

UNITED STATES DISTRICT COURT

for the
Southern District of Florida

MICHAEL VAN CLEVE,
An individual,

Plaintiff,

v.

WYNN COGGINS, sued in her official capacity
as the acting director for the U.S. Secretary of
Commerce, et al.,

Defendants.

Case No.: 1:20-cv-23611-RNS

PLAINTIFF'S THIRD AMENDED COMPLAINT

Plaintiff, Michael Van Cleve ("Van Cleve"), sues the following Defendants: Wynn Coggins, in her official capacity as the acting director for the U.S. Secretary of Commerce; Ron Jarmin, in his official capacity as the acting director for the U.S. Census Bureau, Robert ("Rob") Fairweather, in his official capacity as the acting director for the Office of Management and Budget, the U.S. Department of Commerce ("Department of Commerce"), the U.S. Census Bureau ("Census Bureau") and the Office of Management and Budget ("OMB") and states as follows:

Introduction:

1. Van Cleve is bringing causes of action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§551 et seq., and seeks injunctive and declaratory relief against Defendants concerning the race and ethnicity data collection standards in the October 30, 1997, Office of Management and Budget ("OMB") rule: *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity: Notice of Decision* ("the 1997 OMB Rule"),¹ and the race categories and two-question race and ethnicity format in the 2020 U.S. Census and the 2020 American Community Survey ("ACS") that conjunctively applied and utilized

¹ *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58782 (October 30, 1997).

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the 1997 OMB rule, and future statistical surveys created or utilized by Defendants that apply the same 1997 OMB rule (also referred to as the “race system” or “current race system”).

2. Defendants have clear and unambiguous, nondiscretionary, statutory obligations to produce relevant, accurate, and objective statistical data to Van Cleve and American businesses under federal law, including portions of the Paperwork Reduction Act (“PRA”)² and the Foundations for Evidence-Based Policymaking Act of 2018 (“Evidence Act”),³ and by agency policy – Statistical Policy Directive No. 1: *Fundamental Responsibilities of Federal Statistical Agencies and Recognized Statistical Units* (“Policy Directive #1”⁴) which the undersigned is enforcing through the Administrative Procedure Act (“APA”), 5 U.S.C. §§551 et seq.

3. Federal law, including portions of the PRA⁵ and the Evidence Act, restrict or remove the Defendants’ discretion to create and use arbitrary, illogical race systems for data collection. At the very minimum, Defendants are required to periodically update the race system for accuracy to produce relevant and reliable statistical information, regardless of the 6-year statute of limitations.⁶

4. The current race system includes races which are overbroad, subjective, and imprecise, such as the White and Black races.

5. The current race system includes definitional criteria for the five races that are confusing to Americans and the definitional criteria is factually inaccurate.

6. The current race system does not account for the growing multiracial population in the United States.

7. The current race system excludes, as a race, certain population groups living in the United States, like the Middle Eastern and North African population, (“MENA”),

² 44 U.S.C. § 3506(e)(1) & 44 U.S.C. § 3506(e)(6).

³ 44 U.S.C. § 3563.

⁴ *Statistical Policy Directive No. 1: Fundamental Responsibilities of Federal Statistical Agencies and Recognized Statistical Units*, 79 FR 71609 (December 2, 2014).

⁵ 44 U.S.C. § 3506(e)(1) & 44 U.S.C. § 3506(e)(6).

⁶ 28 U.S.C. § 2401(a).

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despite Census Bureau studies and reports which show that including the MENA group as a race would produce more accurate information.

8. The current race system treats Hispanics as a subclass under race, i.e., an ethnicity, without legally distinguishing between race and ethnicity. Defendants also use a two-part race and ethnicity question when they collect data on race and ethnicity, instead of combining race and ethnicity as one question. The latter has been proven by prior Census Bureau studies reports to be a more accurate method for collecting data on race and ethnicity.

9. Nicholas A. Jones, in his official capacity as the U.S. Census Bureau's Director and Senior Advisor of Race and Ethnic Research and Outreach and Population Division, admitted that most people are confused on the form's categories – confusion which is the result of their arbitrariness. “Our research acknowledges that a growing number of people find the current race and ethnic categories confusing, or wish to see their own specific group reflected on the census.”⁷

10. Wendy Roth, a sociologist from the University of Pennsylvania stated, “There are a lot of other people who don't understand how to complete the U.S. census . . . because it doesn't match their way of understanding race . . . Sometimes they will identify in ways that are the complete opposite of what the U.S. census is trying to capture.”⁸

11. Steven Dillingham, former Census Bureau Director, was publicly questioned by Congresswoman Rashida Tlaib about her race.⁹ She was visibly frustrated that she felt

⁷ *Update on the U.S. Census Bureau's Race and Ethnic Research for the 2020 Census*, Nicholas A. Jones, Director of Race and Ethnic Research and Outreach, Survey News - Volume Three, Issue 5 - U.S. Census Bureau.

https://www.census.gov/content/dam/Census/newsroom/press-kits/2014/article_race_ethnic_research_2020census_jones.pdf

⁸ *To fight discrimination, the U.S. census needs a different race question*, Sujata Gupta, ScienceNews.Org, March 8, 2020. <https://www.sciencenews.org/article/census-2020-race-ethnicity-questions>

⁹ *Rashida Tlaib Questions Why 2020 Census Erases Middle Eastern & North African Identity | NowThis*, YouTube, Posted February 21, 2020, <https://www.youtube.com/watch?v=qUONzziXd1Y&feature=youtu.be>

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pressured to mark "White" as a race on the census instead of being able to identify with her own social group. Steven Dillingham begrudgingly acknowledged the problem.

12. Based on several studies, including the *2020 CBAMS Report*,¹⁰ the Defendants knew that use of the 1997 OMB Rule races, without more precise categories, would reduce or negatively affect the enumeration count for the 2020 U.S. Census/2020 ACS by leading to nonresponse, whereas more precise races act as a motivator for Americans to answer the 2020 U.S. Census/2020 ACS questions.

13. This complaint carefully sets out facts which are supported by Census Bureau officials, Census Bureau reports, and OMB notices.¹¹

14. In the last two years, there have been several census-related cases decided by both federal district courts,¹² appellate courts,¹³ and even the Supreme Court.¹⁴ All those

¹⁰ *2020 Census Barriers, Attitudes, and Motivators Study (CBAMS) Focus Group Final Report*, United States Census Bureau, Prepared by Sarah Evans, Jenna Levy, Jennifer Miller-Gonzalez, Monica Vines, Anna Sandoval Girón, Gina Walejko, Nancy Bates, & Yazmin García Trejo, January 24, 2019, full report available here:

<https://www.census.gov/programs-surveys/decennial-census/2020-census/planningmanagement/final-analysis/2020-report-cbams-focus-group.html>

¹¹ *Parks v. US Dept. of Commerce, et al.*, 456 F. Supp. 3d 691, 697 (D. Md. April 24, 2020).

¹² *New York et al., v. Trump et al.*, Case No. 1:20-cv-05770-JMF, Docket Entry #164, Page 43, (S.D.N.Y. September 10, 2020) ("Meanwhile, by virtue of the Constitution and the Census Act, it is, of course, the federal government's job to collect and distribute accurate federal decennial census data.") (overturned by the Supreme Court on lack of ripeness). See Also, *City of San Jose et al., v. Trump et al.*, Case No. 5:20-cv-05169-LHK-RRR-EMC, Docket Entry 82, Page 25, (N.D. Cal. October 22, 2020), stating, "Second, the census degradation injury arises because, if undocumented immigrants are not included as part of the census, then the census is undercounting the population, which then impacts, inter alia, state and local redistricting (by diluting the political power of areas with high concentrations of affected immigrants), state and local governments' share of federal funding, and state and local governments' ability to perform critical governmental functions—all of which are dependent on and affected by the accuracy and completeness of census data." (vacated by the Supreme Court on ripeness grounds).

¹³ *National Urban League, et al., v. Ross, et al.*, Case No. 20-16868 (9th Cir. October 7, 2020) (stay overturned by the Supreme Court on grounds other than requirements for census accuracy in *Ross et al., v. National Urban League, et al.*, Case No. No. 20A62 (Supreme Court October 13, 2020).

¹⁴ *Department of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019), stating, "by mandating a population count that will be used to apportion representatives, see § 141(b), 2

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cases agree that the enumeration and collection of census-data from the census must be accurate.

Subject Matter Jurisdiction, Standing Generally, and Waiver of Sovereign Immunity

15. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 and §1343 over Van Cleve's causes of action and may have jurisdiction under Public Law 105-119 § 209 (13 U.S.C. § 141 note).¹⁵

16. This Court also has jurisdiction (or powers of judicial review) of Van Cleve's claims under the Administrative Procedure Act, 5 U.S.C. § 500 et seq. The OMB and the Census Bureau and the Department of Commerce are agencies which are subject to the APA.

17. This Court may grant Plaintiffs' request for declaratory and injunctive relief under 28 U.S.C. § 2201 and §2202.

18. The United States has waived its immunity from suit for wrongful acts of an agency action, under 5 U.S.C. § 702 and §704.

19. Individuals, or even one individual, has standing to assert a claim against an agency so long as that person has suffered some legal wrong by the agency or that person has been adversely affected by the agency.¹⁶

The Parties:

Plaintiff Michael Van Cleve/Michael Van Cleve, Law

20. Van Cleve is a natural person, and a resident of the State of Florida, residing within Broward county, which is under the jurisdiction of this court.

21. Van Cleve also operates a business and law practice as a sole proprietorship called Michael Van Cleve, Law, with its primary place of business in Miami-Dade County, Florida.

U.S.C. § 2a, the Act imposes 'a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment'."

¹⁵ This court previously denied jurisdiction under Public Law 105-119 § 209 in its December 21, 2020 Order. The allegation is raised here strictly to preserve the matter for appellate review.

¹⁶ 5 U.S.C. § 551(2). *See also*, Albino v. US, 78 F. Supp. 3d 148 (D.D.C. January 15, 2015).

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Defendant Wynn Coggins – Acting Secretary of U.S. Department of Commerce

22. Defendant Wynn Coggins is the acting Secretary of the U.S. Department of Commerce.

23. The Secretary of Commerce carries out the functions and duties imposed on her by the Census Act, issues rules and regulations to carry out his responsibilities, and delegates functions and duties as necessary. 13 U.S.C. § 4.

24. The Secretary of Commerce prepares questionnaires, determines inquiries, and determines the number and form of statistics, surveys, and censuses. 13 U.S.C. § 5.

25. Congress delegated the duty to conduct the census to the Secretary of Commerce, who must take a census on April 1 every 10 years “in such form and content as he may determine [.]” 13 U.S.C. § 141(a); see also 13 U.S.C. § 5.

26. Defendant Coggins would be responsible for ensuring that the Department of Commerce produces and disseminates accurate, relevant, timely, and objective information related to the decennial census (which is a statistical survey) under 44 U.S.C. § 3506(a)¹⁷ and § 3506(e).

27. Defendant Coggins would also be responsible¹⁸ for ensuring that the Census Bureau complies with the requirements of 44 U.S.C. § 3563(a), which requires the Census Bureau to produce and disseminate accurate, objective, and relevant information.

28. Defendant Coggins is responsible for ensuring both the Department of Commerce and the Census Bureau comply with Policy Directive #1, which requires the agencies to produce and disseminate relevant and timely information to businesses.

29. Defendant Coggins is being sued in her official capacity.

Defendant Ron Jarmin – Acting Director of U.S. Census Bureau

30. Defendant Ron Jarmin is the acting Director of the Census Bureau. The Director of the Census Bureau oversees the 2020 decennial census operations and is responsible for ensuring the accuracy of the 2020 decennial census count.

¹⁷ “The head of each agency is responsible for complying the requirements of this subchapter and related policies established by the Director.” 44 U.S.C. § 3506(e).

¹⁸ “The head of each agency shall enable, support, and facilitate statistical agencies or units in carrying out the responsibilities described in subsection (a)(1).” 44 U.S.C. § 3506(e).

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31. Defendant Jarmin directs the Census Bureau and performs census-related duties assigned by law, regulation, or by the Secretary of Commerce. 13 U.S.C. § 21.

32. Defendant Jarmin would be responsible for ensuring that the Census Bureau produces and disseminates accurate, relevant, timely, and objective information under 44 U.S.C. § 3506(a) and § 3506(e), especially with the decennial census.

33. Defendant Jarmin would also be responsible for ensuring that the Census Bureau complies with the requirements of 44 U.S.C. § 3563(a), which requires the Census Bureau to produce and disseminate accurate, objective, and relevant information.

34. Defendant Jarmin is responsible for ensuring that the Census Bureau complies with Policy Directive #1, which requires the agency to produce and disseminate relevant and timely information to businesses.

35. Defendant Jarmin is sued in his official capacity.

Defendant Rob Fairweather - Acting Director of the Office of Management and Budget

36. Defendant Rob Fairweather is the acting Director of the OMB.

37. Defendant Fairweather assists the President of the United States in overseeing the implementation of his vision across the Executive Branch by managing the OMB.

