plain language of the statutes does not authorize Defendants (1) to compel Plaintiffs to answer the ACS, or (2) to unilaterally criminalize and increase the monetary fine for refusing to answer the ACS. The Court should so hold to avoid reaching constitutional issues.

But if the Court concludes against Plaintiffs on these two statutory points, then the Court would have to decide the constitutional issues stated in Counts III–VI, Compl. ¶¶ 75–112: (1) have Defendants violated the Vesting Clause of Article I and the nondelegation doctrine, and (2) have Defendants unconstitutionally invaded Plaintiffs' rights to freedom of speech and privacy.

Plaintiffs Maureen Murphy and John Huddleston respectfully cross-move for summary judgment on all Counts. The motion is made under Federal Rule of Civil Procedure (FRCP) 56 and Local Rule 56.1. Summary judgment should be granted against all Defendants for two reasons: (1) there are no disputed facts, and (2) Plaintiffs prevail as a matter of law.

The Court should not grant summary judgment in favor of Defendants because they place material facts in dispute and their legal arguments fail as a matter of law. A jury should find facts before judgment can be entered in favor of Defendants. Plaintiffs prevail under the undisputed facts, whereas the government succeeds only under their version of disputed facts.

Plaintiffs file a combined cross-motion for summary judgment and response to Defendants' motion for summary judgment in accordance with the stipulated briefing schedule (ECF19).

Statement of Material, Undisputed Facts

Per Local Rule 56.1, the following undisputed facts are material to deciding this motion (PSOF): Defendants directed Maureen Murphy, John Huddleston, and others to answer the ACS. *See*

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Declarations of Murphy, Huddleston, et al. attached hereto. Defendants threatened Murphy, Huddleston, and others with criminal fines unless they answered the ACS. Murphy Decl. ¶ 12; Huddleston Decl. ¶ 4; Declarations of Putative Class Members Brenda Hiniker ¶ 6; Alan Rogers ¶ 5; John Lawton ¶ 3; Joe Catina ¶ 4; Elizabeth Lofing ¶ 6; and Joanne L. Martin, J.D., ¶ 6. Defendants informed Murphy and Huddleston in writing that their answers to the ACS are required by law and that refusing to answer subjects them to fines. ECF1-1; ECF1-2; ECF1-3; ECF1-4; ECR1-5; ECF1-8. Murphy, Huddleston, and others have refused and will continue to refuse to answer the ACS. Murphy Decl. ¶ 16; Huddleston Decl. ¶ 5; Hiniker Decl. ¶ 7; Rogers Decl. ¶ 6; Lawton Decl. ¶ 6; Catina Decl. ¶ 5; Lofing Decl. ¶ 7; Martin Decl. ¶ 7. Defendants have stated on their website, in an FAQ-style brochure, and in guidance documents, that answering the ACS is mandated by law and those refusing to answer it are subject to fines. https://perma.cc/RWG3-TR77; ECF1-3; ECF1-6; TAM CC-TAM-PMTA-00063 (IRS Technical Assistance Memorandum), 1995 WL 17844611. Defendants have relied on and interpreted 13 U.S.C. §§ 141, 193, 221, and 18 U.S.C. §§ 3559, 3571 to so conclude. *Id.* Defendants randomly select 1 out of 480 households each month to answer the ACS, or about 3.5 million persons every year. *American Community Survey Information Guide*, https://bit.ly/3rQ8c9S, at 1, 6.

This case has nothing to do with the decennial or ten-year Census, which is authorized by the Constitution's Enumeration Clause and involves counting the number of persons in the country for apportioning seats in the House of Representatives. U.S. Const. art. I, § 2, cl. 3. This case involves a survey called the American Community Survey or ACS. The purpose of ACS is to provide "demographic, social, economic, and housing estimates" "needed to assess a variety of programs," ECF1-3, so that government entities, nongovernmental organizations, and businesses can "distribute resources," ECF1-5 at 2.

Defendants have made the ACS mandatory; Defendants threaten individuals who refuse to answer the ACS with fines. *See* Declarations.

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Argument

I. Statutory Construction Resolves this Case in Plaintiffs' Favor

Straightforward statutory construction shows Defendants lack the authority to compel people to answer the ACS. It also shows Defendants lack the authority to criminalize the exercise of fundamental rights and enhance the criminal penalty.

A. Defendants Cannot Compel Plaintiffs to Answer the ACS

Ordinary statutory construction shows that Congress did not give Defendants the power to compel Plaintiffs to answer the ACS. A plain reading of the statutes is also necessary to avoid casting doubt as to the statutes' constitutionality.

Section 141

The first sentence of 13 U.S.C. § 141(a) authorizes Defendants to "take a decennial census of population." The second sentence of 13 U.S.C. § 141(a) authorizes Defendants, "[i]n connection with any such census," "to obtain such other census information as necessary." "[S]uch census" refers to the "decennial census of population" mentioned in the first sentence.

Congress has not defined the phrase "such other census information as necessary." Necessary for what? And while the first sentence contains the clause "in such form and content as he may determine, including the use of sampling procedures and special surveys," that clause relates only to the taking of "a decennial census," not to the collection of "other census information." Congress did not give the Secretary the authority to collect "other census information" using "sampling procedures and special surveys." And Congress did not say what, if any, information falls under the category of "other census information" and how this other census information is to be obtained "[i]n connection with" the decennial census.

The authority Congress has conferred on Defendants via Section 141(a) is narrow: "take" the ten-year census and "obtain" "other census information" that is "necessary" to take the ten-year census. The verbs *take* and *obtain* are important; each verb grants different, specific powers to the Census Bureau. Even assuming Defendants have authority to frame and conduct the ACS under the "other census information" provision or 13 U.S.C. § 5, the statute nowhere states that they can compel answers to the ACS.

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The Supreme Court has undercut the assumption that Defendants have authority to frame and conduct the ACS. The Supreme Court does not allow the use of sampling procedures in connection with the ten-year census. *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999), explained that the 1976 revision to Sections 141, which added the sampling-procedures language, is narrowed by Section 195, which "directly prohibits the use of sampling in the determination of population for purposes of apportionment." 525 U.S. at 338. The Court described as "longstanding" the "prohibition on the use of sampling in matters relating to apportionment." *Id.* The "context is provided by 200 years during which federal statutes have prohibited the use of statistical sampling where apportionment is concerned." *Id.* at 339–40. In light of this context, the Court saw "only one plausible reading" of the statutes: "It prohibits the use of sampling in calculating the population for purposes of apportionment." *Id.* at 340.

The plaintiffs there had argued that the use of sampling procedures in connection with the ten-year census violates both the Census Act and the Enumeration Clause (which requires "actual Enumeration"). 525 U.S. at 327. To avoid casting doubt on the constitutionality of the Census Act, the three-judge district court and the U.S. Supreme Court both "examined the plain text" of the Census Act to reach its conclusion. *Id.* at 334, 343–44. The Court noted that the Defendants themselves had concluded the Census Act "clearly continued the historical precedent of using the 'actual Enumeration' for purposes of apportionment." *Id.* at 340. This understanding was so well-settled that the Census Bureau had declined to invoke *Chevron* deference. *Id.* at 341.

The only issue in *Department of Commerce* was the statutory and constitutional authority for using sampling procedures to take the ten-year census. And, for constitutional-avoidance reasons, the Court construed the statute as *prohibiting* the use of sampling for taking the decennial census. As a result, the Census Bureau must conduct an actual enumeration, without using sampling procedures, once every ten years. The case did not consider whether the Secretary has the power to collect other "nonapportionment information," *id.* at 341, using sampling procedures and compel answers to such sampling surveys; that question was neither presented to the Court nor decided by it. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (An "argument no[t] discussed in the opinion

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of the Court" "is not a binding precedent."). It remains an open question—and that is the question Plaintiffs Murphy and Huddleston ask here.

As a matter of statutory construction, therefore, the Supreme Court has in effect deleted the phrase "including the use of sampling procedures and special surveys" from the first sentence of Section 141(a). Since the phrase has no effect in its own sentence, Defendants' suggestion that it should somehow be transposed into the second sentence is highly tenuous. Even if such transposition were permitted, the second sentence does not permit the Secretary to *compel* people to divulge "other census information" on sampling surveys like the ACS. And since the intrusive questions of the ACS far exceed the scope of actual enumeration, answers to the ACS cannot be considered "other census information."

The authority to conduct the ACS (a sampling survey) comes not from the Enumeration Clause. U.S. Const. art. I, § 2, cl. 3. Rather, it is simply a creature of statute. So, the only way to read Section 141(a) to avoid striking it down under the nondelegation doctrine or as an unconstitutional invasion of Plaintiffs' rights to speech and privacy is to say that, in 1976, Congress at most "allowed the Secretary to authorize the use of sampling procedures" to gather "other census information." *Dep't of Com.,* 525 U.S. at 336–37. Congress *did not* authorize the Secretary to *compel* people to answer these sampling surveys. The phrase, "use of sampling procedures and special surveys," in the first sentence of 13 U.S.C. § 141(a), at most authorizes Defendants to *conduct* sampling surveys; it is silent as to whether Defendants can *compel* people to answer such sampling surveys as the ACS.

