No. 23-35166

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

APPELLANTS' REPLY BRIEF

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GLOSSARY

AAB	Appellees' Answering Brief
ACS	American Community Survey
AOB	Appellants' Opening Brief
CFPB	Consumer Financial Protection Bureau
DOJ	Department of Justice
EPA	Environmental Protection Agency

ARGUMENT IN REPLY

The Census Bureau's principal brief (AAB) essentially presents three arguments: (1) Future injury is questionable. (2) The case is not justiciable. (3) There was no threat. None is persuasive. The Court should reverse the decision below.

1.

Plaintiffs Maureen Murphy and John Huddleston have a continued, unremedied interest in enjoining the Census Bureau from forwarding their names to the Department of Justice (DOJ) for criminal prosecution until the five-year statute of limitations expires, 18 U.S.C. § 3282. And they have a continued, unremedied interest in permanently opting out of answering the American Community Survey (ACS). AOB-12, 25. They each have a significant, "continuous[ ]," AAB-1, 9, 10, "1-in-480 chance" "each month" to be asked to fill out the ACS, AAB-13. And the Census Bureau confirms it takes steps only "to reduce"—but not eliminate—"the likelihood that any one address will be selected more than once every five years." AAB-13.

Despite multiple occasions where the Census Bureau could have said it can take Murphy and Huddleston off its list permanently such that their addresses are permanently removed from the mix of addresses randomly selected to answer the ACS, it confirms once again in its answering brief that Murphy and Huddleston remain on the list permanently. *See, e.g.*, AAB-15. The Census Bureau insists that Murphy

and Huddleston are subject to "continuous[ ]," AAB-1, 9, 10, and "random[ ]," AAB-1, 2, 13, 14, 25, 26, 28, 38, 42, selections "each month," AAB-13, 25. And there is no current mechanism Murphy or Huddleston can utilize to opt out of answering the ACS. The Census Bureau confirms it can mail Murphy and Huddleston another letter asking them to answer the ACS and informing them of the crime of refusing to answer the ACS—or station federal agents on their porches at odd hours, ER-037, to intimidate them (in the Bureau's words "invit[e] to participate," AAB-20) into answering the ACS—at any time.

Unlike the Census Bureau and the court below, the Supreme Court has had no trouble concluding that such a "sword of Damocles" creates a "here-and-now subservience" that makes the case "ripe" for review. *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 n.13 (1991). Nor has this Court "require[d] Damocles's sword to fall before we recognize the realistic danger of sustaining a direct injury." *Chang v. United States*, 327 F.3d 911, 921 (9th Cir. 2003). Murphy and Huddleston's "ripe," "here-and-now" injuries "can be remedied" by federal courts here and now. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2196 (2020).

2.

The Census Bureau tries to distinguish the "test for final agency action" from "justiciability under Article III." AAB-39. But it misses the mark. Courts engage in "a properly pragmatic analysis of ripeness and

final agency action principles." *Hawkes Co. v. U.S. Army Corps of Engineers*, 782 F.3d 994, 1002 (8th Cir. 2015), *aff'd*, 578 U.S. 590 (2016). To say that the Census Bureau's letters and its agents' in-person visits have no "coercive effect" and cause no injury is to "ignor[e] reality." *Id.* at 1002 (quoting *Bennett v. Spear*, 520 U.S. 154, 169 (1997)). Combined with the "uncertain reach" of the statutes the Census Bureau purports to act under when it conducts the ACS and the "draconian penalties imposed" under the Census Bureau's reading of those statutes, ER-086–87, leaves most people like Murphy, Huddleston, and other affiants, ER-019–038, "with little practical alternative but to dance to the [Census Bureau's] tune." *Hawkes*, 782 F.3d at 1002. *Hawkes*, relying extensively on the *Sackett* test, 782 F.3d at 996, minced no words when it acknowledged that even if "issues of ripeness and final agency action are distinct," "final agency action factors … resolv[e] the ripeness issue as well." *Id.* at 1002 n.2. This Court should likewise apply *Sackett* to resolve the ripeness question.

The Court should do so because the *Sackett* factors are a better fit for the unique recipe of powers Congress gave the Census Bureau. Because the Census Bureau has no "prosecution" power (a feature it freely admits, AAB-36–37), it makes little if any sense to use a test designed for agencies that can and do "prosecut[e]." *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134, 1139 (9th Cir. 2000); AOB-15–18. Unlike those other agencies, the Census Bureau "cannot initiate

administrative proceedings … and it cannot sue in federal court." AAB-37. The Census Bureau's admission that it does not have the power to prosecute is both correct and key to concluding Murphy and Huddleston's case against it is ripe.

Likewise, the D.C. Circuit has held that cases seeking declaratory and injunctive relief are ripe for review when the case arises from a federal agency letter stating the agency's interpretation of relevant statutes because such agency action imposes sufficient hardship to warrant review. *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430 (D.C. Cir. 1986). Such "comply-or-else" cases are ripe even if the agency is not expected to follow through with its threat.

3.

The Census Bureau now questions whether Exhibit 3 of the Complaint was directed toward ACS respondents by claiming it was directed toward Congress. AAB-27 (referring to ER-086). The Census Bureau stands on flimsy footing. It made an FAQ document freely available on its website for anyone to see. It invited Murphy and Huddleston to review its website. Murphy and Huddleston saw that FAQ document (alongside other letters the Census Bureau sent them). ER-035; ER-038. The FAQ document contained the same threat that the Census Bureau issued through other correspondence—that those who do not answer the ACS will be fined "not more than $5,000," ER-087, under applicable criminal statutes, for refusing to answer the ACS. If it wanted

the Census Bureau could have asked for discovery on the nature of the threat it refuses to acknowledge it issued to Plaintiffs. Now it wishes this Court to affirm the district court's grant of summary judgment by pointing out a genuine dispute as to material fact that it failed to raise below—whether Murphy and Huddleston were threatened. Such a thirteenth-hour tactic is disingenuous, not to mention that it works against the Census Bureau's interest in seeking affirmance from this Court.

* * *

In sum, the Census Bureau fails to account for the unique limits imposed by Congress on the scope of its power—it has no prosecution power. But accounting for that factor is a necessary precondition to addressing the ripeness question. Perhaps its failure is a concession or a waiver of any argument it could have presented on that point. Or perhaps the Census Bureau's strategic silence on the topic shows the importance or the dispositive nature of that factor. Either way, Plaintiffs have shown why the case is ripe. The Court should so conclude and remand for the district court to rule on the class-certification question and on the merits.

CONCLUSION

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

Dated: August 29, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

9th Cir. Case No. 23-35166

I am the attorney for Plaintiffs-Appellants.

This brief contains 1,160 words, excluding items exempted by FRAP 32(f).

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

The brief complies with the word limit of Cir. R. 32-1(b) because it does not exceed 7,000 words.

Dated: August 29, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Dated: August 29, 2023.

Respectfully submitted,

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Case Name: Maureen Murphy, et al v. Gina Raimondo, et al
Case Number: 23-35166
Document(s): Document(s)

Docket Text:
Submitted (ECF) Reply Brief for review. Submitted by Appellants John Huddleston and Maureen Murphy. Date of service: 08/29/2023. [12782825] [23-35166] (Dynar, Aditya)

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Electronic Document Stamp:
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