38. Defendant Fairweather would be responsible for ensuring that the OMB produces and disseminates accurate, relevant, timely, and objective information under 44 U.S.C. § 3506(a) and § 3506(e).

39. Defendant Fairweather also has additional obligations to provide direction and oversee statistical activities and the dissemination of public information for all federal agencies under 44 U.S.C. § 3504(a) and § 3504(e).

40. Defendant Fairweather would also be responsible for ensuring that the Census Bureau complies with the requirements of 44 U.S.C. § 3563(a), which requires the Census Bureau to produce and disseminate accurate, objective, and relevant information.

41. Defendant Fairweather is responsible for ensuring that the Census Bureau complies with Policy Directive #1, which requires the agency to produce and disseminate relevant and timely information to businesses.

42. Defendant Fairweather is sued in his official capacity.

Defendant U.S. Department of Commerce

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43. Defendant Department of Commerce is an agency of the U.S. government which oversees the Census Bureau and its conduct of the decennial census and other census programs.

44. The Department of Commerce is an agency under 44 U.S.C. § 3506 (as defined in 44 U.S.C. § 3502).

45. The Department of Commerce is responsible for producing accurate, relevant, timely, and objective information under 44 U.S.C. § 3506(e).

46. The Department of Commerce is responsible for disseminating to the public, accurate, relevant, timely, and objective information under 44 U.S.C. § 3506.

47. The Department of Commerce exercises oversight under the Census Bureau and should assist them in complying with Policy Directive #1.

Defendant U.S. Census Bureau

48. Defendant U.S. Census Bureau is an agency within the Department of Commerce. 13 U.S.C. § 2.

49. The Census Bureau is responsible for conducting all census programs, including the development and implementation of the 2020 decennial census and the collection of information for and formulation of the P.L. 94-171 population tabulations used by states for redistricting.

50. The Census Bureau is an agency under 44 U.S.C. § 3506 (as defined in 44 U.S.C. § 3502).

51. The Census Bureau is responsible for producing accurate, relevant, timely, and objective information under 44 U.S.C. § 3506(e).

52. The Census Bureau is responsible for disseminating to the public, accurate, relevant, timely, and objective information under 44 U.S.C. § 3506.

53. The Census Bureau is also a statistical agency¹⁹ under 44 U.S.C. § 3563(a).

54. The Census Bureau must produce and disseminate relevant, timely, accurate, and objective information under 44 U.S.C. § 3563.

¹⁹ Statistical agency is defined under 44 U.S.C. § 3561(11) as “an agency . . . whose activities are predominantly the collection, compilation, processing, or analysis of information for statistical purposes.”

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55. The Census Bureau is a statistical agency under Policy Directive #1 and must disseminate accurate and relevant and timely information to businesses under this policy.

Defendant U.S. Office of Management and Budget

56. Defendant OMB is an executive agency, responsible for several functions such as the production of the President's budget.

57. The OMB also sets forth certain policies, principles, standards, and guidelines for the collection of statistical data.

58. The OMB is an agency under 44 U.S.C. § 3506 (as defined in 44 U.S.C. § 3502).

59. The OMB is responsible for producing accurate, relevant, timely, and objective information under 44 U.S.C. § 3506(e).

60. The OMB is responsible for disseminating to the public, accurate, relevant, timely, and objective information under 44 U.S.C. § 3506.

61. The OMB, which created Policy Directive #1 to comply with the IQA, must assist the Census Bureau in disseminating accurate and relevant and timely information to the public.

Defendants Collectively Named Under Each Count

62. All named Defendants must comply with the PRA as pled above, and all Defendants should be assisting the Census Bureau in complying with 44 U.S.C. § 3563 and Policy Directive #1.

63. Defendants act in concert to prepare and disseminate accurate statistical information, especially for the decennial census and the ACS, and future statistical surveys.

64. Therefore, all Defendants are collectively named under each claim or count.

Personal Jurisdiction

65. Personal jurisdiction can be general or specific. This court has personal jurisdiction over Defendants, who impose the census upon every citizen in every state, including Florida.

Venue

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66. Venue is proper in this division under 28 U.S.C. § 1391(c)(1) and 28 U.S.C. § 1391(e)(1)(C), the Michael Van Cleve, Law, office is physically located in Miami-Dade County. Van Cleve currently resides in Broward County.

Final Actions of Defendants Subject to Judicial Review

67. The informal rulemaking finalized in the OMB's *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58782 (October 30, 1997), is both a discrete act and a final agency action subject to judicial review. A failure to update the 1997 OMB Rule is a discrete act the courts can compel the Defendants to do under 5 U.S.C. § 706(1).

68. The race categories on the 2020 U.S. Census form (the short-form) are the result of an informal adjudication. It is also final agency action taken by Defendants, which is subject to judicial review, and finalized²⁰ upon the initiation of the 2020 U.S. Census this year.²¹

69. The race categories on the 2020 ACS form are the result of an informal adjudication. It is also final agency action taken by Defendants, which is subject to judicial review, and finalized upon the initiation of the 2020 ACS this year.

These Legal Issues are Ripe and not Moot

70. This matter is ripe and not moot for the following reasons: (1) the 2020 Census data is still being processed,²² and the race data will not be released until after the apportionment/enumeration data has been finalized on or about April 30, 2021,²³ and (2)

²⁰ *The 2020 U.S. Census began on January 21, 2020*, United States Census Bureau, Census.gov, <https://2020census.gov/en/important-dates.html>

²¹ The OMB has the sole authority to revise the race categories, pursuant to the 1997 OMB Rule. See Also, Arab American Institute v. OMB, Case No. 18-0871 (ABJ) Docket Entry 39-2, ¶10 (D.D.C. May 13, 2020).

²² *2020 Census Processing Updates*, U.S. Census Bureau, Acting Director Ron Jarmin Statement, published February 2, 2021, available here: <https://www.census.gov/newsroom/blogs/director/2021/02/2020-census-processing-updates.html>

²³ "The result is that our current schedule points to April 30, 2021, for the completion of the apportionment counts." *2020 Census Processing Updates*, U.S. Census Bureau, Acting Director Ron Jarmin Statement, published February 2, 2021, available here:

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the OMB race categories have remained unchanged since 1997 and are still mandatory on every federal statistical agency, and the 1997 rule has not been revoked, revised, or updated, and (3) the 2021 ACS questionnaire²⁴ asks race and ethnicity as separate questions like the 2020 U.S Census/2020 ACS, reflecting no change in agency policy.

71. This court can direct the Defendants to comply with their obligations under the PRA, Evidence Act, and Policy Directive #1, and update the 1997 OMB Rule. This court can also preclude Defendants from asking race and ethnicity as separate questions when Census Bureau reports, studies, and tests show that combining the race and ethnicity questions lead to more accurate responses and reduce nonresponse.

72. The ACS survey is a continuous, monthly, and annual survey, which is subject to repetition, and bound by the 1997 OMB rule (with regard to the race categories on the form).

73. Finally, Defendants have openly admitted both in a recent memorandum of law²⁵ and during oral argument,²⁶ that census-related litigation is normally done after the census is complete.

Feasible Alternatives: Combining Race and Ethnicity into One Question and Including MENA as a Race

74. The Census Bureau had plans to submit for notice and comment potential changes to both the 2020 U.S. Census and the 2020 ACS from July 2017 to September 2018.²⁷

<https://www.census.gov/newsroom/blogs/director/2021/02/2020-census-processing-updates.html>

²⁴ Sample 2021 ACS Form, available here: <https://www2.census.gov/programs-surveys/acs/methodology/questionnaires/2021/quest21.pdf>

²⁵ Common Cause, et al., v. Trump, et al., Case No. 1:20-cv-02023, Docket Entry #59, Page 14, ¶2 (D.D.C. filed September 2, 2020).

²⁶ Common Cause, et al., v. Trump, et al., Case No. 1:20-cv-02023, Docket Entry #80-2, Page 12, Lines 9-25 (D.D.C. filed October 17, 2020).

²⁷ ECF No. 32-2.

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The table below contains a timeline for this document development, as well as opportunities for stakeholders to comment on proposed content.¹

Phase	Planned Activity	Planned Activity Timeline
1	Inform/Create General Awareness	March 2016—August 2016
2	Federal Agencies are Invited to Provide Updates to Federal Use Documentation	March 2016—June 2016
3	Incorporate Feedback	May 2016—September 2016
4	Develop Topic Submission	October 2016—December 2016
5	Provide Updates and Conduct Briefings	January 2017—March 2017
6	Final <i>Topics Planned</i> document available	No later than March 31, 2017
7	Follow-up with Federal Agencies about Federal Use Documentation as needed	March 2017—June 2017
8	<i>Federal Register</i> notice of Public Comment	July 2017—September 2017

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Phase	Planned Activity	Planned Activity Timeline
	Period (proposed changes to ACS)	(60 days)
9	<i>Federal Register</i> notice of Public Comment Period II (ACS submission)	December 2017—January 2018 (30 days)
10	Submit Information Collection Request (ICR) to OMB under the Paperwork Reduction Act (proposed changes to ACS)	January 2018
11	<i>Federal Register</i> notice Public Comment Period (proposed content for 2020 Census)	May 2018—July 2018 (60 days)
12	<i>Federal Register</i> notice Public Comment Period II (2020 Census submission)	August 2018—September 2018 (30 days)
13	Submit Information Collection Request (ICR) to OMB under the Paperwork Reduction Act (proposed content for 2020 Census)	September 2018
14	Provide Updates and Conduct Briefings	January 2018—March 2018
15	Final <i>Questions Planned</i> document available	No later than March 31, 2018

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75. The Census Bureau had in fact planned to make changes to the race and ethnicity questions on the 2020 U.S. Census and the 2020 ACS.³⁰

²⁸ ECF No. 32-2.

²⁹ ECF No. 32-2.

³⁰ ECF No. 32-2.

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76. As late as March 29, 2017, Defendants still had not finalized the race and ethnicity questions on the form:

The Census Bureau recognizes that OMB is continuing to lead the discussion among federal agencies and other stakeholders on race/ethnicity from the perspective of data collection and dissemination guidance and standards, and that the final determination has not been made on the format of the race/ethnicity question for the 2020 Census. If it is determined that the combined race/ethnicity question format may be used for the 2020 Census (versus the separate race and Hispanic Origin questions used for the 2010 Census), it will be crucial for the Census Bureau to ensure that critical operations are fully prepared to go into production for the 2020 Census using the combined question. Therefore, the 2018 End-to-End Census Test data collection operations will utilize the combined race/ethnicity question version (that includes a Middle Eastern or North African category) to further its analysis and understanding of mode differences for the race/ethnicity responses before deploying the 2020 Census questionnaire.³¹

77. The Census Bureau tested new or revised census content, to include the race and ethnicity questions, on the 2018 End-to-End Census Test.³²

78. "Research has found that, over time, there have been a growing number of people who do not identify with any of the race categories, and this means that an increasing number of respondents have been classified as 'Some Other Race.' The combined question format with detailed checkboxes attempts to help improve the accuracy of these data."³³

79. Specifically, the 2018 End-to-End Census Test removed the MENA group from the White group, disaggregated the race groups, and combined race and ethnicity into one question (instead of asking race and ethnicity as two separate questions). The image below reflects the 2018 End-to-End Census Test.

³¹ ECF No. 32-4. Agency Information Collection Activities; Proposals, Submissions, and Approvals: *2018 End-to-End Census Test: Peak Operations*, 82 FR 15486, 15488 (March 29, 2017).

³² ECF No. 32-3; ECF No. 32-4. Agency Information Collection Activities; Proposals, Submissions, and Approvals: *2018 End-to-End Census Test: Peak Operations*, 82 FR 15486 (March 29, 2017).

³³ ECF No. 32-4. Agency Information Collection Activities; Proposals, Submissions, and Approvals: *2018 End-to-End Census Test: Peak Operations*, 82 FR 15486, 15489 (March 29, 2017).

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Person 1

5. Please provide information for each person living here. If there is someone living here who pays the rent or owns this residence, start by listing him or her as Person 1. If the owner or the person who pays the rent does not live here, start by listing any adult living here as Person 1.

What is Person 1's name? Print name below.

First Name MI

Last Name(s)

 years

8. What is Person 1's race or ethnicity?
Mark all boxes that apply AND print ethnicities in the spaces below. Note, you may report more than one group.

WHITE – Provide details below.

German

Irish

English

Italian

Polish

French

Print, for example, Scottish, Norwegian, Dutch, etc.

Mexican or Mexican American

Puerto Rican

Cuban

Salvadoran

Dominican

Colombian

African American

Jamaican

Haitian

Nigerian

Ethiopian

Somali

Chinese

Filipino

Asian Indian

Vietnamese

Korean

Japanese

Lebanese

Iranian

Egyptian

Syrian

Moroccan

Israeli

Native Hawaiian

Samoan

Chamorro

Tongan

Fijian

Marshallese

³⁴ ECF No. 32-6; 2018 End-to-End Test.