Defendants' summary-judgment briefing relies on the irrelevant parsing of what their letters to Plaintiffs say—"required" by law. Defendants say neither the letters nor the in-person visits and interactions with federal agents that followed "threaten" anyone. But these written statements and in-person interactions are inherently threatening. *See* Plaintiffs' and Putative Class Members' Declarations. And Defendants' website, which they invite everyone to visit, plainly refers to these statutes and says those refusing to answer can be fined $5,000. *See* ECF1-3. Defendants cannot now create a fact dispute premised on semantics where none exists. *See* FRCP 56(a). And ultimately, Defendants defeat their own summary-judgment motion for, if this were indeed a genuine dispute as

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to a material fact (were Plaintiffs threatened or weren't they), then no summary judgment can issue in favor of Defendants until the trier-of-fact makes a fact-finding.

Section 193

This section gives the Secretary permission or discretion ("may") to "make surveys and collect such preliminary and supplementary statistics related to the main topic of the census as are necessary to the initiation, taking, or completion thereof." The power to "make surveys" means simply "[t]o cause [the survey] to exist." *Black's Law Dictionary* 1144 (Deluxe 11th Ed.). And the power to "collect … statistics" means simply to gather or accumulate them. It is a stretch to say the "make" and "collect" powers include the power to "compel," *i.e.*, "cause or bring about by force, threats, or overwhelming pressure." *Black's Law Dictionary* at 353; *id.* at 1783 ("threat" 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"). Nothing in the plain words of Section 193 authorizes Defendants to *compel* people to answer sampling surveys like the ACS. Again, the verbs *make* and *collect* are important; each verb grants different, specific powers to the Census Bureau. And neither verb grants the power to compel answers.

What "preliminary" or "supplementary" statistical information is "related to the main topic of the census"? We only know that such information must be "necessary to the initiation, taking, or completion" of the "census," and that the Secretary can make surveys and collect statistics "[i]n advance of, in conjunction with, or after the taking of each census." Nothing more.

Section 221

Congress has said that any adult who "refuses … to answer … any of the questions on any schedule submitted to him in connection with any … survey provided for by subchapters I, II, IV, and V of chapter 5 of this title, applying to himself or to the family to which he belongs or is related, … shall be fined not more than $100." 13 U.S.C. § 221(a). Even if the ACS is a survey authorized by Section 141 or 193 or both, those who refuse to answer the ACS questions face a fine of "not more than $100."

The passive-voice phrase "shall be fined" raises two issues. First, does it impose a mandatory duty on the governmental actor or the survey recipient? Second, does it impose an affirmative duty or

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confer discretion? However one reads "shall be fined," Section 221(a) does not give Defendants the power to compel Murphy, Huddleston, or anybody else to answer the ACS.

Mandatory or Permissive?

The question is whether the word "shall" is mandatory or permissive. "The trouble comes in identifying which words are mandatory and which permissive." *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 112 (2012). While the "traditional, commonly repeated rule is that *shall* is mandatory and *may* is permissive," *id.*, if a duty is imposed on the government, "the word 'shall' when used in statutes, is to be construed as 'may,' unless a contrary intention is manifest." *Railroad Co. v. Hecht*, 95 U.S. 168, 170 (1877).

More recently, the Supreme Court has said that phrases like "shall be fined" "impos[e] a mandatory duty" on the governmental actor. *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 172 (2016). *See also Reading Law* at 112 ("Mandatory words impose a duty; permissive words grant discretion."). It does not impose an obligation on plaintiffs Murphy or Huddleston or anybody else to answer the ACS. Nothing in Section 221 gives Defendants the power to *compel* people to answer the ACS. *See Black's Law Dictionary* at 1292 ("obligation" means a "legal or moral duty to do or not do something").

Defendants say that Section 221(a) grants Defendants discretion to compel answers to the ACS and enhance the $100 fine to $5,000. The Defendants, therefore, say that the word "shall" has to be construed as a "permissive wor[d]" that grants "discretion." *Reading Law* at 112. But if so, that discretion is confined to deciding whether to prosecute people for refusing to answer the ACS. *Railroad Co.*, 95 U.S. at 170 (construing "shall" as "may" if the duty is imposed on the government). The discretion does not extend to deciding whether to compel people to answer the ACS or to enhance the fine.

If "shall" is construed as imposing a "mandatory duty" on Defendants and Plaintiffs alike, *Kingdomware Techs., Inc.,* 579 U.S. at 172, then failure to prosecute is not an excuse—and the fact that Defendants have not prosecuted Murphy or Huddleston yet would mean only that Defendants are in active noncompliance with the statute and Plaintiffs have already confessed they violated the statute.

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In neither scenario can Section 221(a) be construed to give Defendants the power to compel people to answer the ACS.

The Duty Is Imposed on Whom?

If the passive-voice phrase "shall be fined," 13 U.S.C. § 221(a), imposes a duty on people to pay $100 when they refuse to answer the ACS, then it is a mandatory duty according to *Reading Law* at 112 and *Railroad Co.*, 95 U.S. at 170, because the duty falls on a nongovernmental actor. What does having a mandatory duty to pay a fine even mean? Such a reading raises all sorts of questions about how to implement Section 221(a). Are those like Murphy or Huddleston who refuse to answer the ACS (or confess to committing a crime, as Defendants would put it), supposed to preemptively send a $100 check to the Secretary in lieu of answering the ACS? Is there any pre-payment judicial or administrative process they can use to protect their purse and their private information?

If construed so, Plaintiffs Murphy and Huddleston are currently under a legal obligation to send a $100 check to the Secretary and the Defendants are under no obligation to take any action whatsoever against the Plaintiffs. But this interpretation also renders Section 221(a) indecipherable. It raises questions about what due process, if any, is available to those like Murphy and Huddleston who refuse to answer the ACS but are not prosecuted by the federal government.

So, there is only one interpretation that gives meaning to each word and phrase in Section 221(a): the passive-voice phrase "shall be fined" imposes a duty on the governmental actor.

The deliberate use of passive voice in the statute is important. The Supreme Court has looked to the statute's structure to determine the subject of passive-voice provisions (like "shall be fined" contained in Section 221(a): fined by whom?). *Barron v. City of Baltimore*, 32 U.S. 243, 248 (1833), concluded that the phrase "shall be passed" in U.S. Const. art. I, § 9, cl. 3 did not refer to state actors because the next section reads, "No State shall … pass any Bill of Attainder [or] ex post facto Law." U.S. Const. art. I, § 10. So "shall be passed" in Article I, § 9 must refer "solely to the government of the United States." *Id.* Similarly, in *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, 139 S.Ct. 881, 890 (2019), the Court construed the phrase "registration has been made" in 17 U.S.C. § 411(c) as referring to the Copyright Office as the actor having the duty to perform the action (registration). *See also United States v. Wilson*, 503 U.S. 329 (1992) (construing the phrase, "defendant shall be given credit"

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in 18 U.S.C. § 3585(b) as referring to the Attorney General as the actor having the duty to perform the action (calculation of credits)). So too here. The actor performing the action (fining $100) has to be the Defendants.

Once it is plain that the (discretionary) duty is imposed on the governmental actor, it is also plain that the scope of that duty is narrow. Defendants only have the discretion to decide whether to prosecute Murphy or Huddleston for $100 each. The statute does not thereby confer on Defendants the power to compel them to answer the ACS.

Put differently, if Defendants' reading is correct, then Defendants' statement that they have the power to compel Murphy or Huddleston to answer the ACS (or call it a mandatory survey) is an exercise of their prosecutorial discretion to fine them $100 each. *Black's Law Dictionary* at 1151 ("mandatory" means "[o]f, or relating to, or constituting a command; required; preemptory"). Defendants cannot now assert they have decided not to prosecute Plaintiffs Murphy or Huddleston under Section 221(a), or that Plaintiffs are not currently under any threat to answer the ACS. That is because, according to Defendants, Section 221(a) supplies the necessary self-executing compulsion, force, threat, or overwhelming pressure on Plaintiffs Murphy and Huddleston to answer the ACS. *See Black's Law Dictionary* at 353 (defining "compel").

The predicate-act canon does not help Defendants assert the power to compel answers to the ACS either. *See Reading Law* at 192–94; *see also Luis v. United States*, 578 U.S. 5, 26 (2016) (Thomas, J., concurring) (quoting same). It should be "common sense," *Reading Law* at 192, that the discretion to fine those refusing to answer the ACS does not include the power to compel them to answer the ACS. Where "the means for the exercise of a granted power are given" in the statute (as here, permission to prosecute), "no other or different means can be implied, as being more effectual or convenient." *Reading Law* at 193 (quoting *Field v. People ex rel. McClernand*, 3 Ill. 79, 83 (1839)).

In sum, the plain words of 13 U.S.C. §§ 141, 193, 221 show that Congress did not confer power on Defendants to compel any person to answer the ACS; Defendants must administer the ACS as a fully voluntary sampling survey.

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B. Defendants Cannot Criminalize the Violation of a Statute that Congress Decriminalized

In 1976, Congress decriminalized 13 U.S.C. § 221(a). Pub. L. 94-521, § 13(1), 90 Stat. 2465 (Oct. 17, 1976). Before 1976, Section 221(a) stated that those refusing to answer a survey "shall be fined not more than $100 or imprisoned not more than sixty days, or both." The 1976 amendment removed the phrase "or imprisoned not more than sixty days, or both." *Id.* The current Section 221(a) says only, "shall be fined not more than $100." By removing criminalizing language from Section 221(a), Congress decriminalized the refusal-to-answer violation.

In construing statutes, courts presume that a significant change in the language entails a change in meaning. In *United States v. Wells*, 519 U.S. 482 (1997), for example, Congress had omitted the "materiality" requirement when it redefined the false-statement offense in the federal criminal code, 18 U.S.C. § 1014. In the lower courts, the prosecutors had argued that materiality remains a requirement because the amendment to Section 1014 was merely a stylistic change that did not affect the meaning of the statute; Congress simply "overlooked" the omission. 519 U.S. at 497. The Supreme Court unanimously disagreed and gave effect to the "unambiguous provision of the statute" that deleted materiality as an element from the statute. *Id.*

The 1976 amendment to Section 221 is such a significant change in the language. Congress deleted the criminalizing part from the statute. And by retaining the word "fine," which is used primarily to denote payment of a civil nature, *Black's Law Dictionary* at 776–77, Congress did not "clear[ly] and unambiguously" state that refusal to answer the ACS is a crime. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 93 (2007).

The general provisions contained not in Title 13 but in Title 18 do not *sub silentio* edit the specific "shall be fined not more than $100" language contained in the Census Bureau's enabling statute. *Morton v. Mancari*, 417 U.S. 535 (1974), dealt with an analogous situation. The Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.*, provided an employment preference for qualified Native Americans in the Bureau of Indian Affairs. The later-in-time Equal Employment Act of 1972, 42 U.S.C. § 2000e-16(a) (1970 ed., Supp. II), prohibited racial discrimination in federal employment. The Supreme Court rejected the claim by non-Native American employees of the BIA that the preference had been repealed. The Supreme Court reasoned: the "Indian preference statute is a

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specific provision applying to a very specific situation. The 1972 Act, on the other hand, is of general application." 417 U.S. at 550–51. So, unless there is "clear intention otherwise," the "specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Id.*

So, even if 18 U.S.C. §§ 3559, 3571 were amended after the 1976 amendments to 13 U.S.C. § 221, per *Morton*, the more specific 13 U.S.C. § 221 governs over the general 18 U.S.C. §§ 3559, 3571. It follows, therefore, that the $100 fine for refusing to answer the ACS does not make refusal to answer the ACS a crime. Therefore, there is no statutory authority in Defendants' enabling act (the Census Act) that gives them the power to criminalize a violation of 13 U.S.C. § 221(a). Nor does the Census Act give Defendants the power to increase the statutorily defined specific fine of $100 to $5,000.

C. The Court Should Not Defer to Defendants' Statutory Interpretation

Applying the ordinary statutory construction tools avoids constitutional questions about improper delegation and deference to agency interpretations that this Court would otherwise have to address were it inclined to skip or conduct a cursory textual analysis. But Defendants have invoked *Chevron* deference. ECF22:23; *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). Of note: Defendants do not ask for *Chevron* deference to their interpretation of 13 U.S.C. § 221, and 18 U.S.C. §§ 3559, 3571. ECF22:24–27. They only ask for *Chevron* deference to their interpretation that they have the statutory authorization to conduct a mandatory ACS. ECF22:23.

No Statutory Gap to Fill

There being no statutory gaps to fill, there is no occasion to defer under *Chevron* to Defendants' interpretation of the Census Act. *Chevron* deference does not even apply here because nothing in the statutes is ambiguous. There are no statutory gaps for the Defendants to fill because, as demonstrated above, the unambiguous words of the statute resolve the interpretive question in Plaintiffs' favor. So, even if invoked, *Chevron* deference is inapposite here for it potentially applies only if the Court concludes after "empty[ing]" the "legal toolkit" that the at-issue provisions of the Census Act are hopelessly ambiguous. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019).

Even then, *Chevron* deference applies only where "ambiguities in statutes within an agency's jurisdiction to administer" have left "statutory gaps" open for the agency to "fill." *Nat'l Cable &*

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Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005). And that, too, only if Congress "delegated" such gap-filling responsibility to the agency. *Id.* There is no statutory gap actual or imaginary that would allow Defendants to "fill" it by deciding to make some surveys like the ACS "mandatory." Also, neither the Census Bureau nor the Department of Commerce under which the Bureau is housed has been given rulemaking authority; these agencies do not engage in formal or informal rulemaking to effectuate the Census Act; they do not create rules via in-house administrative adjudication under the Census Act; nor, as Defendants admit, do they themselves prosecute (or execute) violations of the Census Act. Absent Congressionally delegated authority to fill gaps, federal courts have no occasion to defer to such agencies' interpretations of their operative statutes.

Nor can the Census Bureau use Title 18 as the source of its authority to criminalize Section 221(a) and enhance the fine fifty-fold. That is so because Title 18 is not "within [the Defendants'] jurisdiction to administer." 545 U.S. at 980. Neither does Title 18 render provisions of Title 13 ambiguous. Defendants' interpretation rewrites the statutes by criminalizing them and enhancing the fine fifty-fold. Defendants unlawfully legislate when they interpret the statutes this way. The lawmaking function belongs to Congress and deference is inapplicable when a federal agency assumes the statutes implicitly delegate lawmaking authority to it.

In *Loving v. United States*, 517 U.S. 748, 758 (1996), the Supreme Court explained that it starts with the "fundamental precept" that "the lawmaking function belongs to Congress, U.S. Const. art. I, § 1, and may not be conveyed to another branch or entity." There is a "true distinction" between "the delegation of power to make the law, which necessarily involves a discretion as to what it shall be," and "conferring authority or discretion" to execute Congressionally written law: the "first cannot be done; to the latter no valid objection can be made." *Field v. Clark*, 143 U.S. 649, 693–94 (1892). This limitation is a constitutional barrier to an exercise of legislative power by the executive branch. Defendants have "no power to act … unless and until Congress confers power upon [them]." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

In situations where, as here, reading 13 U.S.C. §§ 141, 193, 221(a) as implicitly giving such sweeping power to Defendants is to say that the Court will defer to Defendants' view that Congress impliedly delegated lawmaking power to Defendants. These the Court cannot do; the Court can

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neither defer to Defendants' interpretation under such circumstances nor find implied delegation in the statutes.

Rule of Lenity

Because it is a traditional tool of statutory interpretation, the Court must apply the rule of lenity before *Chevron* deference. Borrowing Title 18 to amend 13 U.S.C. § 221(a) would also run afoul of the rule of lenity. Notably, Defendants do not ask for *Chevron* deference to this portion of their argument. *Compare* ECF22:24–27 *with* ECF22:23.

The Supreme Court concluded unanimously in *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004), when a statute "has both criminal and noncriminal applications," "the rule of lenity applies." This is because a court "must interpret the statute consistently," regardless of "whether [it] encounter[s] its application in a criminal or noncriminal context." *Id.*

"The rule of lenity is a new name for an old idea—the notion that penal laws should be construed strictly." *Wooden v. United States*, 142 S.Ct. 1063, 1082 (2022) (Gorsuch, J., concurring, joined by Sotomayor, J.) (simplified). The rule "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality op.). But it also applies in noncriminal settings. *Wooden*, 142 S.Ct. at 1086 n.6 (Gorsuch, J., concurring) ("Historically, lenity applied to all penal laws—that is, laws inflicting any form of punishment, including ones we might now consider civil forfeitures or fines.") (simplified).

Three "core values of the Republic" underlie the rule of lenity: (1) due process; (2) the separation of governmental powers; and (3) "our nation's strong preference for liberty." *United States v. Nasir*, 17 F.4th 459, 473 (3d Cir. 2021) (en banc) (Bibas, J., concurring).

First, due process requires that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). So, the rule of lenity's "emphasis on fair notice isn't about indulging a fantasy. It is about protecting an indispensable part of the rule of law—the promise that, whether or not individuals happen to read the law, they can suffer penalties only for violating standing rules announced in advance." *Wooden*, 142 S.Ct. at 1083 (Gorsuch, J., concurring).

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Second, lenity also protects the separation of powers: the legislature sets penalties for certain conduct, the executive prosecutes alleged violations, and, ultimately, the judiciary imposes applicable punishment. *See United States v. Bass*, 404 U.S. 336, 348 (1971). Lenity "strikes the appropriate balance between the legislature, the prosecutor, and the court" in defining liability. *Liparota v. United States*, 471 U.S. 419, 427 (1985). "It places the weight of inertia upon the party that can best induce Congress to speak more clearly, forcing the government to seek any clarifying changes to the law rather than impose the costs of ambiguity on presumptively free persons." *Wooden*, 142 S.Ct. at 1083 (Gorsuch, J., concurring) (simplified). "In this way, the rule helps keep the power of punishment firmly in the legislative, not in the judicial department." *Id.*

Third, and "perhaps most importantly," lenity embodies "our instinctive distaste against" laws imposing punishment "unless the lawmaker has clearly said they should." *Nasir*, 17 F.4th at 474 (Bibas, J., concurring) (simplified). By promoting liberty, lenity "fits with one of the core purposes of our Constitution, to secure the Blessings of Liberty for all." *Id.* (simplified). Under the rule of lenity, therefore, "any reasonable doubt about the application of a penal law must be resolved in favor of liberty." *Wooden*, 142 S.Ct. at 1081 (Gorsuch, J., concurring).

Federal courts have applied the rule of lenity before resorting to any deference doctrine. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S.Ct. 789, 790 (2020) (Gorsuch, J., statement regarding denial of certiorari); *Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1060 (9th Cir. 2020) ("The rule of lenity and *Chevron* deference are typically mutually exclusive."); *Hylton v. Att'y Gen.*, 992 F.3d 1154, 1158 (11th Cir. 2021) (same). The primacy of lenity over *Chevron* deference flows from *Chevron* itself, which requires courts to apply traditional tools of statutory construction to determine whether a statute has a plain meaning. *Chevron*, 467 U.S. at 843 n.9. The rule of lenity is one such traditional tool of statutory construction. *Reading Law* at 296–302.