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80. However, Defendants still refused to use any version of the 2018 End-to-End Test for the race section of the 2020 U.S. Census and 2020 ACS.³⁵



UNITED STATES DEPARTMENT OF COMMERCE
Economics and Statistics Administration
U.S. Census Bureau
Washington, DC 20233-0001

2020 CENSUS PROGRAM MEMORANDUM SERIES: 2018.02

Date: January 26, 2018

MEMORANDUM FOR: The Record

From: Albert E. Fontenot, Jr. (**January 26, 2018**)
Associate Director for Decennial Census Programs

Subject: Using Two Separate Questions for Race and Ethnicity in 2018 End-to-End Census Test and 2020 Census

Contact: Burton Reist, Chief
Decennial Communications and Stakeholder Relations
301-763-4155

This memorandum documents the 2020 Census Program decision to continue to use two separate questions for collecting data on race and ethnicity in the 2018 End-to-End Census Test and the 2020 Census.

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81. An image of the 2020 U.S. Census can be seen below, where the race and ethnicity questions are asked separately.

³⁵ ECF No. 32-7; 2018 End-to-End Test.

³⁶ ECF No. 32-7; 2018 End-to-End Test.

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Person 1

5. Please provide information for each person living here. If there is someone living here who pays the rent or owns this residence, start by listing him or her as Person 1. If the owner or the person who pays the rent does not live here, start by listing any adult living here as Person 1.

What is Person 1's name? *Print name below.*

First Name MI

Last Name(s)

6. What is Person 1's sex? Mark ONE box.

Male Female

7. What is Person 1's age and what is Person 1's date of birth? For babies less than 1 year old, do not write the age in months. Write 0 as the age.

Print numbers in boxes.

Age on April 1, 2020 Month Day Year of birth

years

→ **NOTE: Please answer BOTH Question 8 about Hispanic origin and Question 9 about race. For this census, Hispanic origins are not races.**

8. Is Person 1 of Hispanic, Latino, or Spanish origin?

No, not of Hispanic, Latino, or Spanish origin

Yes, Mexican, Mexican Am., Chicano

Yes, Puerto Rican

Yes, Cuban

Yes, another Hispanic, Latino, or Spanish origin – *Print, for example, Salvadoran, Dominican, Colombian, Guatemalan, Spaniard, Ecuadorian, etc.*

9. What is Person 1's race?

Mark one or more boxes **AND** print origins.

White – *Print, for example, German, Irish, English, Italian, Lebanese, Egyptian, etc.*

Black or African Am. – *Print, for example, African American, Jamaican, Haitian, Nigerian, Ethiopian, Somali, etc.*

American Indian or Alaska Native – *Print name of enrolled or principal tribe(s), for example, Navajo Nation, Blackfeet Tribe, Mayan, Aztec, Native Village of Barrow, Inupiat Traditional Government, Nome Eskimo Community, etc.*

Chinese Vietnamese Native Hawaiian

Filipino Korean Samoan

Asian Indian Japanese Chamorro

Other Asian – *Print, for example, Pakistani, Cambodian, Hmong, etc.*

Other Pacific Islander – *Print, for example, Tongan, Fijian, Marshallese, etc.*

Some other race – *Print race or origin.*

→ If more people were counted in Question 1 on the front page, continue with Person 2 on the next page.

³⁷ 2020 U.S. Census Form, Informational/Sample, available here: <https://www.census.gov/programs-surveys/decennial-census/technical->

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82. The use of the 2018 End-to-End Test, or some variant thereof, is proof that the Defendants can use a combined race and ethnicity question, and that it was feasible to list MENA as a race in a statistical survey like the 2020 U.S. Census or 2020 ACS.

28 U.S.C. 2401(a) Does Not Create a Jurisdictional Bar for this Lawsuit

83. 28 U.S.C. § 2401(a) is a statute of limitations.

84. The statute is designed to protect the government from litigation, rather than punish the plaintiff for unreasonable delay in pursuing the plaintiff's claim(s).

85. The statute states, "Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."³⁸

86. However, the Defendants exceeded the scope of their authority and committed an ultra vires act when they finalized the 1997 OMB Rule.³⁹

87. Furthermore, the Defendants are under a continuing obligation⁴⁰ to produce accurate, relevant, objective, and reliable statistical data under both the PRA and the Evidence Act.

88. Finally, the 2020 U.S. Census and the 2020 ACS are applying the 1997 OMB Rule, so the as-applied doctrine⁴¹ should allow the court to review both the 1997 OMB Rule and the 2020 U.S. Census and 2020 ACS surveys applying the 1997 OMB Rule.

[documentation/questionnaires/2020.html](#)

³⁸ 28 U.S.C. § 2401(a)

³⁹ "We have allowed an untimely challenge to a regulation on which an agency relies in taking final agency action on the ground that the regulation was outside the agency's statutory authority. Alabama v. PCI Gaming Authority, 801 F. 3d 1278, 1292 (11th Cir. 2015).

⁴⁰ "The [continuing obligation] doctrine can apply if 'the text of the pertinent law imposes a continuing obligation to act or refrain from acting.' Id. at 307. Surveying its precedent, the D.C. Circuit explains that it has 'repeatedly refused to hold that actions seeking relief under the APA to 'compel agency action unlawfully withheld or unreasonably delayed' are time-barred.'" Center for Biological Diversity v. Bernhardt, Case No. 1:20-cv-00529 (TNM) (D.D.C. August 20, 2020).

⁴¹ "It is well established that a rule may be reviewed when it is applied in an adjudication — an agency need not explicitly reassess the validity of a rule to subject the rule to challenge on review." American Tel. & Tel. Co. v. FCC, 978 F. 2d 727, 734 (D.C. Cir. Decided

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The Census Act and the Census Bureau

89. The U.S. Constitution requires an “actual Enumeration” of every person living in the United States to take place every ten years. U.S. Const. art. I, § 2, cl. 3.

90. The Constitution gives Congress authority to conduct the census “in such a Manner as [Congress] shall by Law direct,” U.S. Const. art. I, § 2, and “vests Congress with wide discretion over . . . the conduct of the census,” Wisconsin v. City of N.Y., 517 U.S. 1, 15 (1996).

91. The enumeration clause of the U.S. Constitution likely gives Congress the derivative power to collect data other than strict enumeration (such as race) in the decennial census.

92. Pursuant to this authority, Congress delegated the duty of conducting the census to the Secretary of Commerce, subject to the provisions of the most recent Census Act of 1976, 13 U.S.C. § 141, et seq. (the “Census Act”), and other applicable federal statutes and regulations promulgated thereunder or corresponding with the Census Act.

93. The Census Act authorizes the Secretary to collect information “other” than total population only “as necessary.” 13 U.S.C. § 141(a).

94. The Census Act itself implicitly requires accuracy of decennial data.⁴²

November 13, 1992). See Also, Citizens for Responsibility v. Federal Election, 243 F. Supp. 3d 91, 100 (D.D.C. March 22, 2017).

⁴² New York et al., v. Trump et al., Case No. 1:20-cv-05770-JMF, Docket Entry #164, Page 43, (S.D.N.Y. September 10, 2020) (“Meanwhile, by virtue of the Constitution and the Census Act, it is, of course, the federal government’s job to collect and distribute accurate federal decennial census data.”). (vacated by the Supreme Court on ripeness grounds). See Also, City of San Jose et al., v. Trump et al., Case No. 5:20-cv-05169-LHK-RRC-EMC (Docket Entry 82, Page 25) (N.D. Cal. October 22, 2020), stating, “Second, the census degradation injury arises because, if undocumented immigrants are not included as part of the census, then the census is undercounting the population, which then impacts, inter alia, state and local redistricting (by diluting the political power of areas with high concentrations of affected immigrants), state and local governments’ share of federal funding, and state and local governments’ ability to perform critical governmental functions—all of which are dependent on and affected by the accuracy and completeness of census data.” (vacated by the Supreme Court on ripeness grounds).

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95. Section 6 of Title 13 addresses the methods that the Secretary is authorized to use in collecting data other than the enumeration of total population for apportionment purposes. In particular, Section 6 provides:

A. The Secretary, whenever he considers it advisable, may call upon any other department, agency, or establishment of the Federal Government, or of the government of the District of Columbia, for information pertinent to the work provided for in this title.

B. The Secretary may acquire, by purchase or otherwise, from States, counties, cities, or other units of government, or their instrumentalities, or from private persons and agencies, such copies of records, reports, and other material as may be required for the efficient and economical conduct of the censuses and surveys provided for in this title.

C. To the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available from any source referred to in subsection (a) or (b) of this section instead of conducting direct inquiries. 13 U.S.C. § 6.

The Paperwork Reduction Act and the Information Quality Act

96. The Census Bureau is a statistical agency subject to the standards and directives of the OMB under the PRA, 44 U.S.C. §§ 3501-21, and the federal Information Quality Act ("IQA"),⁴³ see consolidated Appropriations Act of 2001, Pub. L. No. 106-554, 114 Stat. 2763 (2000) (amending PRA).

97. The IQA required the OMB to set forth policy and guidance to ensure that federal agencies were collecting objective data, to include statistical data.⁴⁴

98. The PRA sets forth standards that federal agencies must meet before the OMB can approve a proposed data collection, and requires the OMB to "coordinate the activities of Federal statistical system to ensure the efficiency and effectiveness of the system

⁴³ The IQA required the OMB's Director to, no later than September 30, 2001, "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of chapter 35 of title 44, United States Code, commonly referred to as the Paperwork Reduction Act." Public Law 106-554, Appendix C, Section 515(a).

⁴⁴ Public Law 106-554, Appendix C, Section 515(a).

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and the integrity, objectivity, impartiality, utility, and confidentiality of information collected for statistical purposes.” 44 U.S.C. § 3504(e)(1).

99. Furthermore, 44 U.S.C. § 3506(e)(1) and § 3506(e)(6) require Defendants to “ensure the relevance, accuracy, timeliness, integrity, and objectivity of information collected or created for statistical purposes” and make that data “readily accessible to the public.”

100. The PRA also requires federal agencies to “make data available to statistical agencies and readily accessible to the public.”⁴⁵

101. The PRA was enacted on May 22, 1995, and the law preceded the 1997 Rule.

The Evidence Act

102. The Census Bureau is governed by the Foundations for Evidence-Based Policymaking Act of 2018 (the “Evidence Act”), signed into law January 14, 2019. Specifically, 44 U.S.C. § 3563 requires that statistical agencies like the Census Bureau conduct “credible and accurate statistical activities.” Id.

103. Under the Evidence Act, accurate information is defined as, “statistics that consistently match the events and trends being measured.”⁴⁶

104. Under the Evidence Act, objective means, “means accurate, clear, complete, and unbiased.”⁴⁷

105. Under the Evidence Act, relevant means, “processes, activities, and other such matters likely to be useful to policymakers and public and private sector data users.”⁴⁸

106. According to the OMB, the Evidence Act requires the following:

The Foundations for Evidence-Based Policymaking Act of 2018 (‘Evidence Act’) . . . signed into law on January 14, 2019, emphasizes collaboration and coordination to advance data and evidence-building functions in the Federal Government by statutorily mandating Federal evidence-building activities, open government data, and confidential information protection and statistical efficiency. Evidence is broadly defined and includes foundational fact finding, performance measurement, policy analysis, and program evaluation . . . In

⁴⁵ 44 U.S.C. § 3506(e)(6).

⁴⁶ 44 U.S.C. § 3563(d)(1).

⁴⁷ 44 U.S.C. § 3563(d)(3).

⁴⁸ 44 U.S.C. § 3563(d)(4).

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addition, the Evidence Act mandates a systematic rethinking of government data management to better facilitate access for evidence-building activities and public consumption."⁴⁹

Policy Directive #1

107. Pursuant to the federal laws above, the Census Bureau's Information and Quality Guidelines state that the Census Bureau must "provide information that is accurate, reliable, and unbiased."⁵⁰

108. And pursuant to the IQA and the PRA, the OMB sets certain policies that the Census Bureau must comply,⁵¹ policies such as Policy Directive #1.

109. The core mission of statistical agencies such as the Census Bureau is to "require relevant and timely statistical information to inform decision-makers in governments, businesses, institutions, and households."⁵²

110. Federal statistical agencies must provide objective, accurate, and timely information, have credibility with data users, have the trust of the individuals whose information is collected, and be independent from political and other undue external influence in the development, production, and dissemination of statistics.⁵³

111. Federal statistical agencies must "seek input regularly from the broadest range of private-and public-sector data users" in any plans for information collection or dissemination and must "apply sound statistical methods to ensure statistical products are accurate."⁵⁴

⁴⁹ ECF No. 19-9, Page 1, ¶1; *Phase 1 Implementation of the Foundations for Evidence-Based Policymaking Act of 2018: Learning Agendas, Personnel, and Planning Guidance*, OMB Memorandum from Former OMB Director Russell Thurlow Vought, July 10, 2019, <https://www.whitehouse.gov/wp-content/uploads/2019/07/M-19-23.pdf>

⁵⁰ Information Quality Guidelines Objectivity, U.S. Census Bureau, <https://www.census.gov/about/policies/quality/guidelines/objectivity.html>

⁵¹ 5 C.F.R. § 1320.18.