The rule of lenity instructs the Court to interpret the statutes at issue in favor of Plaintiffs Murphy and Huddleston such that Defendants have no statutory authority to compel them to answer the ACS, criminalize the Section 221 fine, or enhance it.

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Due Process and Separation of Powers

Deferring to Defendants' interpretation also cannot be squared with the Constitution's separation of powers and the related guarantees afforded by the Fifth Amendment's Due Process Clause. It is uniquely the federal courts' "province and duty … to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1629 (2018) ("To preserve the balance Congress struck in its statutes, courts must exercise independent interpretive judgment."). Deference denies nongovernmental litigants their right to due process of law. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1679 (2012) (noting that for centuries, "due process" has "consistently referred to the guarantee of legal *judgment* in a case by an authorized *court* in accordance with settled law") (emphasis added). When courts defer, they "[t]ransfe[r] the job of saying what the law is from the judiciary to the executive." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). Such bias and transfer of power leads to "more than a few due process … problems." *Id.* at 1155. Deference "embed[s] perverse incentives in the operations of government" and requires courts to "bow to the nation's most powerful litigant, the government, for no reason other than it is the government." *Egan v. Delaware River Port Authority*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring). The "risk of arbitrary conduct is high," and deference puts "individual liberty … in jeopardy" because "an agency can change its statutory interpretation with minimal justification and still be entitled to full deference." *Id.* at 280. Judicial proceedings are required to provide "neutral and respectful consideration" of a litigant's views free from "hostility or bias." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719, 1732, 1734 (2018) (Kagan, J., concurring).

As a matter of the Constitution's separation of powers, judges also abandon their duty of independent judgment when they "become habituated to defer to the interpretive views of executive agencies, not as a matter of last resort but first." *Valent v. Comm'r of Soc. Sec.*, 918 F.3d 516, 525 (6th Cir. 2019) (Kethledge, J., dissenting). Under any deference doctrine, "the agency is free to expand or change the obligations upon our citizenry without any change in the statute's text." *Id.* That truth is especially obvious here because 13 U.S.C. §§ 141, 193, 221 have not changed in relevant part since

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1976, and the ACS came into existence only in the 2000s, as did Defendants' position that they can compel people to answer the ACS or recriminalize the refusal-to-answer violation.

II. Defendants' Interpretation Renders the Statutes Unconstitutional under the Vesting Clause

As discussed in Part I above, straightforward statutory construction resolves the meaning of the statutes in favor of Plaintiffs Murphy and Huddleston. And deferring to governmental litigants' interpretation of the statutes is neither necessary nor appropriate. The constitutional-doubt canon also counsels in favor of resolving the statutory questions in Plaintiffs' favor so as to avoid casting constitutional doubt on the operative statutes. *Edward J. Bartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

But if the Court concludes that the statutes give Defendants the authority to compel Plaintiffs to answer the ACS, criminalize the Section 221(a) violation, and enhance the fine fifty-fold, then to rule in Defendants' favor, the Court must also conclude that there is no Vesting Clause or nondelegation doctrine problem with such interpretation. As a plurality of the Supreme Court recently recognized, "a nondelegation inquiry always begins (and often almost ends) with statutory interpretation." *Gundy v. United States*, 139 S.Ct. 2116, 2123 (2019) (per Kagan, J., with three Justices concurring and one Justice concurring in the judgment). So robust statutory construction remains inescapable.

The Constitution states, "*All* legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1 (emphasis added). This means that Congress may not divest "powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. 1, 42–43 (1825). Whether federal legislation effects a prohibited delegation of legislative powers—and thus violates the Vesting Clause—is determined based on whether the legislation provides "an intelligible principle" to which the administering agency is directed to conform when carrying out its functions under the statute. *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

To answer whether Congress has supplied an "intelligible principle … requires construing the challenged statute to figure out what task it delegates and what instructions it provides." *Gundy*, 139 S.Ct. at 2123. The Supreme Court has long focused the delegation inquiry on the "limits of the

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[agency's] discretion," *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 473 (2001), and has required the delegation to provide sufficiently definite standards such that "[p]rivate rights are protected." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104–05 (1946).

The Major-Questions Doctrine

Applying the major-questions doctrine, *West Virginia v. EPA*, 142 S.Ct. 2587 (2022), struck down EPA's expansive interpretation of statutes. The doctrine is a clear-statement rule under Article I's Vesting Clause. *Id.* at 2619 (Gorsuch, J., concurring). Defendants must demonstrate that they have clear congressional authorization to take actions that have major economic and political significance. The doctrine has its genesis in the Constitution's separation of powers and the courts' duty to ensure that executive agencies are not usurping Congress's Article I power to make law.

In *West Virginia v. EPA*, the Supreme Court held that a provision of the Clean Air Act directing EPA to determine the "best system of emission reduction" did not permit it to require coal-powered plants throughout the nation to shift their power generation to alternative sources. 142 S.Ct. at 2613–15. The Court so held because "[a]gencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'" *Id.* (simplified).

Where, as here, an agency is making decisions with major economic and political consequences, courts must "'hesitate before concluding that Congress' meant to confer such authority." *Id.* at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)). "Extraordinary grants of regulatory authority are rarely accomplished through modest words [*i.e.*, "preliminary and supplementary statistics"], vague terms ["other census information"], or subtle devices ["in connection with the decennial census"]." *Id.* at 2609 (simplified). Nor does Congress typically use "oblique or elliptical language to empower an agency to make a radical and fundamental change to a statutory scheme." *Id.* (quoting *MCI Telecomms. Corp. v. Am. Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994)).

Even where an agency's interpretation has a "colorable textual basis," courts must use "common sense as to the manner in which Congress [would have been] likely to delegate" the power claimed. *Id.* Courts must "presume that Congress intends to make major policy decisions itself, not

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leave those decisions to agencies." *Id.* (simplified); *see id.* at 2613. So, Defendants must point to clear congressional authorization when they exercise power of major economic and political significance. *See id.* at 2608. They have not done so here.

This case presents questions of major economic and political significance. Defendants claim, under their interpretation of the Census Act, that thousands of people who have refused to answer the ACS owe them millions of dollars in arrears. They claim they will have to spend millions more if the ACS were administered as a fully voluntary survey. But Defendants already administer hundreds of other surveys that are fully voluntary, *see* Census Bureau, List of All Surveys & Programs, https://perma.cc/45C8-AMQR, and at least one survey for which they give survey recipients $5 to "incentive[ize]" the recipient to voluntarily answer the survey, Consumer Expenditure Survey Letter, https://perma.cc/3SHY-JF78. They claim billions more in fiscal implications because federal-aid, state-aid, and local-aid programs depend on ACS data to obtain legislative appropriations and fund such programs. Defendants claim the information they gather via the ACS is extremely important to all levels of government because it forms the basis for data-informed legislation, thus admitting to the vast economic and political importance of the ACS. ECF22:1. Defendants claim the power to compel millions of people to give them highly personal information. If Defendants are right, then millions of people must turn over highly personal information to Defendants—or become instant federal criminals if they do not. So, "this is a major questions case." 142 S.Ct. at 2610. And Defendants have not met their burden of proving Congress clearly authorized their interpretation in question. *Id.* at 2609 (stating that "agencies must point" to clear congressional authorization).

The Nondelegation Doctrine

As noted above, the relevant statutes do not allow agencies to compel the production of the information they seek through the ACS. If the statutes are interpreted broadly, then they have no limiting principle because Defendants could collect any private information in any way they choose. If so read, the statutes provide no limiting or intelligible principle to direct Defendants.

If read broadly, the sentence, "In connection with any such census, the Secretary is authorized to obtain such other census information as necessary," 13 U.S.C. § 141(a), provides no intelligible principle to which Defendants are directed to conform. What sufficiently definite standards does

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"other census information" give Defendants? What guidance does "as necessary" give? Does the verb "obtain" grant Defendants the sweeping power to compel the production of detailed personal information from Plaintiffs and to intrude upon Plaintiffs' constitutional rights to speech and privacy by requiring them to answer the ACS? The answers are, respectively, none, none, and no.

If read broadly, the words of 13 U.S.C. § 193, "may make surveys and collect such preliminary and supplementary statistics related to the main topic of the census as are necessary to the initiation, taking, or completion thereof," provide no intelligible principle to which Defendants are directed to conform. What does "preliminary and supplementary statistics" mean? "Related to the main topic of the census"? "Necessary to the initiation, taking, or completion [of the census]"? These words are insufficient to grant Defendants the broad authority to compel Plaintiffs to answer the ACS and thereby compel them to speak when they wish to remain silent, and compel them to divulge highly personal details about their lives without regard for Plaintiffs' right to privacy.

The words "refuses … to answer … any of the questions on any … survey … shall be fined not more than $100," 13 U.S.C. § 221(a), provide no intelligible principle to which Defendants are directed to conform if they are read broadly to authorize Defendants to redefine the refusal-to-answer violation as a crime and impose a fifty-fold enhancement of the fine.