⁵² *Statistical Policy Directive No. 1: Fundamental Responsibilities of Federal Statistical Agencies and Recognized Statistical Units* ("Policy Directive No.1"), 79 Fed. Reg. 71614-15 (Dec. 2, 2014), <https://www.govinfo.gov/content/pkg/FR-2014-12-02/pdf/2014-28326.pdf>

⁵³ *Statistical Policy Directive No. 1: Fundamental Responsibilities of Federal Statistical Agencies and Recognized Statistical Units* ("Policy Directive No.1"), 79 Fed. Reg. 71611-12 (Dec. 2, 2014), <https://www.govinfo.gov/content/pkg/FR-2014-12-02/pdf/2014-28326.pdf>

⁵⁴ *Id.* at 71615.

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Race Data Collection in the United States: 1790-1960

112. A historical context of how the Census Bureau has determined race in the past is both necessary and useful to understand how the definition of race has evolved, and how the country arrived at the current 1997 OMB races.

113. Race categories on the decennial census have undergone continuous change throughout our country's history.

114. In 1790, the race categories were, "Free White males" "Free White females" "All Other Free Persons" and "Slaves."⁵⁵ The categories have been changing ever since.

115. For example, the race category "Free Colored Persons" was added in 1830 then dropped completely in 1850.⁵⁶

116. The term "Mulatto"⁵⁷ was added as a race category in 1850 to measure the quantum of "Black Blood" through the observation of enumerators or U.S. Marshals.

117. "Chinese" was added as a race category locally in 1860 (in California only) then nationally in 1870.⁵⁸ All persons of Asian descent were likely aggregated under the Chinese race category regardless of their national origin at that time.

118. In 1890, "Quadroons" and "Octoroons" were added as a race category to continue the Census Bureau's attempts at failed race science studies and black blood measurements.⁵⁹

⁵⁵ *Measuring Race and Ethnicity Across the Decades: 1790–2010 Mapped to 1997 U.S. Office of Management and Budget Classification Standards*, United States Census Bureau (Census.gov), Last Revised September 4, 2015, https://www.census.gov/data-tools/demo/race/MREAD_1790_2010.html

⁵⁶ *Measuring Race and Ethnicity Across the Decades: 1790–2010 Mapped to 1997 U.S. Office of Management and Budget Classification Standards*, United States Census Bureau (Census.gov), Last Revised September 4, 2015, https://www.census.gov/data-tools/demo/race/MREAD_1790_2010.html

⁵⁷ *Measuring Race and Ethnicity Across the Decades: 1790–2010 Mapped to 1997 U.S. Office of Management and Budget Classification Standards*, United States Census Bureau (Census.gov), Last Revised September 4, 2015, https://www.census.gov/data-tools/demo/race/MREAD_1790_2010.html

⁵⁸ *Measuring Race and Ethnicity Across the Decades: 1790–2010 Mapped to 1997 U.S. Office of Management and Budget Classification Standards*, United States Census Bureau (Census.gov), Last Revised September 4, 2015, https://www.census.gov/data-tools/demo/race/MREAD_1790_2010.html

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119. The definition of White kept changing too. In 1910, Whites were divided into four groups: "The white population is divided into four groups: (1) Native, native parentage-that is, having both parents born in the United States; (2) native, foreign parentage-having both parents born in foreign countries; (3) native, mixed parentage-having one parent native and the other foreign born; (4) foreign born."⁶⁰

120. Yet even by 1910, the Census Bureau was still thinking about race as those who were White and then everybody else. "This classification by color or race, and in the case of the white population by nativity and parentage, results in five principal classes of the population-the native whites of native parentage, the native whites of foreign or mixed parentage, the foreign-born whites, the negroes, and all others. The last-named group is frequently omitted from the tables, as it comprises several very different subclasses and yet in the aggregate is numerically unimportant in most parts of the United States."⁶¹

121. In 1930, "Mexican"⁶² was a race category (prior to 1930 Mexicans were marked as White) and in 1930, "Hindu"⁶³ was a race category.

⁵⁹ *Measuring Race and Ethnicity Across the Decades: 1790–2010 Mapped to 1997 U.S. Office of Management and Budget Classification Standards*, United States Census Bureau (Census.gov), Last Revised September 4, 2015, https://www.census.gov/data-tools/demo/race/MREAD_1790_2010.html

⁶⁰ *1910 Census: Volume 1. Population, General Report and Analysis, Chapter II: Color or race, nativity, and parentage*, Page 125, U.S. Census Bureau, (1913), Available Here: <https://www.census.gov/library/publications/1913/dec/vol-1-population.html>

⁶¹ *1910 Census: Volume 1. Population, General Report and Analysis, Chapter II: Color or race, nativity, and parentage*, Page 125, U.S. Census Bureau, (1913), Available Here: <https://www.census.gov/library/publications/1913/dec/vol-1-population.html>

⁶² *Measuring Race and Ethnicity Across the Decades: 1790–2010 Mapped to 1997 U.S. Office of Management and Budget Classification Standards*, United States Census Bureau (Census.gov), Last Revised September 4, 2015, https://www.census.gov/data-tools/demo/race/MREAD_1790_2010.html

⁶³ "Pure-blood Hindus belong ethnically to the Caucasian or white race and in several instances have been officially declared to be white by the United States courts in naturalization proceedings. In the United States, however, the popular conception of the term 'white' is doubtless largely determined by the fact that the whites in this country are almost exclusively Caucasians of European origin and in view of the fact that Hindus, whether pure-blood or not, represent a civilization distinctly different from that of Europe, it was thought proper to classify them with non-white Asiatics." *1910 Census: Volume 1. Population, General Report and Analysis, Chapter II: Color or race, nativity, and parentage*,

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122. From 1940-1970, Japanese, Filipinos, and Koreans also appeared as formal, separate race categories.⁶⁴

123. While the race category of White started out as a specific sect of Western Europeans, the term now broadly encompasses those persons who would have never been considered to be White when the country first started.⁶⁵

124. As stated by the OMB, "Over time, however, there have been variations in how the Nation's principal population groups have been classified according to race and ethnicity; such differences have occurred even within data sets."⁶⁶

125. Prior to the 1960s, this race data was often abused to the detriment of non-White populations.⁶⁷

126. Nonetheless, as the Civil Rights Movement (and civil rights laws) of the 1960s and 70s took hold, the race data started being used to enforce civil rights violations.

The OMB Creates a Uniform, But Arbitrary Rule for Race Data Collection: 1977-1997

Page 126, U.S. Census Bureau, (1913), Available Here:

<https://www.census.gov/library/publications/1913/dec/vol-1-population.html>

⁶⁴ *Measuring Race and Ethnicity Across the Decades: 1790–2010 Mapped to 1997 U.S. Office of Management and Budget Classification Standards*, United States Census Bureau (Census.gov), Last Revised September 4, 2015, https://www.census.gov/data-tools/demo/race/MREAD_1790_2010.html

⁶⁵ "What started as a term synonymous with northwest European people has broadened to include groups that in the nineteenth century would likely have been considered "colored," such as some of the peoples of North Africa and the Middle East." *Measurement of Race and Ethnicity in a Changing, Multicultural America*, Karen Humes and Howard Hogan, Race and Social Problems Article 111, 17 September 2009, Page 123-124, <https://doi.org/10.1007/s12552-009-9011-5>

⁶⁶ *Standards for the Classification of Federal Data on Race and Ethnicity*, 60 Fed. Reg. 44674, 44675 (August 28, 1995).

⁶⁷ "For the first time, 1950 and 1960 Census documents stated: 'The concept of race as it has been used by the Bureau of the Census is derived from that which is commonly accepted by the general public. It does not, therefore, reflect clear-cut definitions of biological stock, and several categories obviously refer to nationalities (US Census Bureau 1953, p. 3B-4, 1963, p. X).' These statements are significant, as it can be argued that they reflect the beginning of societal, political, and scientific abandonment of key elements of race science and eugenics." *Measurement of Race and Ethnicity in a Changing, Multicultural America*, Karen Humes and Howard Hogan, Race and Social Problems Article 111, 17 September 2009, Page 118, <https://doi.org/10.1007/s12552-009-9011-5>

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127. Before 1977, the federal government used, “an assortment of definitions for broad racial categories.”

128. To achieve uniformity in federal data collection, the agency created a new standard for statistical race reporting, Directive 15.⁶⁸

129. Between 1977 to 1997, all federal statistical agencies were bound by the OMB's Directive 15: Race and Ethnic Standards for Federal Statistics and Administrative Reporting, May 12, 1977.⁶⁹

130. Directive 15 described four races: American Indian or Alaskan Native, Asian or Pacific Islander, Black, and White.⁷⁰

131. Directive 15 divided ethnicity into those persons of Hispanic origin and those persons not of Hispanic origin.⁷¹

132. Directive 15 allowed for collection of more detailed information as long as it could be aggregated to the four primary race categories.⁷²

133. Directive 15 does not explain the difference between race and origin.⁷³

134. In fact, the OMB admitted that the American Indian/Alaskan Native category is merely a legal definition that does not rely on ancestry.⁷⁴

135. While the Census Bureau was permitted by the OMB to make some subtle changes to race data collection, such as adding Hawaiian/Samoan as a race group for the

⁶⁸ *Standards for the Classification of Federal Data on Race and Ethnicity*, 60 Fed. Reg. 44674-44675 (August 28, 1995).

⁶⁹ *Recommendations From the Interagency Committee for the Review of the Racial and Ethnic Standards to the Office of Management and Budget Concerning Changes to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 36876 (July 9, 1997).

⁷⁰ *Recommendations From the Interagency Committee for the Review of the Racial and Ethnic Standards to the Office of Management and Budget Concerning Changes to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 36876, 36876-36877 (July 9, 1997).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Standards for the Classification of Federal Data on Race and Ethnicity*, 60 Fed. Reg. 44674, 44679 (August 28, 1995).

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1990 Census,⁷⁵ Directive 15 still remained binding for minimum reporting requirements on race.

136. On June 9, 1994, the OMB solicited for commentary on Directive 15 based, at least in part, on Congressional hearings and testimony.⁷⁶

137. In the 1994 notice, the OMB explicitly mentioned that commentators and critics thought the geographic descriptions for race and ethnicity “is not sufficiently definitive.”⁷⁷

138. As early as 1994, commentators also noted “there is less continuity in racial and ethnic data than many believed,⁷⁸ suggesting that historical continuity should not prevail over accurate race/ethnicity measurement.

139. The 1994 notice also mentioned that some commentators believed race and ethnicity should be eliminated entirely because an over-emphasis on race in America may “contribute to the fragmentation of our society.”⁷⁹

140. On August 28, 1995, the OMB explicitly admitted that, “There are no clear, unambiguous, objective, generally agreed-upon definitions of the terms, ‘race’ and

⁷⁵ “In response to these issues, Congressman Robert Matsui (D-CA) filed a bill. The bill, H.R. 4432, required the Census to use the race question that included the same checkbox groups that were present in the 1980 Census. An identical bill (S. 2444) was filed by Senator Mark Matsunaga (D-HI). HR. 4432, as amended, passed both the House and the Senate and was presented to President Reagan in October 1988. Although President Reagan ‘pocket-vetoed’ the bill in November 1988, the Census Bureau acknowledged the Asian and Pacific Islander communities’ stance on the race question and was concerned that this issue could negatively impact the 1990 Census. Thus, the Census Bureau decided to revise the 1990 Census race question to include the same individual Asian and Pacific Islander groups that were present for the 1980 Census.” *Measurement of Race and Ethnicity in a Changing, Multicultural America*, Karen Humes and Howard Hogan, Race and Social Problems Article 111, 17 September 2009, Page 121, <https://doi.org/10.1007/s12552-009-9011-5>

⁷⁶ *Standards for the Classification of Federal Data on Race and Ethnicity*, 59 Fed. Reg. Volume 110 Document Number 94-14079 (June 9, 1994).

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Id.

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'ethnicity' . . . [and] . . . that respondents are not always clear on the differences between race and ethnicity.'"⁸⁰

141. In that same 1995 notice, the OMB stated that the Directive 15 races are vague, subjective social constructs that mix national origin, geographic origin, physical characteristics, and language.⁸¹

142. In the 1995 notice, the OMB stated that, in addition to state and local agencies, law enforcement would also be required to update their race categories if Directive 15 were changed.⁸²

143. The 1995 notice also made certain astute observations about certain people from the Middle East, explaining, "some Arabs are light-skinned and some are dark-skinned."⁸³

144. The 1995 notice also explained that the OMB didn't know how European aboriginal tribes and Australian aboriginal tribes identify themselves with the Directive 15 races.⁸⁴

145. The 1995 notice also mentioned that some people feel like they are being forced to provide the government "false information" because of their mixed racial and ethnic background and that the categories "do not recognize their existence."⁸⁵

146. The 1995 notice also noted that discrimination depends on how a person is viewed by an observer, not how that person self-identifies their race or ethnicity: "Whether someone is a victim of discrimination often turns on the way in which others act on their perception of, for example, the color of the individual's skin, the ethnic origin of his or her

⁸⁰ *Standards for the Classification of Federal Data on Race and Ethnicity*, 60 Fed. Reg. 44674, 44680 (August 28, 1995).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Standards for the Classification of Federal Data on Race and Ethnicity*, 60 Fed. Reg. 44674, 44681 (August 28, 1995).

⁸⁴ *Standards for the Classification of Federal Data on Race and Ethnicity*, 60 Fed. Reg. 44674, 44684 (August 28, 1995).

⁸⁵ *Standards for the Classification of Federal Data on Race and Ethnicity*, 60 Fed. Reg. 44674, 44685 (August 28, 1995).

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last name, or the accent with which he or she speaks. Such issues do not depend generally on the way in which the individual identifies his or her racial or ethnic background[.]”⁸⁶

147. The 1995 notice wholeheartedly admitted that Directive 15 had inconsistent definitional criteria, that race needed more study, and that the only definition provided by the OMB in Directive 15, was that race was not scientific or anthropological.⁸⁷

148. The 1995 notice readily admitted that Directive 15 required aggregation from an incredibly diverse and ever-changing American population into unscientific “historical” race groups.⁸⁸

149. On July 9, 1997, the OMB issued another notice, in a new attempt to update Directive 15.⁸⁹

150. The OMB provided a thoughtful discussion on the four races, why the agency was seeking that data, comments, and proposed suggestions.⁹⁰

151. In July 1997 notice, the agency detailed that interracial marriages were on a historic rise, which would degrade the accuracy of race data under Directive 15.⁹¹

152. In fact, in 1997, the agency explicitly mentioned that in a “decade or two” the impact of multiracial families in the data sets would be significant and the dissension or discrepancies between multiracial families and the historical race categories would be considerable.⁹²

153. At the end of the July 9, 1997 notice, the OMB made a striking statement:

⁸⁶ *Standards for the Classification of Federal Data on Race and Ethnicity*, 60 Fed. Reg. 44674, 44675 (August 28, 1995).

⁸⁷ *Standards for the Classification of Federal Data on Race and Ethnicity*, 60 Fed. Reg. 44674, 44691 (August 28, 1995).

⁸⁸ *Id.*

⁸⁹ *Recommendations From the Interagency Committee for the Review of the Racial and Ethnic Standards to the Office of Management and Budget Concerning Changes to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 36874 (July 9, 1997).

⁹⁰ *Id.*

⁹¹ *Recommendations From the Interagency Committee for the Review of the Racial and Ethnic Standards to the Office of Management and Budget Concerning Changes to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 36874, 36901 (July 9, 1997).

⁹² *Recommendations From the Interagency Committee for the Review of the Racial and Ethnic Standards to the Office of Management and Budget Concerning Changes to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 36874, 36903 (July 9, 1997).

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Some important issues have not been resolved during this period of review and a number of questions are left unanswered. For example, conceptual bases for defining Arab or Middle Eastern ethnicity should be explored. The differences between the concepts of 'race,' 'ethnicity,' and 'ancestry' have not been satisfactorily determined . . . Also, more research is needed on inconsistencies in reporting race and ethnicity over time. More thought should be given to the current use of geographic origin in the definition of racial categories.⁹³

Compare with the legal standard for APA Review

(‘[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made’.’)⁹⁴

154. In the same notice, the OMB also wrote that previous Census Bureau, Director Harry Scarr, said that race and ethnicity are not mutually exclusive concepts despite being treated separately by the Census Bureau.⁹⁵

155. The July 1997 notice also mentioned that race and ethnicity are “fluid” and that the general population may not see a distinction between the two.⁹⁶

156. On October 30, 1997, the OMB updated Directive 15 and made the following, very subtle, changes to Directive 15: Asians and Pacific Islanders were separated into two categories.⁹⁷

157. The Hispanic ethnicity category was changed to “Hispanic or Latino.”⁹⁸

158. Black was changed to “Black or African American.”⁹⁹

⁹³ *Recommendations From the Interagency Committee for the Review of the Racial and Ethnic Standards to the Office of Management and Budget Concerning Changes to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 36874, 36944 (July 9, 1997).

⁹⁴ Center for Biological Diversity v. US Fish and Wildlife Service, Case No. 2:19- CV-14243 (S.D. Fla. Sept. 15, 2020), quoting, Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

⁹⁵ *Recommendations From the Interagency Committee for the Review of the Racial and Ethnic Standards to the Office of Management and Budget Concerning Changes to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 36874, 36909 (July 9, 1997).

⁹⁶ Id.

⁹⁷ *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58782, 58789 (October 30, 1997).

⁹⁸ Id.

⁹⁹ Id.

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159. Finally, American Indian or Alaskan Native was modified to include the “original peoples” of South America and Central America.¹⁰⁰

160. The agency also defined the races (and ethnicities) as follows:¹⁰¹

A. “American Indian or Alaska Native. A person having origins in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment.

B. Asian. A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.

C. Black or African American. A person having origins in any of the black racial groups of Africa. Terms such as ‘Haitian’ or ‘Negro’ can be used in addition to ‘Black or African American.’

D. Hispanic or Latino. A person of Cuban, Mexican, Puerto Rican, Cuban, South or Central American, or other Spanish culture or origin, regardless of race. The term, ‘Spanish origin,’ can be used in addition to ‘Hispanic or Latino.’

E. Native Hawaiian or Other Pacific Islander. A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.

F. White. A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.”

161. The October 30, 1997 OMB decision makes the 5 main races binding on federal statistical agencies.¹⁰²

162. Any other data collection on other “population groups” must be aggregated into the 5 main races.¹⁰³

163. The October 30, 1997 OMB decision also made it clear that race was not scientific, anthropological, or biological, yet the same race categories would be used in medical research.¹⁰⁴

¹⁰⁰ Id.

¹⁰¹ Id.

¹⁰² Id.

¹⁰³ Id.

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164. The October 30, 1997 OMB decision never addressed the pending question on the differences between race, ethnicity, and national origin.

165. The October 30, 1997 OMB did not clear up or resolve the inconsistent definitional criteria between the races that were identified in the 1995 notice by both commentators, critics, and the OMB itself.

The Administrative Record Prior to the 2020 U.S. Census/2020 ACS

166. The Census Bureau conducted several studies prior to the 2020 U.S. Census, to include the *2010 Census Race and Hispanic Origin Alternative Questionnaire Experiment Report*¹⁰⁵ and the *2015 National Content Test Race and Ethnicity Analysis Report*.¹⁰⁶

167. Both reports found that the historical race categories from the 1997 OMB Rule were outdated, confusing to Americans, and resulted in wrong or inaccurate responses.

168. The 2015 report specifically found that, "there have been a growing number of people who do not identify with any of the official OMB race categories."¹⁰⁷

169. With these reports in mind, the OMB issued a notice on September 30, 2016, in an attempt to update the race categories once again.

170. In the September 30, 2016 notice, the OMB stated that "America's population was becoming continually diverse"¹⁰⁸ and the race categories "needed refinement."¹⁰⁹

171. In that same 2016 notice, the OMB revealed some interesting information:
During the periodic review preceding the 1997 revision, OMB's Interagency Committee for the Review of the Racial and Ethnic Standards considered

¹⁰⁴ *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58782, 58785 (October 30, 1997).

¹⁰⁵ *2010 Census Race and Hispanic Origin Alternative Questionnaire Experiment Report*, United States Census Bureau, Report Written as of February 28, 2013, available here: https://www.census.gov/library/publications/2013/dec/2010_cpex_211.html

¹⁰⁶ *The United States Census Bureau's 2015 National Content Test: Race and Ethnicity Analysis Report*, United States Census Bureau, Report Issued February 28, 2017, available here: <https://www.census.gov/programs-surveys/decennial-census/2020-census/planning-management/final-analysis/2015nct-race-ethnicity-analysis.html>

¹⁰⁷ *Id.*

¹⁰⁸ *Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity*, 81 Fed. Reg. 67398, 67399 (September 30, 2016).

¹⁰⁹ *Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity*, 81 Fed. Reg. 67398 (September 30, 2016).

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suggestions to require an additional, distinct minimum reporting category for respondents identifying as 'Arabs or Middle Easterners.' At the conclusion of the review, agreement could not be reached among public stakeholders on the intended measurement concept (i.e., whether the category should be based on language, geography, etc.) nor, accordingly, a definition for this category. The Committee took this public disagreement into consideration and thus did not issue a definition nor an additional, minimum reporting category for this group. Instead, OMB encouraged further research be done to determine the best way to improve data for 'Arabs/Middle Easterners.'¹¹⁰

172. On March 1, 2017, the OMB issued yet another notice, soliciting commentary for data collection on race.¹¹¹

173. One of the questions the OMB asked was, "[s]hould Federal agencies be required to collect detailed race and ethnicity data even when such data could not be responsibly reported due to statistical reliability and confidentiality concerns? If so, in which cases? What factors should be considered?"¹¹²

174. In this 2017 notice, the OMB reminded everyone that race was not genetically, scientifically, or biologically based, yet those categories are still used for medical research.¹¹³

Modern Science on Human Genetic Variation

175. The races listed in the 1997 OMB Rule are not created based on the frontiers of science; therefore, this court should not afford the Defendants any special deference in their decisionmaking.¹¹⁴

¹¹⁰ *Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity*, 81 Fed. Reg. 67398, 67400 (September 30, 2016).

¹¹¹ *Proposals From the Federal Interagency Working Group for Revision of the Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity*, 82 Fed. Reg. 12242 (March 1, 2017).

¹¹² *Proposals From the Federal Interagency Working Group for Revision of the Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity*, 82 Fed. Reg. 12242, 12246 (March 1, 2017).

¹¹³ *Proposals From the Federal Interagency Working Group for Revision of the Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity*, 82 Fed. Reg. 12242, 12243 (March 1, 2017).

¹¹⁴ *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1264 (11th Cir. 2009).

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176. The *definitional criteria*¹¹⁵ for the five 1997 OMB races are also not based in fact, and the criteria are confusing, for the following reasons stated in this science-section of the complaint.

177. In the classification of living organisms, commonly known as biological taxonomy, race is an informal rank or subgroup below a species. To have two or more races, there must be distinct, consistent biological differences between the groups.

178. When it comes to *Homo sapiens* or human beings – race is a biological myth based on pseudoscience.

179. All modern humans on Earth originated from common ancestors in Africa. Those Africans emigrated out of Africa to various corners of the Earth in different waves, starting around 100,000 years ago¹¹⁶ (maybe earlier), with the most significant wave of migration occurring around 70,000-50,000 years ago.¹¹⁷ This is known as the Out of Africa hypothesis, which is the leading scientific theory on human migration throughout the Earth.

180. Thus, every human ancestral point of origin is ultimately African.

181. Modern science of scholarship commonly refers to different human groups as populations.

182. Alleles are the “flavors” or variants of a gene. Some alleles are dominant and others recessive.

¹¹⁵ *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58782, 58789 (October 30, 1997).

¹¹⁶ “The most recent fossil find, from Morocco, suggests that anatomically modern human features began appearing as long as 300,000 years ago. For the next 200,000 years or so, we remained in Africa, but already during that period, groups began to move to different parts of the continent and become isolated from one another—in effect founding new populations.” *There’s No Scientific Basis for Race—It’s a Made-Up Label*, Elizabeth Kolbert and Robin Hammond, National Geographic Magazine, March 12, 2018.

<https://www.nationalgeographic.com/magazine/2018/04/race-genetics-science-africa/>

¹¹⁷ “All non-Africans today, the genetics tells us, are descended from a few thousand humans who left Africa maybe 60,000 years ago.” *There’s No Scientific Basis for Race—It’s a Made-Up Label*, Elizabeth Kolbert and Robin Hammond, National Geographic Magazine, March 12, 2018. <https://www.nationalgeographic.com/magazine/2018/04/race-genetics-science-africa/>

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183. Variants in alleles result in different phenotypic traits, such as differences in eye color, skin color, or the type of hair color, etc.

184. All humans, as a species, have the genes to code for hair, eyes, hands, etc., despite the genetic variation in alleles.

185. Allele frequency is usually most significant in small, localized populations.¹¹⁸ The allele flow of small, geographically localized populations can sometimes result in distinctive alleles. Those alleles may appear within a certain localized group, at a higher frequency than in any other population.

186. However human genetic variation is continuous¹¹⁹ even within a specific region,¹²⁰ such that certain specific phenotypical traits like skin color, will undergo gradual change depending on allele flow and migration of individuals between existing groups. Alternatively, populations can experience immediate change, upon a Bottleneck Event or the Founder Effect – this is known as genetic drift.

187. Natural selection or genetic mutation can also affect the occurrence of a particular genetic trait. Gene flow, genetic drift, mutation, intentional sexual selection, and

¹¹⁸ “Because genetic drift occurs rapidly in small populations, particularly in those that are also isolated, these groups quickly accumulate distinctive allele frequencies.” *Genetic Structure of Human Populations*, Science Magazine, Science Vol 298, P. 2283-2284, December 20, 2002, <https://science.sciencemag.org/content/298/5602/2381>

¹¹⁹ “Skin color is easily observable as a phenotypic trait exhibiting continuous variation.” *Race and Human Variation*, Michael B. C. Rivera, ResearchGate.Net, May 27, 2020, Page 500, https://www.researchgate.net/profile/Shubhra_Sharma4/post/Are_there_any_human_races-And_if_not_what_does_this_mean_to_the_concept_of_racism/attachment/5ea1c2d84f9a520001e1e2b8/AS%3A883522050998276%401587659480788/download/Explorations-Human+Race499-525-READ3.pdf

¹²⁰ “One crucial innovation in reconceptualizing genotypic and phenotypic variation was the anthropologist C. Loring Brace's observation that such variations, insofar as it is affected by natural selection, slow migration, or genetic drift, are distributed along geographic gradations or clines.” *Race (human categorization)*, Wikipedia, [https://en.wikipedia.org/wiki/Race_\(human_categorization\)#Historical_origins_of_racial_classification](https://en.wikipedia.org/wiki/Race_(human_categorization)#Historical_origins_of_racial_classification)

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natural selection do not operate in a vacuum,¹²¹ but are interrelated in their ultimate effect upon a species.