Defendants' actions "must always be grounded in a *valid* grant of authority from Congress." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 161 (emphasis added). The nondelegation doctrine requires Congress to *not* leave the matter to the agency "without standard or rule, to be dealt with as [the agency] please[s]." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 418 (1935). *Panama Refining* struck down a statute granting the President authority to outlaw transportation of excess oil without providing "definition of circumstances and conditions in which the transportation is to be allowed or prohibited." *Id.* at 430. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537–38 (1935) struck down a statute enabling the President to adopt private industry codes, leaving him free to "exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable."

The Census Act grants even broader authority than the statutes in *Panama Refining* and *Schechter* that the Supreme Court struck down. Defendants would have this Court presume that compelling people to divulge any and all intimate details of their lives is allowed because the phrases "other census

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information," "preliminary and supplementary statistics related to the main topic of the census," "any of the questions on any … survey," are capacious. 13 U.S.C. §§ 141(a), 193, 221(a). To the contrary, these statutes are a "wafer-thin reed on which to rest such sweeping power" as compelling people to divulge intimate details of their lives or else be branded a federal criminal. *Ala. Ass'n of Realtors v. HHS*, 141 S.Ct. 2485, 2489 (2021) (concluding that HHS's "claim of expansive authority under" the statutory word "necessary" "is unprecedented"); *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 585–86 (1952) (concluding that even the government's belief that its action "was necessary to avert a national catastrophe" could not overcome a lack of congressional authorization).

The statutes do not indicate which questions are within Census Bureau's discretion to ask. The word "necessary" does not rescue the statutes. When the Supreme Court reviewed a similar statutory scheme appearing to grant the President full discretion to adopt any poultry-related standard he deems is "needed or advisable," it had no trouble striking down the statute as unconstitutional. *Schechter Poultry*, 295 U.S. at 537–38.

The nondelegation doctrine requires the statutes to contain a "declared legislative policy." *Panama Refining*, 293 U.S. at 426. The only declared policy the statutes contain—"related to the main topic of the census," and "[i]n connection with any such census," 13 U.S.C. §§ 141(a), 193—point at most to the actual decennial census, whose declared policy is the modest one of actually enumerating the number of people in the country to apportion seats in the House of Representatives. That declared policy does not encompass the policy to compel people to give Defendants "demographic, social, economic, and housing estimates" "needed to assess a variety of programs," ECF1-3, so that government entities, nongovernmental organizations, and businesses can "distribute resources," ECF1-5 at 2. The latter policy is mere post hoc rationalization offered by the Defendants to support their litigating position.

An express Congressional declaration of policy is imperative under the nondelegation doctrine. *Panama Refining*, 293 U.S. at 426. Without it, Congress has not spoken on the topic. Congress has given no instructions on what to do should certain circumstances arise. And no statute limits the factual conditions under which a particular survey could be made compulsory for a subset of the U.S. population. Without a "declared legislative policy," Defendants' assertion that it has the authority to

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compel answers to the ACS, and criminalize and enhance the refusal-to-answer fine, is simply "delegation running riot." *Schechter Poultry*, 295 U.S. at 553 (Cardozo, J., concurring).

According to Defendants' current reading, they have "an unfettered discretion to make whatever laws [the Department] thinks may be needed or advisable." *Schechter Poultry*, 295 U.S. at 537–38. Such an interpretation renders these statutes void for vagueness, which is another way of applying the intelligible principle test. *Gundy*, 139 S.Ct. at 2142 (Gorsuch, J., dissenting). The statutes would allow Defendants to rewrite the financial and legal obligations, and the fundamental constitutional rights to speech and privacy of the entire United States population. But the legislature "does not … hide" such giant "elephants in mouseholes." *Whitman*, 531 U.S. at 468. Indeed, "[we] expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Ala. Ass'n of Realtors*, 141 S.Ct. at 2489 (quoting *Utility Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

Congress has already spoken clearly. No administrative discretion or delegation to make ACS compulsory, compel people to answer it, and criminalize and enhance the refusal-to-answer fine can be extracted from the language of 13 U.S.C. §§ 141, 193, 221.

No Implied Delegation to Invade Rights

If these sections are sufficient to justify compelling Plaintiffs to share intimate details about their lives, then these sections impose no discernible limits on Defendants' authority to compel disclosure of any level of detail about any person in any way Defendants choose. For example, broadly reading these statutes means that Defendants can compel Plaintiffs to disclose how much they spend on particular consumables, whether and how much they recycle, what entertainment they consume, what news or social media they subscribe to, what political parties or issues they support or eschew, what climate-conscious, race-conscious, public-reaction-conscious decisions they make, etc.—all under the pretext that such information "provide[s] more current demographic, social, economic, and housing estimates throughout the decade" and helps "federal and state governments … manage or evaluate programs." ECF1-3 at 1–2. It is debatable whether such measures could pass constitutional muster if adopted by Congress itself; it is beyond dispute that such measures constitute the sorts of

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policy decisions that the Constitution reserves to Congress alone in its role as the Nation's exclusive repository of legislative power.

If the statutes are read broadly and the Defendants' interpretation is correct, then it would mean that Congress can delegate to agencies the authority to violate the people's constitutional rights. But Congress itself cannot violate free speech and privacy rights. *Nemo potest facere per alium quod per se non potest*: no one can do through another what he cannot do by himself. *Black's Law Dictionary* at 1985 ¶1740. Federal agencies like Defendants cannot do what Congress itself cannot do without violating the Constitution—even if, when the statutes are read broadly, Congress seems to have told Defendants to do that thing. Defendants have simply assumed the power to trample constitutional rights.

The nondelegation doctrine does not permit Congress to delegate authority to impede or violate people's fundamental constitutional rights. While it is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority," such delegation is valid only so long as "private rights are protected." *Am. Power*, 329 U.S. at 105. That is, the delegation is invalid if private rights are thereby abridged, violated, or intruded upon. And that is precisely the type and scope of delegated authority Defendants are asking this Court to bless. The Court should respectfully decline Defendants' invitation.

No Implied Delegation to Criminalize the Exercise of Rights

The nondelegation inquiry is more stringent when Defendants criminalize conduct on their own initiative. Congress must be even more precise when it is authorizing criminal sanctions, which is consistent with the rule of lenity.

Federal agencies can criminalize conduct only if the statute itself explicitly so provides. The statute, 13 U.S.C. § 221, does not say the refusal-to-answer violation is a crime, nor does it delegate any power to Defendants to criminalize or enhance the fine. In *United States v. Alghazouli*, 517 F.3d 1179 (9th Cir. 2008), the Ninth Circuit was asked whether a statute criminalizes the violation of an agency regulation. The court concluded that the statute must specifically state that violating a regulation constitutes a crime. *Id.* at 1183. Because the statute there did not say so, the agency was wrong to criminalize the action at issue.

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The Supreme Court concluded the same in *United States v. Eaton*, 144 U.S. 677 (1892). Congress, to regulate the manufacture and sale of oleomargarine authorized IRS to make "needful regulations," and imposed in Section 18 a fine for neglecting to do anything "required by law." The Supreme Court held that someone violating IRS's *rule* requiring wholesale dealers to disclose information kept in their books to IRS is not liable for paying the statutory fine created by Section 18 in the absence of a statute "distinctly" making such neglect "a criminal offense." *Id.* at 688. So too here. *See Black's Law* Dictionary at 1561 ("requirement" means "[s]omething that must be done … something legally imposed, called for, or demanded; an imperative command"). Congress has not distinctly or specifically stated that the refusal-to-answer violation is a crime, nor that the $100 can be enhanced by the Defendants unilaterally. To the contrary, Congress *removed* any doubt as to the civil nature of the fine when it decriminalized Section 221 in 1976. *See* 90 Stat. 2465.

The nondelegation problem is more acute here than it was in *Gundy*. The *Gundy* plurality concluded that because the Supreme Court's prior interpretation of the relevant statute "already … require[s] the Attorney General to apply SORNA to all pre-Act offenders," it is an act of *Congress* as interpreted by the Supreme Court, not an interpretation of the Attorney General, that authorized the criminal sanctions. 139 S.Ct. at 2123. Importantly, the *Gundy* plurality did not endorse, and Justice Gorsuch flagged as unconstitutional, any "purport[ed] … endow[ment]" to a federal agency of the "power to write his own criminal code governing the lives of a half-million citizens." *Id.* at 2131 (Gorsuch, J., dissenting). Defendants' reading of the operative statutes here purports to endow them the power to criminalize the refusal-to-answer violation and enhance the criminal penalty by a factor of 50 for the entire U.S. population. Under *Gundy*, such assertion of authority by Defendants violates the nondelegation doctrine.

The *Gundy* plurality's conclusion also rested on the fact that the underlying behavior (knowingly failing to register under SORNA) is specifically defined as a crime by Congress itself. 139 S.Ct. at 2121 (discussing 18 U.S.C. § 2250(a)). Plaintiffs' refusal to divulge personal information to Defendants and choosing to stay silent instead is *not* criminal behavior. As explained below, it is the exercise of their constitutional right to privacy and the right not to be compelled to speak. According to *Gundy*, it is a nondelegation doctrine violation if Defendants can criminalize any behavior and

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enhance the applicable fine. *Gundy* did not strike down SORNA as violating the nondelegation doctrine because, as a matter of statutory construction, the statute directed the Attorney General to do exactly what he did. Here, in contrast, Congress specifically *decriminalized* 13 U.S.C. § 221. 90 Stat. 2465. Defendants say that Congress only removed the imprisonment penalty; it did not decriminalize Section 221. But there are *no* criminalizing words in Section 221, so it cannot be that Congress somehow removed all criminalizing words from the statute but preserved the criminal nature of the statute.