188. Yet there is no defined human population on Earth with enough distinctive alleles to justify being classified as a different biological racial group.¹²² Alternatively, none of the racial groups identified on the 2020 United States Census share enough specific alleles to be classified as a specific biological racial group.¹²³

189. Human beings are extremely genetically similar.¹²⁴ There is only a 0.1 to 0.2 genetic variation for the entire species.¹²⁵ However, that variation is not strongest among the classical race groups.

¹²¹ *Natural Selection, Genetic Drift, and Gene Flow Do Not Act in Isolation in Natural Populations*, Christine A. Andrews, Nature Education, 2010, <https://www.nature.com/scitable/knowledge/library/natural-selection-genetic-drift-and-gene-flow-15186648/>

¹²² “[R]aces’ are neither homogeneous nor distinct for most genetic variation.” *Implications of biogeography of human populations for ‘race’ and medicine*, Sarah A Tishkoff & Kenneth K Kidd, Nature Genetics Supplement, Vol 36 Number 11, November 2004, <https://doi.org/10.1038/ng1438>

¹²³ “[E]ven when region-specific alleles did appear, they only occurred in about 1% of the people from that region—hardly enough to be any kind of trademark. Thus, there is no evidence that the groups we commonly call ‘races’ have distinct, unifying genetic identities.” *How Science and Genetics are Reshaping the Race Debate of the 21st Century*, Vivian Chou and Daniel Utter, Harvard University, April 17, 2017, <http://sitn.hms.harvard.edu/flash/2017/science-genetics-reshaping-race-debate-21st-century/>

¹²⁴ “[H]uman biology is, in fact, very homogenous compared to the greater genetic variation we observe in other closely related species.” *Race and Human Variation*, Michael B. C. Rivera, ResearchGate.Net, May 27, 2020, Page 493, <https://www.researchgate.net/profile/Shubhra-Sharma4/post/Are-there-any-human-races-And-if-not-what-does-this-mean-to-the-concept-of-racism/attachment/5ea1c2d84f9a520001e1e2b8/AS%3A883522050998276%401587659480788/download/Explorations-Human+Race499-525-READ3.pdf>

¹²⁵ “Current estimates of how much variation occurs species-wide indicates that all *H. sapiens* are ~99.6–99.8% identical at the nucleotide sequence level.” *Implications of biogeography of human populations for ‘race’ and medicine*, Sarah A Tishkoff & Kenneth K Kidd, Nature Genetics Supplement, Vol 36 Number 11, November 2004, <https://doi.org/10.1038/ng1438>

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190. People who would otherwise self-identify in two separate racial groups on the current 2020 Census, such as Asian and White, could have less genetic variation between them than two White persons.¹²⁶

191. The greatest human genetic diversity is not between any two race groups identifiable on the 2020 U.S. Census, but between populations in Africa.¹²⁷ For example, the genetic diversity between Khoe-San Africans and the Pygmies of Central Africa, who spent thousands of years apart as distinct groups.¹²⁸ Yet even they are not distinct enough to be biologically separate human races.

192. Furthermore, high levels of admixture in the United States population or different ethnic groups have created considerable heterogeneity that undermine the formation or consistency of any specific biological racial group within the United States.

¹²⁶ "Ultimately, there is so much ambiguity between the races, and so much variation within them, that two people of European descent may be more genetically similar to an Asian person than they are to each other." *How Science and Genetics are Reshaping the Race Debate of the 21st Century*, Vivian Chou and Daniel Utter, Harvard University, April 17, 2017, <http://sitn.hms.harvard.edu/flash/2017/science-genetics-reshaping-race-debate-21st-century/>

¹²⁷ "Genetic distances are correlated with geographic distances among the global human population. This is especially apparent when we consider that genetic diversity is highest in sub-Saharan Africa, and average genetic heterogeneity decreases in populations further away from the African continent in accordance with the migratory history of anatomically modern Homo sapiens." *How Science and Genetics are Reshaping the Race Debate of the 21st Century*, Vivian Chou and Daniel Utter, Science in the News, April 17, 2017, <http://sitn.hms.harvard.edu/flash/2017/science-genetics-reshaping-race-debate-21st-century/>

¹²⁸ "By analyzing the genes of present-day Africans, researchers have concluded that the Khoe-San, who now live in southern Africa, represent one of the oldest branches of the human family tree. The Pygmies of central Africa also have a very long history as a distinct group. What this means is that the deepest splits in the human family aren't between what are usually thought of as different races—whites, say, or blacks or Asians or Native Americans. They're between African populations such as the Khoe-San and the Pygmies, who spent tens of thousands of years separated from one another even before humans left Africa." *How Science and Genetics are Reshaping the Race Debate of the 21st Century*, Vivian Chou and Daniel Utter, Harvard University, April 17, 2017, <http://sitn.hms.harvard.edu/flash/2017/science-genetics-reshaping-race-debate-21st-century/>

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193. Finally, high levels of mobility between modern humans through planes, trains, ships, and automobiles will further frustrate the likelihood of this United States having populations of localized groups that are distinct enough to be considered separate biological races.

194. The OMB has therefore acknowledged that race has no biological or anthropological or genetic or scientific significance.

The Use of Census Data and The Effect of Inaccurate Data on Federal Programs and Federal Funding and Other Federal Agencies

195. The census data collected from the decennial census is used to disburse billions of dollars, at least 675 billion dollars (probably more), for various federal programs to state and local governments, and to the American people, who utilize those programs. "Today, census data also have important consequences not delineated in the Constitution: The Federal Government considers census data in dispensing funds through federal programs to the States, and the States use the results in drawing intrastate political districts." Wisconsin v. City of New York, 517 US 1, 6 (1996).

196. The allocation of those funds to certain federal programs are also based on or influenced by race. The use of statistical data to determine and delineate federal funding is a matter almost as important and essential as enumeration of the American population. Those monies will be disbursed in an inefficient manner if the government continues with the current form. Medicare, Medicaid, Head Start, Title VI, and the National School Lunch Program are just a few programs that rely on the census's statistical data.

197. Millions of dollars in various grants, such as the Federal Pell Grant Program, also rely on the census data.

198. Agencies, such as the Minority Business Development Agency, use the census data to achieve their agency goals and directives. Those goals would be subverted or undermined if the agency has poor, inaccurate data.

199. Defendants have already argued that the use of race-data for various federal programs and federal agencies serve a paramount purpose for the country in their memorandum of law/motion to dismiss Richard Ameninhat P. Parks's amended

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complaint, in Parks v. United States Department of Commerce, et al., Case 8:19-cv-00642-TDC, Docket Entry #20, (D. Md. September 20, 2019).¹²⁹

200. Defendants propagated the argument that, "If forced to use unreliable data, federal funding might be reduced or erroneously appropriated, and compliance with the Voting Rights Act, which relies on Census data, would be more difficult."¹³⁰

201. Defendant Census Bureau, has consistently reminded the American population that the race data is important.¹³¹

202. "The public interest also requires obedience to the Constitution and to the requirement that Congress be fairly apportioned, based on accurate census figures. Furthermore, it is in the public interest that the federal government distribute its funds, when the grant statute is keyed to population, on the basis of accurate census data."¹³²

203. Hospitals, schools, and state and local organizations obtain poor statistical data by using the current OMB race categories. For example, Massachusetts General

¹²⁹ "As the Supreme Court has explained, the census 'serves an important function in the allocation of federal grants to states based on population. In addition, the census also provides important data for Congress and ultimately for the private sector.' *Baldrige v. Shapiro*, 455 U.S. 345, 353, 353 n.9 (1982) (specifying that census data 'is used for such varied purposes as computing federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies'); *See also, Wisconsin v. City of N.Y.*, 517 U.S. 1, 5-6 (1996)." Parks v. U.S. Dept. of Commerce, et al., Case 8:19-cv-00642-TDC, Docket Entry #20, *Defendant's Memorandum of Law in Support of their Motion to Dismiss*, (D. Md. September 20, 2019). The case was later dismissed in Parks v. U.S. Dept. of Commerce, et al., 456 F.Supp.3d 691 (D. Md. April 24, 2020).

¹³⁰ Id.

¹³¹ "All levels of government need information on race to implement and evaluate programs, or enforce laws. Examples include: the Native American Programs Act, the Equal Employment Opportunity Act, the Civil Rights Act, the Voting Rights Act, the Public Health Act, the Healthcare Improvement Act, the Job Partnership Training Act, the Equal Credit Opportunity Act, the Fair Housing Act, and the Census Redistricting Data Program. Both public and private organizations use race information to find areas where groups may need special services and to plan and implement education, housing, health, and other programs that address these needs. For example, a school system might use this information to design cultural activities that reflect the diversity in their community. Or a business could use it to select the mix of merchandise it will sell in a new store." *The Black Population: 2000*, U.S. Census Bureau, Jesse McKinnon, Issued August 2001, <https://www.census.gov/prod/2001pubs/mso01-bp.pdf>

¹³² Carey v. Klutznick, 637 F. 2d 834, 839 (2d Cir. 1980).

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Hospital stated that their use of the OMB's five main race categories created less precise data (particularly because Hispanics are not included as a race)."¹³³

Article III Standing – Specific Allegations Pled in the Alternative

204. For the purposes of standing, Van Cleve requests that the court take judicial notice of the affidavits, declarations, and documents already in the court record for this case.

205. The following theories of standing are primarily based on the effect of inaccurate race data, and are pled in the alternative.

206. Defendants should be judicially/equitably estopped¹³⁴ from arguing that inaccurate race data from the Census will not create an injury under the theories below.

Theory 1: Inaccurate Data Precludes, Prevents, or Obstructs Michael Van Cleve, Law from Identifying and Providing Legal Assistance to Disadvantaged Populations/Communities

207. Van Cleve is not just a person but also a sole proprietor, operating in Miami-Dade County, as a private practitioner in the practice of law, by and through the business Michael Van Cleve, Law.

208. Van Cleve is also a member of the Florida Bar.

¹³³ “There has been ongoing confusion about the distinction between the race and ethnicity categories as they are currently presented in the two-question format. Combining the questions would improve the accuracy of self-reported data and may also reduce non-response rates . . . When we transitioned to collecting according to current OMB standards, MGH saw a decrease in the number of patients identifying as Hispanic/Latino (from roughly 3,700 patients in 2012 to 2,750 in 2015), and a commensurate increase in Unknown/Unavailable responses.” Massachusetts General Hospital, Commentating on *Review and Possible Limited Revision of OMB's Statistical Policy Directive on Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity*, Posted on October 31, 2016, <https://www.regulations.gov/document?D=OMB-2016-0002-0312>

¹³⁴ “Although we have not had occasion to discuss the doctrine elaborately, other courts have uniformly recognized that its purpose is ‘to protect the integrity of the judicial process,’ *Edwards v. Aetna Life Ins. Co.*, 690 F. 2d 595, 598 (CA6 1982), by ‘prohibiting parties from deliberately changing positions according to the exigencies of the moment,’ *United States v. McCaskey*, 9 F. 3d 368, 378 (CA5 1993). See *In re Cassidy*, 892 F. 2d 637, 641 (CA7 1990) (‘Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process.’).” *New Hampshire v. Maine*, 532 US 742, 750 (2001).

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209. The Florida Bar encourages its members to service individuals who are indigent, in need pro bono services, or otherwise encourages its members to assist communities that are subject to discrimination, segregation, or economic deprivation.

210. The Florida Bar relies on decennial census data.¹³⁵

211. The decennial census assists not only federal and state and local governments to understand demographic change, but also the private sector and private businesses.

So finally, that let me just end with talking about, you know that when we when we're done with the census will continue to keep working. You know that the Census Bureau doesn't stop for when the census is over. So, we're already planning the 2030 census. But also, we have a number of activities across the Census Bureau as we seek to continually innovate and modernize the Census Bureau activities and improve the data that we provide to the American public businesses and government decision makers.

– Ron Jarmin, Acting Census Bureau Director.¹³⁶

Businesses help us inform their employees and customers on the -- of the importance of census data, including how it affects the economy, jobs, community, public and private services, research and family and individual decision making.