The Congressional directive to Defendants is the opposite of how Defendants interpret 13 U.S.C. § 221 and 18 U.S.C. §§ 3559, 3571. The Court should enjoin Defendants' unconstitutional incursion.

III. Defendants Unconstitutionally Invade Plaintiffs' Fundamental Rights

A. Freedom of Speech

Defendants sent letters to Plaintiffs Murphy and Huddleston instructing them that they are required by law to answer the ACS, and Defendants' agents showed up at their homes to obtain their compliance. Defendants have intruded upon Plaintiffs' fundamental right to freedom of speech under the First Amendment.

The Supreme Court has "held time and again that freedom of speech includes both the right to speak freely and the right to refrain from speaking at all." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S.Ct. 2448, 2463 (2018) (simplified). And the Supreme Court has held that compelling disclosure of information to the government violates the First Amendment "even if there is no disclosure to the general public." *Ams. for Prosperity Found. v. Bonta*, 141 S.Ct. 2373, 2388 (2021) (simplified) ("*AFPF*"). "The gravity of the privacy concerns in this context is further underscored." *Id.*; *see Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) ("The First Amendment has a penumbra where privacy is protected from governmental intrusion."). Assurances that the information disclosed to the Defendants will be kept confidential or will not be publicly disclosed by the agency is not sufficient to meet the "narro[w] tailor[ing]" and "sufficiently important" government interest test. *Id.* Nor can Defendants' compelled disclosure of private information from Plaintiffs to Defendants be saved by speculating that some of the same information "is already disclosed to [other agencies such as] the

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IRS." *Id.* When a government entity "[m]andat[es] speech that a speaker would not otherwise make [it] necessarily alters the content of the speech." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988).

Compelled disclosure regimes, even those like *AFPF* where there is reasonable certainty that the disclosed information will be kept confidential by the Defendants fall in the category of "content-based regulation of speech." *Id.*; *see* ECF1-1, 1-2, 1-3, 1-5. The First Amendment "does not permit the [government] to sacrifice speech for efficiency" in this manner. *Id.*

Defendants' actions compelling Plaintiffs to answer the ACS do not satisfy any level of scrutiny under the First Amendment. And certainly, Defendants' compelled-disclosure regime does not satisfy exacting scrutiny. In *AFPF*, for example, the Supreme Court struck down as facially unconstitutional California's demand that charities disclose IRS Schedule Bs to the state attorney general. 141 S.Ct. at 2385–89. The Court applied "exacting scrutiny," which requires that a government-mandated disclosure regime be "narrowly tailored to the government's asserted interest." *Id.* at 2383. A "substantial relation to an important interest is not enough to save a regime that is insufficiently tailored." *Id.* at 2384. A fully voluntary ACS would satisfy *AFPF*'s narrow tailoring test; Defendants' current mandatory ACS regime does not.

Compelled disclosure of information to the government, even where there is some plausible reason for mandating disclosure, also does not survive intermediate scrutiny. For example, *Doe v. Harris*, 772 F.3d 563 (9th Cir. 2014), enjoined a statute compelling registered sex offenders to disclose to law enforcement their email addresses within 24 hours of creating a new one. The Ninth Circuit enjoined enforcement of the statute because it did not satisfy intermediate First Amendment scrutiny. *Id.* at 583. Here, the Census Bureau's compelled-disclosure *executive action* premised on a thin-reed statute is arguably more egregious than the new-email-notification *statute* at issue in *Doe v. Harris*. There, at least, the state had a plausible argument about the importance of the government's interest in compelling disclosure from registered sexual offenders. Here, even that interest is lacking. To be sure, *Doe*'s intermediate scrutiny test in the Ninth Circuit is superseded by *AFPF*'s exacting scrutiny test. But *Doe* shows that the mandatory ACS regime would not satisfy even the more lenient intermediate scrutiny test.

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Each ACS question requires Plaintiffs to label and conform their responses to one of the listed options. *See* ECF1-4. Some questions, like those asking for estimated home value, ECF1-4 at 12, require giving an opinion. Some questions ask for specific dollar amounts as the answer, *id.* at 11. None of the questions (other than questions calling for descriptive answers) appearing on the ACS includes a "none of the above," "don't know," "refuse to answer," or "explain" checkboxes. Refusing to answer the questions is subject to the Section 221(a) fine. And the fine is enhanced for providing false or misleading information under Section 221(b), which is likely to occur when answering questions that ask for labels, opinions, or dollar amounts. Plaintiffs do not wish to self-identify and pigeonhole themselves into any categories pre-set by the Census Bureau. They are opposed on principle to such categorization. There is no dispute, for Defendants concur, that the ACS asks for highly personal and private information and requires Plaintiffs to disclose highly sensitive and personal facts and opinions about themselves and their family members or face fines if they refuse. Defendants do not ask these questions in a stop-and-frisk scenario, in a search incident to arrest, post-arrest questioning, questioning upon a warrant or a judicial or legislative subpoena, or "as a condition" of obtaining a federal benefit. *AFPF*, 141 S.Ct. at 2389. Plaintiffs are compelled to speak under threat of monetary fines simply because Defendants think they have the power to compel Plaintiffs to answer the ACS.

Saying that Plaintiffs are required by law to answer the ACS is identifiable harm in itself under the First Amendment. The First Amendment "mandates that we presume that the speaker, not the government, knows best what they want to say and how to say it." *Riley*, 487 U.S. at 790–91. In refusing to answer the ACS, Plaintiffs have shown they know "what they want to say"—stay silent. Such exercise of Plaintiffs' First Amendment rights is subject to intrusion neither by the Census Bureau nor by Congress; the Census Act does not authorize "the inevitable recrudescence of the general warrant." *People v. McKay*, 41 P.3d 59, 81 (Cal. 2002) (Brown, J., concurring & dissenting).

To say that Plaintiffs are required by law to answer the ACS is to threaten them and intrude on their First Amendment rights. If they do not answer they are subject to the Section 221 fine. This is the logic of the predicate-act canon "applie[d] to individual rights." *Luis*, 578 U.S. at 26 (Thomas, J., concurring). The First Amendment freedom of speech is a constitutional right and the Constitution

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"protect[s] those closely related acts necessary to their exercise." *Id.* There "comes a point," as here, where "the regulation of action intimately and unavoidably connected with a right is a regulation of the right itself." *Id.* (simplified). Congress itself could not have enacted such a general warrant as the mandatory ACS. So, the Census Bureau cannot invent one under the aegis of the statutes at issue here. Defendants' abridgment of Plaintiffs' right to not speak is plainly unconstitutional under the First Amendment.

B. Privacy

The "required by law" or mandatory nature of the ACS unconstitutionally invades Plaintiffs Murphy and Huddleston's fundamental right to privacy. The right of personal privacy is fundamental. *Griswold*, 381 U.S. at 485.

Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2244 (2022), called the right to privacy "a broader entrenched right that is supported by other precedents." *Dobbs* concluded only that the right to abortion, which had previously been considered one "part of a right to privacy" is not a fundamental right. *Id.* at 2245. *Dobbs* does not reformulate the other parts of the fundamental right to privacy, such as "the right to shield information from disclosure and the right to make and implement important personal decisions without [unwarranted] governmental interference." *Id.* at 2267; *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (The right of privacy is "the right of the individual … to be free from unwarranted government intrusion."). Therefore, the fundamental right to privacy that is derived from the First, Third, Fourth, Fifth (Self-Incrimination and Due Process Clauses), Ninth, and Fourteenth Amendments (minus the right-to-abortion component) survives unscathed by *Dobbs*.

Boyd v. United States, 116 U.S. 616, 630 (1886) described the Fourth and Fifth Amendments as protection against all governmental invasions "of the privacies of life." And *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) referred to the Fourth Amendment as guaranteeing a "right to privacy, no less important than any other right carefully and particularly reserved to the people." The Fifth and Fourteenth Amendments' Due Process Clauses also protect the right to privacy. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

Congress once gave the Treasury Secretary the authority in all revenue actions "other than criminal" the power to serve an investigative demand on anyone. *An Act to Amend the Customs-Revenue*

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Laws and to Repeal Moieties, ch. 391 § 5, 18 Stat. 187 (1874). *Boyd*, 116 U.S. at 638, concluded that subpoenas issued under the statute were "unconstitutional and void" under the Fourth Amendment because they are akin to general warrants. Compelling a person to give information to the government is the same as "[b]reaking into a house and opening boxes and drawers." *Id.* at 622, 630. Both actions "affect the very essence of constitutional liberty and security," and constitute "the invasion of his indefeasible right to personal security, personal liberty, and private property." *Id.*

Carpenter v. United States, 138 S.Ct. 2206, 2216 (2018) recognized the right to privacy in one's private or personal information that the individual wants to keep private and not "voluntarily tur[n] over" to a private party or a government official. There is also a Fourth Amendment property-rights basis for the right to privacy, as all four dissenting opinions recognized in *Carpenter*. *See also United States v. Jones*, 565 U.S. 400, 405–06 (2012). The right to privacy is also conventionally protected as liberty encompassed in the Fifth and Fourteenth Amendment's Due Process Clauses. *Griswold*, 381 U.S. at 486–87 (Goldberg, J., concurring). Importantly, the Ninth Amendment protects a broad and fundamental right to privacy—both the *Griswold* majority and Justice Goldberg's concurrence recognized this principle. *Id.* at 484, 487–493.

The Fourteenth Amendment's Privileges or Immunities Clause also offers an unimpeded textual basis alongside the Ninth Amendment for the right to privacy. Kyle Alexander Casazza, *Inkblots: How the Ninth Amendment and the Privileges or Immunities Clause Protect Unenumerated Constitutional Rights*, 80 S. Cal. L. Rev. 1383 (2007); Jeffrey Rosen, *How New Is the New Textualism?*, 25 Yale J.L. & Human. 43 (2013); *Dobbs*, 142 S.Ct. at 2302 (Thomas, J., concurring) ("[W]e could consider whether any of the rights announced in this Court's substantive due process cases are 'privileges or immunities of citizens of the United States' protected by the Fourteenth Amendment.").

For example, to protect the right to privacy in one's personal information, requiring a person to disclose their name (which could be satisfied orally or by producing a driver's license) has been upheld under the Fourth Amendment only when "suspicious circumstances" exist relating to a person's behavior in an ongoing police investigation. *Hiibel v. Sixth Judicial Dist. Ct. of Nev., Humboldt Cnty.*, 542 U.S. 177 (2004) (upholding conviction for refusing to answer questions incident to a *Terry*

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stop). Of course, Defendants do not claim any suspicion leads them to serve investigative demands on 3.5 million Americans every year.

Laws abridging fundamental rights like the individual's right to privacy must be justified by a "compelling state interest." *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969). And such laws must be narrowly drawn to express only legitimate governmental interests. *Griswold*, 381 U.S. at 485. *AFPF*, as noted, applying exacting scrutiny, struck down as facially unconstitutional a California law that invaded plaintiffs' speech and privacy rights. The Court should apply this settled test and strike down the mandatory nature of the ACS. If the ACS were administered as a fully voluntary survey, with no adverse consequences levied against those who refuse to answer it, then the ACS could survive a challenge to its constitutionality. In its current posture, however, the ACS does not.

IV. This Case Is Ripe

Compelling a person to give information to the government is the same as "[b]reaking into a house and opening boxes and drawers." *Boyd*, 116 U.S. at 630. All actions Defendants could take against Plaintiffs Murphy and Huddleston they have taken. Plaintiffs have confessed in writing to what the Defendants call the federal crime of refusing to answer the ACS that now subjects them to thousands of dollars in fines. Defendants have not disavowed prosecution. They admit the opposite—that the statute is very much alive and far from moribund. Defendants also admit that those whom they shortlist to answer the ACS suffer concrete, particularized injuries for Defendants must obtain OMB's approval to injure 3.5 million Americans every year. ECF22:6. Murphy and Huddleston have already spent time, money, and effort to locate information so they could truthfully answer the ACS. As such, Plaintiffs' claims are fully ripe.

Defendants downplay their own letters and the in-person visits of their agents. 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, a letter from the Social Security Administration, a letter informing a person that they might be called for jury duty, or a letter from the Census Bureau, all carry the inherent imprimatur of official action. And all such letters are issued with the legal backdrop of the respective statutes, like Section 221, that denote varying degrees of legal consequences (fines, penalties, punishment, or loss of

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benefits, rights 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 (it is an important civic duty on par with the civic duty of serving on a jury), any letter the Census Bureau sends saying the person is also "required by law" to answer this other survey called the ACS carries with it that unmistakable "or else." It is reasonable for people, therefore, to take the Census Bureau's letter seriously—Defendants want people to take the letter seriously because otherwise, as they admit, many thousands will exercise their rights to speech and privacy by refusing to answer the ACS.

Given this backdrop, Defendants' ripeness argument simply falls apart. The desuetude canon shows why Plaintiffs' claims are ripe. *Reading Law* at 336–39. Every statute has effect until it is repealed. The statute continues to be enforceable. There is no such thing as administratively planned obsolescence of congressionally enacted statutes. "In reason, and by most authorities, the power alone which can make a law is competent to annul one." Joel Prentiss Bishop, *Commentaries on the Written Laws and Their Interpretation* § 149, at 135 (1882). Defendants' self-defeating argument is that the statutes, 13 U.S.C. §§ 141, 193, 221, are linguistically clear, but have been notoriously ignored by both its administrators and the Department of Justice for an extended period of time. But Defendants continue to impart notice that those asked to answer the ACS are required by law to do so under these sections. They did so to Ms. Murphy and Mr. Huddleston. *See* ECF1-1 ("You are required by U.S. law to respond to this survey (Title 13, United States Code, Sections 141, 193, and 221)."); ECF1-5 at 3, 7 (same); ECF1-8 at 3 (same). And Defendants candidly say on their website (which Murphy and Huddleston were directed to peruse for further information about the ACS and in fact perused), that respondents can be fined "not more than $5,000" for not completing the ACS. ECF1-3 at 3. Defendants created a "credible" threat of enforcement when they repeatedly contacted Plaintiffs, in person and in writing, claiming that the law compels them to answer the ACS. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc). This repeated by-paper and in-person contact *is* Defendants' enforcement of operative statutes against Plaintiffs given that Congress has not granted Defendants any other rulemaking, adjudicating, or executing authority.

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Constitutional Ripeness

Plaintiffs easily satisfy constitutional ripeness, which is "synonymous" with the injury-in-fact requirement. *Twitter.com v. Paxton*, 26 F.4th 1119, 1123. Plaintiffs' injury is not conjectural or hypothetical, and a ruling in their favor can give them meaningful relief. *Meland v. Weber*, 2 F.4th 838, 849 (9th Cir. 2021). Their injury "is being subjected to a law that requires or encourages [them] to" not exercise their constitutional rights to silence and privacy. They can be selected to answer the ACS once every five years. ECF22:8. They have currently been selected to answer the ACS, which obligation has not been lifted off them. *Meland*, 2 F.4th at 849.

Plaintiffs are also beyond a mere "concrete plan to violate the law," *id.* at 1139 (simplified); they have already violated it. Defendants have already "communicated a specific warning or threat to initiate proceedings," *id.*—respondents like Murphy and Huddleston "shall be fined" "for not completing the ACS." ECF1-3 at 3. *See Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 653 (9th Cir. 2021) ("[T]he state's refusal to disavow enforcement … is strong evidence that the state intends to enforce the law and that [Plaintiffs] face a credible threat."); *Arizona v. Yellen*, 34 F.4th 841, 850 (9th Cir. 2022) (There is sufficient intent to enforce a law where a state "sent letters to businesses notifying them" of its interpretation of the law.). Defendants' agent visited Ms. Murphy *three times* to personally demand her response to the ACS. During one of those visits, Defendants' agent spent 30 minutes on her porch, repeatedly ringing the doorbell and banging on her door. Multiple letters, and multiple personal visits 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 the second *Thomas* factor. And there is "history of past prosecution *or* enforcement under the challenged statute," *id.* (emphasis added)—when the ACS was called the long form, at least five people have been criminally prosecuted for refusing to answer it, Daily Decl. ¶25, and Defendants admit they *enforce* the mandatory ACS against thousands of people, including Plaintiffs, when they tell them they are "required by law" to answer it.

Where criminal provisions are at issue—as Defendants claim 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 had 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. The parties were

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"sufficiently adverse" due to the governmental litigant's failure to "disavo[w] any intention of invoking the criminal penalty provision." *Id.* at 302; *Arizona*, 34 F.4th at 850 (same). Defendants here refuse to take future prosecution off the table. Indeed, they cannot make such a commitment because prosecution decisions are up to the DOJ, which has also not produced any statement agreeing not to prosecute respondents that refuse to answer the ACS. Daily Decl. ¶17.

Nor would a promise not to prosecute Murphy or Huddleston, if that promise were made now, be of any moment. If a defendant seeks to "buy off" or "pick off" the class-representative plaintiff with such an offer, then it "would effectively ensure" such class actions "would never have their day in court." *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011). Allowing such pick-off or buy-off of Plaintiffs by Defendants is "contrary to sound judicial administration." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

Plaintiffs Murphy and Huddleston also suffered economic injury because they have spent time, effort, and money to review instructions, search personal records, and collect relevant information. Murphy Decl. ¶ 19; Huddleston Decl. ¶ 8. Where such "tangible economic injury" exists, courts do "not rely on the three-factor test applied in *Thomas*." *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 855 (9th Cir. 2002).

Cases, like this one, that are brought under the Declaratory Judgment Act, are ripe even where they are viewed as seeking pre-enforcement review where the challenged statute "imposes costly, self-executing compliance burdens or if it chills protected First Amendment activity." *Minn. Citizens Concerned for Life v. FEC*, 113 F.3d 129, 132 (8th Cir. 1997).

Prudential Ripeness

Susan B. Anthony List v. Driehaus, 573 U.S. 149, 167 (2014) (simplified) said that while the "prudential ripeness" test "is in some tension … with a federal court's obligation to hear and decide cases," it would "not resolve the continuing vitality of the prudential ripeness doctrine" in that case. Prudential ripeness is, therefore, on life support and should not be used here to dispose of this case. Regardless, prudential ripeness is satisfied here.