– Steven Dillingham, Former Census Bureau Director.¹³⁷

212. The Census Bureau has admitted to the use of and importance of the census data for American businesses.¹³⁸

¹³⁵ See “*IV. Facts and Statistics*” *Minorities in the Legal Profession*, The Florida Bar, Updated March 2017, <https://www.floridabar.org/about/diversity/diversity003/resources003/>

¹³⁶ The transcript to the National Advisory Committee on Racial, Ethnic and Other Populations (“NAC”) November 7, 2019 Fall Meeting, Pages 22-23, available here <https://www2.census.gov/cac/nac/meetings/2019-11/transcript-day-1.pdf>

¹³⁷ The transcript to the NAC November 7, 2019 Fall Meeting, Page 15, available here <https://www2.census.gov/cac/nac/meetings/2019-11/transcript-day-1.pdf>

¹³⁸ “The 2020 Census will be valuable to businesses, as the results will provide a rich set of data on the communities they serve, including population trends and growth projections. Business owners rely on census results to make decisions, such as where to open new stores, restaurants, factories, or offices, where to expand operations, where to recruit employees, and which products and services to offer.” *Importance of Data, Business Decisions*, United States 2020 Census, <https://2020census.gov/en/census-data.html>. See Also, <https://www.census.gov/library/stories/2019/10/can-census-bureau-data-drive-business-growth-job-creation.html>

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213. Congress has admitted to the same. In a recent amicus curiae brief, the House of Representatives advocated for the accuracy of data, not just for Congressional legislation but also for business purposes.¹³⁹

214. President Joe Biden has openly acknowledged, by executive order, that the federal race system needs improvement and has appointed the directors of the OMB, Census Bureau, and the Department of Commerce to improve it through an “equitable data working group.”¹⁴⁰

215. Van Cleve, as a business owner, has the desire to help underprivileged communities through legal assistance. Although the ultimate injury is widely shared between Van Cleve and many other business owners not parties to this lawsuit, it is not a general grievance.¹⁴¹

216. Van Cleve, through his business, represented and/or assisted persons that would be included within the MENA race or the Hispanic race/ethnicity, and where their cultural identities were an issue.

217. Van Cleve, as a business owner, also has a vested interest in federal agencies, like the Minority Business Development Agency, using correct or accurate census data.

218. Van Cleve, as a business owner, has also diverted a considerable amount of his resources, incurred financial costs, exhausted time, manpower, and declined other cases,

¹³⁹ “Congress depends on accurate census data to legislate effectively. Census data guides many of the most significant federal programs, including Medicaid assistance, Medicare, the Supplemental Nutrition Assistance Program, the National School Lunch Program, and the Children’s Health Insurance Program. In addition, ‘policy makers at all levels of government, as well as private businesses, households, researchers, and nonprofit organizations, rely on an accurate census in myriad ways that range far beyond the single fact of how many people live in each state.’ *New York v. Dep’t of Com.*, 351 F. Supp. 3d at 519.” *New York et al., v. Donald J. Trump et al.*, Case No. 20-cv-5770 (RCW) (PWH) (JMF) Docket Entry #107, (S.D.N.Y. filed August 14, 2020) (vacated by the Supreme Court on ripeness grounds).

¹⁴⁰ *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, 86 Fed. Reg. 7009, Section 9, (Executive Order January 20, 2021).

¹⁴¹ “Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found ‘injury in fact’.” *Federal Election Comm’n v. Akins*, 524 US 11, 24 (1998).

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which are valid Article III injuries, to get Defendants to engage in corrective action or to counteract action for their outdated race questions and outdated race system.

219. The 2020 U.S. Census and the 2020 ACS, in their current forms, as well as general statistical collection with the use of the five OMB race categories, will lead to inaccurate data based on arbitrary decisions.

220. This inaccurate data will make it more difficult to understand which communities need the most help.¹⁴²

221. The dissemination of inaccurate data violates 44 U.S.C. § 3506(e)(1) and 44 U.S.C. § 3506(e)(6), which require the production of accurate and relevant information to the public (and businesses like Michael Van Cleve, Law). Courts have found that the PRA creates a statutory responsibility for agencies like the OMB to provide correct information to the public.¹⁴³

222. This dissemination of inaccurate data violates 44 U.S.C. § 3563 of the Evidence Act, which requires the production of accurate and relevant information to private data users.

223. This dissemination of inaccurate data also violates a core mission of the Census Bureau under Policy Directive #1, that is, to provide relevant and timely information to businesses, such as Michael Van Cleve, Law.

¹⁴² “Indeed, even where a decline in self-response does not lead to an overall net undercount, it will create inaccuracies in subgroup data — particularly at the local level — that can be quite serious in and of themselves.” New York et al., v. US Dept. of Commerce et al., 351 F. Supp. 3d 502, 600 (S.D.N.Y. January 15, 2019).

¹⁴³ “In passing the PRA, Congress enumerated nearly a dozen purposes that it was meant to serve. Two are of particular relevance here. First, Congress sought to ‘improve the quality and use of Federal information to strengthen ... openness in Government and society.’ 44 U.S.C. § 3501(4) (emphasis added). Second, Congress sought to ‘improve the responsibility and accountability of the [OMB] and all other Federal agencies to Congress and to the public for implementing the information collection review process, information resources management, and related policies and guidelines established under [the PRA].’ 44 U.S.C. § 3501(11) (emphasis added). These statements evince Congress's clear intent that information concerning the government's data collection efforts be shared with the public so that the public might hold the government to account.” United to Protect v. Presidential Adv.Com'n, 288 F. Supp. 3d 99, 103 (D.D.C. December 29, 2017).

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224. Federal courts have consistently held that informational injuries suffice for Article III standing where the information must be publicly disclosed, and the information would help the plaintiff.¹⁴⁴

225. The Southern District of Florida has recently enforced informational injuries as valid for Article III Standing purposes.¹⁴⁵

226. The 11th Circuit has recently reaffirmed the justiciability of informational injuries.¹⁴⁶

227. Inaccurate information is no less an injury than the refusal to provide information. “[R]eceipt of the wrong information is no less of an injury than failure to receive any information at all.”¹⁴⁷

Theory 2: 2020 U.S. Census Data/2020 ACS Race Data Will Be Unreliable for Litigation

228. Van Cleve, also litigates cases where race data or race information may be necessary.

229. For example, Van Cleve has taken on discrimination cases such as Fair Housing Act cases.

230. Van Cleve cannot reasonably rely on the data during the representation of a client for any particular case (such as a Fair Housing Act case), if the data is inaccurate.

¹⁴⁴ “[A] denial of access to information can work an injury in fact for standing purposes, at least where a statute (on the claimants' reading) requires that the information ‘be publicly disclosed’ and there `is no reason to doubt their claim that the information would help them.” Center for Biological Diversity v. Bernhardt, Case No. 18-2576, Pages 11-12 (D.D.C. February 12, 2020) https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2018cv2576-28

¹⁴⁵ “The Supreme Court has held time and again that the violation of a statutory right to receive information one is entitled to receive creates a concrete injury sufficient to confer standing on a plaintiff.” Zia v. CitiMortgage, Inc., 210 F. Supp. 3d 1334, 1343 (S.D. Fla. September 26, 2016).

¹⁴⁶ “A prime example is the illegal deprivation of information . . . a plaintiff suffers an ‘injury in fact’ when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.” Muransky et al., v. Godiva Chocolatier, Inc., Case No.: 16-16486 (11th Cir. October 28, 2020).

¹⁴⁷ US House of Representatives v. US Dept. of Commerce, et al., 11 F. Supp. 2d 76, 85 (D.D.C. August 24, 1998).

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231. This inaccurate data also creates ethical concerns for Florida lawyers, since a Florida lawyer should not offer evidence the lawyer knows to be false.¹⁴⁸

Theory 3: Prevention of Bad Data Being Used in the Judicial System

232. The judicial court system regularly relies on census data.

233. In fact, courts have repeatedly held that census data is presumed to be accurate, unless proven otherwise.¹⁴⁹

234. The Supreme Court has also explicitly held that the degradation of census data is a concrete Article III injury.¹⁵⁰ Although Defendants believe that Dept. of Commerce, et al., v. New York, et al., 139 S. Ct. 2551, 2557-2558 (2019) only applies to apportionment cases, laws like the PRA and the Evidence Act reinforce that Congress and the Supreme Court want all statistical data (like the census) to be objective, reliable, relevant, and accurate.

235. Van Cleve, as an officer of the court, is preventing an imminent injury to the judicial system.

Theory 4: Forced Miseducation Thrust Upon Van Cleve as a Servicemember

236. Van Cleve is also a United States Army Reserve Servicemember.

237. Servicemembers are obligated to take annual equal opportunity ("EO") and harassment/discrimination/diversity training, pursuant to AR 600-20 (revised July 24, 2020).

238. AR 600-20 describes minimum race categories, and the regulation is bound by the minimum race categories of DoDD 1350.2.

239. The minimum race categories in DoDD 1350.2 are a carbon copy of the OMB's May 12, 1977 Directive 15 race categories.

¹⁴⁸ Rules Regulating the Florida Bar, Chapter 4-3.3(a)(4).

¹⁴⁹ "Benavidez has failed to prove that his alternate population figures are thoroughly documented, have a high degree of accuracy, and are clear, cogent, and convincing. He has therefore failed to overcome the strong presumption that the 2000 Census data are correct." Benavides v. Irving Independent School District, 690 F.Supp.2d 451, 457 (N.D. Tex. January 20, 2010).

¹⁵⁰ Dept. of Commerce, et al., v. New York, et al., 139 S. Ct. 2551, 2557-2558 (2019).

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240. Van Cleve objects to being miseducated about race based on a clearly arbitrary and facially inconsistent agency decision which is fairly traceable to Defendants' agency rules.

Legal Standard of Review for APA Challenges

241. “[W]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal.” Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1083 (D.C. Cir. 2001). “[The complaint] properly read [presents] arguments about the legal conclusion to be drawn about the agency action.” Marshall Cnty. Health Care Auth. v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993).

242. “The scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency.” Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 US 29, 43 (1983).

243. “Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made’.” Motor Vehicle Mfrs. Assn. of United States, Inc., 463 US 29, 43 (1983).

244. “In reviewing that explanation, we must ‘consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment’.” Id.

245. “Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” Id.

COUNT ONE AS TO ALL DEFENDANTS:

Violation of Administrative Procedure Act, 5 U.S.C. §706(2)(A): (Agency Action that is Arbitrary, Capricious, an Abuse of Discretion or Otherwise Not in Accordance with Law): Failure to Include Races Such as MENA on the 2020 U.S. Census/2020 ACS Was

An APA Violation

246. Van Cleve alleges paragraphs 1-240 as if fully stated herein.

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247. The APA, 5 U.S.C. §§551 et seq., prohibits final agency action that is “arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law[.]” 5 U.S.C. § 706(2)(A).

248. Defendants lead agencies or are agencies subject to the requirements of the APA. 5 U.S.C. § 701(b)(1).

249. The 1997 OMB Decision was made by the OMB, and the Census Bureau, which is under the direction of the Department of Commerce must continue to use the 1997 OMB race categories when they collect race data.

250. However, Defendants act in concert to finalize the race categories on the 2020 U.S. Census/2020 ACS form. Therefore, all Defendants are named under this count.

251. As stated above, race is not biological, genetic, anthropological, or scientific at all. However, the OMB has said that race and ethnicity are groups which share social, cultural, and ancestral characteristics.¹⁵¹

252. The five main races used by the Census Bureau on the 2020 U.S. Census and 2020 ACS are not the only races in the United States.

253. The Defendants failed to include other races in the United States in the 2020 U.S. Census and 2020 ACS, such as the Middle Eastern and North Africa (“MENA”) group.

254. In the OMB's September 30, 2016 request for commentary on the OMB's minimum race categories, there was an overwhelming amount of commentary (that should be a part of the administrative record) from both individual Americans and various organizations of repute¹⁵² requesting the OMB to create a distinct MENA race category.

¹⁵¹ *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58782, 58782 (October 30, 1997).

¹⁵² Commentators for the OMB's September 30, 2016 request for public comment on race ranged from individual Americans, state organizations, private entities, and other federal agencies. The majority of commentators expressed support for divorcing the MENA group from the White race category. Even the Department of Veteran Affairs supported the need for a MENA race group. <https://www.regulations.gov/document?D=OMB-2016-0002-0327>

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255. Although cases such as Dow v. United States, 226 F. 145 (4th Cir. 1915) may have led the Defendants to make the MENA group a subclass of White in the past, most MENA persons do not currently identify as White. Likewise, some MENA persons feel uncomfortable identifying as Black, and do not wish to be forced to choose between the races of color (White/Black). The following text below is an excerpt of the Census' Bureau's own research, showcasing the way the current definitions of race on the form distort the data.¹⁵³

Another African American asked during the debriefing part of the session why we were separating North African from the rest of the continent, 'Africa is Africa.'

One participant of Lebanese descent expressed positive sentiment that there was a MENA category. Saying, 'Here we go, Middle Eastern, they finally labeled that, they put that onto something.' During debriefing she said, 'It makes me feel good to see it. Makes me feel like I belong.'

Another participant, of Iranian descent, said he was happy to see MENA, as he did not have to go through the 'typical dilemma of if I should put White or something else.'

One participant who was of Amazigh (Berber) descent said, 'Yeah I am White' but did not select that option. After scrolling down and choosing MENA, the participant said, 'it's White normally but they changed the categories.'