The "fitness" and "hardship" factors were satisfied in *Driehaus* because (1) the challenge to the statute "presents an issue that is purely legal, and will not be clarified by further factual development,"

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and (2) "denying prompt judicial review would impose a substantial hardship on petitioners, forcing them to choose between refraining from" exercising, here, their First Amendment and privacy rights on the one hand, or exercising those rights and "risking costly … proceedings and criminal prosecution on the other." *Id.*

In *Davis*, as here, both factors show the case is prudentially ripe. The trappers' claims were ready for resolution in *Davis* because "the legal arguments are as clear as they are likely to become" and waiting for further facts to develop would not help the court resolve the claims. *Id.* at 857. In the end, Defendants present abstract, conclusory arguments against prudential ripeness, calling Plaintiffs' claims a generalized grievance. But the established, undisputed material facts, in this case show the opposite—ACS's numerous and highly specific questions, multiple contacts between Defendants' agents and Plaintiffs, Plaintiffs' receipt of multiple letters from Defendants demanding personal information, and Plaintiffs' firm commitment that they will continue to refuse to answer the ACS to fully exercise their fundamental rights to speech and privacy—all show concretely adverse controversy.

V. There Is Agency Action

The issuance of the letters respectively to Ms. Murphy and Mr. Huddleston followed up in-person visits by Census Bureau agents "mar[k] the consummation of the Agency's decisionmaking process." *Sackett v. EPA*, 566 U.S. 120, 127 (2012). The letters are "not subject to further Agency review." *Id.*; Daily Decl. ¶¶ 6–15. The fact that the letters invite Murphy and Huddleston to interact further with Defendants is inapposite because "that confers no entitlement to further Agency review." *Id.* Nor do Defendants have any rulemaking, adjudicatory, or executive authority whatsoever, other than the ACS selection and follow-up process outlined by Defendants, Daily Decl. ¶¶ 6–15—which process they admit has now concluded, Daily Decl. ¶ 22 ("Accordingly, pursuant to the standard process described above, the Bureau would have closed out both Plaintiffs' addresses."). Murphy and Huddleston, like the Sacketts, "cannot initiate [the enforcement] process, and each day they wait for the Agency to drop the hammer, they accrue, by the Government's telling, … potential liability." 566 U.S. at 127.

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So, Defendants' actions have all the "hallmarks of APA finality." *Id.* at 126. Via the letters Defendants sent Plaintiffs, Defendants "determined rights or obligations," and "legal consequences flow from the issuance of the [letters]." *Id.* (simplified). And nothing in the Census Act expressly or impliedly "precludes judicial review." *Id.* at 128. There, as here, "there is no adequate remedy other than APA review." *Id.* at 131. So, there is no impediment to this Court hearing this case. Defendants' arguments to the contrary lack merit. *See also Dep't of Com. v. New York*, 139 S.Ct. 2551, 2556 (2019) (concluding that the Census Bureau's decision to ask a particular question to millions of people is reviewable under the APA).

Defendants bring up sovereign immunity. But sovereign immunity does not attach in the first place. When a suit asks for specific nonmonetary relief "against government officials where the challenged actions of the officials are alleged to be unconstitutional or beyond statutory authority," then "[i]t is well-established that sovereign immunity does not bar [such] suits." *Clark v. Libr. of Cong.*, 750 F.2d 89, 102 (D.C. Cir. 1984). In official-capacity suits alleging officials' actions are unconstitutional or beyond statutory authority, "there is no sovereign immunity to waive—it never attached in the first place." *Chamber of Com. v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996); *see also Gros Ventre Tribe v. United States*, 469 F.3d 801, 808 n.8 (9th Cir. 2006) (same).

Defendants' argument also fails under *Larson* and *Dugan*. *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689–90 (1949) (stating the *ultra vires* doctrine); *Dugan v. Rank*, 372 U.S. 609 (1963) (applying the *ultra vires* doctrine). Government officers are not entitled to sovereign immunity when the officers act beyond statutory authority, or when the statute that confers the power to act is unconstitutional, or if the officers exercise that power in an unconstitutional manner.

The Administrative Procedure Act, specifically the second sentence of 5 U.S.C. § 702 "eliminate[s]" the sovereign-immunity defense here. *Clark*, 750 F.2d at 102. "Congress' plain intent in amending § 702 was to waive sovereign immunity." *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525–26 (9th Cir. 1989). The Section 702 waiver of sovereign immunity in suits for specific nonmonetary relief "against a Federal agency or officer acting in an official capacity … applies to any suit whether under the APA or not." *Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 57–58 (1st Cir. 2007). Even absent "agency action in the APA sense," APA Section 702 waives sovereign

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immunity. *Presbyterian*, 870 F.2d at 525–26. The First Circuit concluded recently that a declaratory-injunctive-relief statutory and constitutional challenge to IRS's information-gathering practices based on a letter that IRS sent the plaintiff is not barred by any exception to Section 702's waiver of sovereign immunity. *Harper v. Rettig*, __ F.4th __, 2022 WL 3483824 (1st Cir. Aug. 18, 2022). The APA, thus, contains a general waiver of sovereign immunity; Plaintiffs' suit here asks only for non-monetary declaratory and injunctive relief; so Defendants' sovereign-immunity argument is meritless.

VI. Plaintiffs Are Entitled to a Trial by Jury Here

If the Court is inclined to conclude that there are disputed facts that preclude granting summary judgment, Plaintiffs reserve the right to seek a trial by jury. The Court should not pre-judge the question of whether to call for a jury in this case at this juncture. The question, if needed, will have to be decided in due course upon an appropriate motion filed to that effect. By way of preview, and to respond to Defendants' stray comment suggesting otherwise: The Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, under which this case is brought, "is neither legal nor equitable, but sui generis," *Pac. Indem. Co. v. McDonald*, 107 F.2d 446, 448 (9th Cir. 1939), and "specifically preserves the right to jury trial for both parties." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 504 (1959); *see also Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022) (concluding that the Seventh Amendment jury-trial right applied in suits challenging agency action).

Conclusion

The Court should grant summary judgment in favor of Plaintiffs Maureen Murphy and John Huddleston.

DATED: August 26, 2022.

Pacific Legal Foundation, 255 South King Street, Suite 800
Seattle, Washington 98104 | (425) 576-0484

Respectfully submitted:

s/ *Aditya Dynar*
ADITYA DYNAR
DC Bar No. 1686163*
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 610
Arlington, VA 22201
Telephone: (202) 807-4472
Email: ADynar@pacificlegal.org

s/ *Brian T. Hodges*
BRIAN T. HODGES
WSBA No. 31976
Pacific Legal Foundation
255 South King Street, Suite 800
Seattle, WA 98104
Telephone: (425) 576-0484
Email: BHodges@pacificlegal.org

s/ *Michael A. Poon*
MICHAEL A. POON
Cal. Bar No. 320156*
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
Email: MPoon@pacificlegal.org

** pro hac vice*

Attorneys for Plaintiffs

Certificate of Service

I hereby certify that on this date, I filed a copy of the foregoing with the Clerk of this Court through the CM/ECF system, which will notify all counsel of record of this filing.

DATED: August 26, 2022.

s/ *Aditya Dynar*
ADITYA DYNAR
DC Bar No. 1686163

Attorney for Plaintiffs

Certificate of Compliance

Per Local Rule 7(f)(4), the foregoing principal filing of the Plaintiffs is automatically allowed 36 pages because the Court granted leave to the Defendants to file an overlength brief of not more than 36 pages. ECF21. Defendants consent to this 36-page limit for Plaintiffs' principal brief.

DATED: August 26, 2022.

s/ *Aditya Dynar*
ADITYA DYNAR
DC Bar No. 1686163

Attorney for Plaintiffs

Pacific Legal Foundation, 255 South King Street, Suite 800
Seattle, Washington 98104 | (425) 576-0484

Hon. David G. Estudillo

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

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,

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.

Civil Action No. 3:22-cv-05377-DGE

[PROPOSED] ORDER GRANTING PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT

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Good cause appearing, Plaintiffs' cross-motion for summary judgment is GRANTED.

DATED this ____ day of _____, 2022.

_____
U.S. District Judge

Presented by

s/ *Aditya Dynar*
ADITYA DYNAR
DC Bar No. 1686163*
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 610
Arlington, VA 22201
Telephone: (202) 807-4472
Email: ADynar@pacificlegal.org

s/ *Brian T. Hodges*
BRIAN T. HODGES
WSBA No. 31976
Pacific Legal Foundation
255 South King Street, Suite 800
Seattle, WA 98104
Telephone: (425) 576-0484
Email: BHodges@pacificlegal.org

s/ *Michael A. Poon*
MICHAEL A. POON
Cal. Bar No. 320156*
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
Email: MPoon@pacificlegal.org

** pro hac vice*

Attorneys for Plaintiffs

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Document Number:	26

Docket Text:
CROSS MOTION AND RESPONSE re [22] MOTION for Summary Judgment , filed by Plaintiffs John Huddleston, Maureen Murphy. Oral Argument Requested. (Attachments: # (1) Proposed Order) Noting Date 9/30/2022, (Dynar, Aditya)

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Katherine Turnbill | Legal Secretary
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From: Katherine Turnbill
Sent: Friday, August 26, 2022 2:17 PM
To: estudilloorders@wawd.uscourts.gov
Cc: Aditya Dynar <ADynar@pacificlegal.org>; Brian T. Hodges <BHodges@pacificlegal.org>; Michael A. Poon <mpoon@pacificlegal.org>; john.j.robinson@usdoj.gov
Subject: 3:22-cv-05377-DGE Murphy et al v. Raimondo et al - Proposed Order

Dear Clerk,
Attached please find the Proposed Order Granting Plaintiffs' Cross Motion for Summary Judgment.
Sincerely,

Katherine Turnbill | Legal Secretary
Pacific Legal Foundation
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