One participant of Turkish descent said, 'I'm not White, I'm not Asian, I'm not Middle Eastern. Something else, some other race. I am a Turk.' The participant explained that Turkey is located between Asia and Europe, bordered with the Middle East. He also said that he was from the middle of Turkey, so he is Some other race, just Turkish.'

One participant of Somali descent said, 'Technically we are considered Middle Eastern, but I 'don't know what to put. I could put either Black or Middle Eastern, but it really doesn't matter. The U.S. sees me as Black. If I was walking down the street, other people would think I'm Black.' He marked his race as 'Black or African American.'¹⁵⁴

¹⁵³ *Usability Testing Results Evaluating the Decennial Census Race and Hispanic Origin Questions Throughout the Decade: 2012-2020*, Center for Behavioral Science Methods Research and Methodology Directorate, U.S. Census Bureau, Erica L. Olmsted-Hawala and Elizabeth M. Nichols, June 26, 2020. <http://www.census.gov/content/dam/Census/library/working-papers/2020/adrm/rsm2020-02.pdf>

¹⁵⁴ Id.

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256. The Census Bureau found through experimentation, "The inclusion of a MENA category significantly decreased the overall percentage of respondents reporting as White or SOR and significantly increased the percentage of respondents reporting as Black or Hispanic . . . When no MENA category was available, people who identified as MENA predominantly reported in the White category, but when a MENA category was included, people who identified as MENA predominantly reported in the MENA category."¹⁵⁵

257. The failure to include other races in the United States, such as the MENA group, on the 2020 U.S. Census/2020 ACS questionnaires led or will lead to the dissemination of inaccurate race data.

258. Defendants engaged in an arbitrary decision by failing to include other races, such as the MENA group, on the 2020 U.S. Census/2020 ACS.

259. Defendants decision to exclude other races from the 2020 U.S. Census/2020 ACS like MENA, directly violated Policy Directive No. 1 and the PRA and the Evidence Act. For APA purposes, the decision was either arbitrary, an abuse of discretion, or not in accordance with the law.

260. Relief Requested:

A. A declaration under the APA or 28 U.S. Code § 2201/2202, stating that the Defendants violated the APA when they excluded races such as MENA from the 2020 U.S. Census form.

B. An order directing revision of the race data prior to its dissemination to the public, where all persons that identified as MENA are tabulated as their own race, instead of being aggregated under White.

C. An order directing Defendants to revise the race data from the 2020 U.S. Census though other administrative records at their disposal or supplement the data with other surveys (such as the 2021 ACS) prior to its release.

¹⁵⁵ *2015 National Content Test Race and Ethnicity Analysis Report*, U.S. Census Bureau, Prepared by Kelly Mathews, Jessica Phelan, Nicholas A. Jones, Sarah Konya, Rachel Marks, Beverly M. Pratt, Julia Coombs, Michael Bentley, Issued February 28, 2017, Page XIII, <https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2015nct-race-ethnicity-analysis.pdf>

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D. A declaration that the Defendants refusal to use a form like the 2018 End-to-End Test for the 2020 U.S. Census/2020 ACS (or some other reasonable variation similar to the 2018 End-to-End Test), which made a separate race box for the MENA group, was a violation of the APA, the PRA, the Evidence Act, or Policy Directive #1.

E. Any other relief this court deems just.

261. Van Cleve has suffered and will continue to suffer irreparable harm unless the relief requested in Paragraphs 260 is granted.

COUNT TWO AS TO ALL DEFENDANTS:

Violation of Administrative Procedure Act, 5 U.S.C. §706(2)(A): (Agency Action that is Arbitrary, Capricious, an Abuse of Discretion or Otherwise Not in Accordance with Law): Failure to Treat Hispanics as a Race on the 2020 U.S. Census/2020 ACS Was An
APA Violation

262. Van Cleve incorporates by reference Paragraphs 1-240 as if fully stated herein.

263. The APA, 5 U.S.C. §§551 et seq., prohibits final agency action that is “arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law[.]” 5 U.S.C. § 706(2)(A).

264. Defendants lead agencies or are agencies subject to the requirements of the APA. 5 U.S.C. § 701(b)(1).

265. The 1997 OMB Decision was made by the OMB and the U.S. Census Bureau must continue to use the 1997 OMB race categories, although the Census Bureau can request permission from the OMB to deviate from the 1997 OMB Rule.

266. However, the Defendants act in concert to finalize the race categories on the 2020 U.S. Census/2020 ACS form. Therefore, all Defendants are named under this count.

267. Race is not biological, genetic, anthropological, or scientific at all. The OMB has stated that race and ethnicity are groups which share social, cultural, and ancestral characteristics.

268. However, the OMB never made a satisfactory distinction between race and ethnicity when they finalized the 1997 OMB Rule, and the 2020 U.S. Census/2020 ACS uses that rule to decide the race and ethnicity question on the forms. “The differences

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between the concepts of 'race,' 'ethnicity,' and 'ancestry' have not been satisfactorily determined[.]”¹⁵⁶

269. The OMB explicitly acknowledged that Americans don't understand the difference between race and ethnicity.¹⁵⁷

270. U.S. Census Bureau officials have explicitly admitted that there is no difference between ethnicity and race.¹⁵⁸

271. The Census Bureau's research has reached the same conclusion.¹⁵⁹

272. The American Anthropological Association made the same conclusion.¹⁶⁰

¹⁵⁶ *Recommendations From the Interagency Committee for the Review of the Racial and Ethnic Standards to the Office of Management and Budget Concerning Changes to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 36874, 36944 (July 9, 1997).

¹⁵⁷ “The terms ‘race’ and ‘ethnicity’ are frequently used interchangeably in the United States. For most daily and practical applications, Hispanics are considered a race. Definitions of race and ethnicity in major dictionaries often have considerable overlap. Crews and Bindon (1991) suggest that race is a sociological construct that is poorly correlated with any measurable biological or cultural phenomenon other than the amount of melanin in an individual's skin.” *Recommendations From the Interagency Committee for the Review of the Racial and Ethnic Standards to the Office of Management and Budget Concerning Changes to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 36874, 36909 (July 9, 1997).

¹⁵⁸ “We accept that there is no firm distinction between ‘race’ and ‘ethnicity,’ as both are dimensions in group identity. Groups currently considered ‘ethnic’ or ‘national’ were once viewed as separate ‘races.’ *Measurement of Race and Ethnicity in a Changing, Multicultural America*, Karen Humes and Howard Hogan, *Race and Social Problems* Article 111, 17 September 2009, <https://doi.org/10.1007/s12552-009-9011-5>

¹⁵⁹ “While many respondents report within the race and ethnicity categories specified by the OMB standards, it is clear from recent censuses, surveys, and experimental tests that the implementation of the standards is not well understood or is considered unacceptable by a growing number of respondents (Compton et al. 2012; Dowling 2014). This results in respondents' inability or unwillingness to self-identify as the OMB standards intended. For a segment of respondents, this arises because of the conceptual complexity that is rooted in the OMB standards' definitional distinction between ‘race’ and ‘ethnicity’ and in the presentation format of the race and ethnicity categories.” *2015 National Content Test Race and Ethnicity Analysis Report*, U.S. Census Bureau, Prepared by Kelly Mathews, Jessica Phelan, Nicholas A. Jones, Sarah Konya, Rachel Marks, Beverly M. Pratt, Julia Coombs, Michael Bentley, Issued February 28, 2017. <https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2015nct-race-ethnicity-analysis.pdf>

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273. The Hispanic community and the Latino community are not included within the race categories of the form despite being a considerable percentage of the American population.

274. Therefore, the decision to treat Hispanics as a subclass under race using the two-part ethnicity and race question, instead of a distinct race on the 2020 U.S. Census/2020 ACS was an arbitrary decision. The decision is also not supported by the evidence in the administrative record.

275. Defendants have failed to consider an important aspect of the problem by ignoring decades of Census Bureau research detailing the lack of distinction between race and ethnicity prior to finalizing the 2020 U.S. Census/2020 ACS race categories.

276. The practical effect of treating Hispanics as an ethnicity instead of a race led the Defendants to ask ethnicity and race as separate questions on the 2020 U.S. Census/2020 ACS, in accordance with the 1997 OMB Rule.

277. The combined race and ethnicity question has led to lower nonresponse almost every time it is tested. Therefore, Defendants should have used a combined race and ethnicity question on the 2020 U.S. Census/2020 ACS.

When the race and Hispanic origin questions are combined, a high percentage of responses included both Hispanic origin and one of the four major race categories currently allowed under Directive No. 15.

In every targeted sample, nonresponse to each of two combined questions was significantly lower than nonresponse to the corresponding separate Hispanic origin and race questions.

The two combined race and Hispanic origin questions elicited high levels of multiple responses in the Hispanic targeted sample. Over 90 percent of the multiple responses involved Hispanic origin and a race group.

¹⁶⁰ “Among the guidelines for the review, OMB stated that . . . ‘the racial and ethnic categories set forth in the standard should be developed using appropriate scientific methodologies, including the social sciences.’ The guidelines noted, too, that ‘the racial and ethnic categories set forth in the standards should not be interpreted as being primarily biological or genetic in reference. Race and ethnicity may be thought of in terms of social and cultural characteristics as well as ancestry.’ However, the distinction between the concepts of race and ethnicity was, again, not clarified.” *American Anthropological Association Response to OMB Directive 15: Race and Ethnic Standards for Federal Statistics and Administrative Reporting (Sept 1997)*.

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Results of the 1996 Race and Ethnic Targeted Test, available here:
<https://www.census.gov/library/working-papers/1997/demo/POP-twps0018.html>

In 2012, the AQE research was completed, and the results demonstrated promising strategies that combined race and ethnicity into one question and addressed challenges and complexities of race and Hispanic origin measurement and reporting.

Research to Improve Data on Race and Ethnicity, available here:
<https://www.census.gov/about/our-research/race-ethnicity.html>

The 2015 NCT results built upon the 2010 AQE results, showing no changes to distributions for major groups; obtaining decreased reporting of 'Some Other Race;' achieving lower item nonresponse for the combined race/ethnicity question than for the separate race and ethnicity questions; and gaining higher overall consistency of race/ethnicity reporting for Hispanics. Based on the results of the 2015 NCT research, the Census Bureau's 2018 End-to-End Test will a) employ the successful question format design which uses a combined question with detailed checkboxes design and b) include a dedicated "Middle Eastern or North African" response category.

Research to Improve Data on Race and Ethnicity, available here:
<https://www.census.gov/about/our-research/race-ethnicity.html>

278. Defendants decisions to treat Hispanics as an ethnicity or a subclass below race in the 2020 U.S. Census/2020 ACS directly violated Policy Directive No. 1 and the PRA and the Evidence Act. For APA purposes, the decision was either arbitrary, an abuse of discretion, or not in accordance with the law.

279. Relief Requested:

A. A declaration under the APA or 28 U.S. Code § 2201/2202, stating that the Defendants violated the APA when they treated Hispanics as an ethnicity instead of a race on the 2020 U.S. Census form/2020 ACS Form.

B. An order directing the Defendants to revise the race data prior to its dissemination to the public, where all persons that identified as Hispanic are tabulated as their own race, instead of being aggregated under the five main races.

C. An order directing Defendants to revise the race data from the 2020 U.S. Census though other administrative records at their disposal or supplement the data with other surveys (such as the 2021 ACS) prior to its release.

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D. A declaration that the Defendants refusal a form like the 2018 End-to-End Test (or some reasonable variation that combined race and ethnicity into one question) on the 2020 U.S. Census and 2020 ACS was a violation of the APA, PRA, Evidence Act, or Policy Directive #1.

E. Any other relief this court deems just.

280. Van Cleve has suffered and will continue to suffer irreparable harm unless the relief requested in Paragraphs 279 is granted.

COUNT THREE AS TO ALL DEFENDANTS:

Administrative Procedure Act, 5 U.S.C. §706(1): Request to Compel Agency
Action Unlawfully Withheld or Unreasonably Delayed

281. Van Cleve incorporates by reference Paragraphs 1-240 as if fully stated herein.

282. The APA, 5 U.S.C. §§551 et seq., allows a federal court “to compel [an] agency action which is unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1).

283. Defendant OMB, led by Defendant Fairweather (collectively “Defendants” under this count), is an agency subject to the requirements of the APA. 5 U.S.C. § 701(b)(1).

284. The OMB has sole authority to revise the race data standards,¹⁶¹ and the OMB Director is obligated to maintain the integrity and objectivity of statistical data collection under the PRA¹⁶² and has similar obligations under the Evidence Act.¹⁶³

285. However, the Census Bureau and the Department of Commerce are primarily responsible for implementing the questions on the 2020 U.S. Census/2020 ACS;¹⁶⁴ therefore, all Defendants act in concert when applying the race policies of the 1997 OMB Rule.

286. All Defendants are required to ensure they are producing/collecting and then disseminating accurate information under the PRA, the Evidence Act, or by Policy Directive #1.

¹⁶¹ ECF No. 32-1; See Also, *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58782 (October 30, 1997).

¹⁶² 44 U.S.C. § 3504(e).

¹⁶³ 44 U.S.C. 3563.

¹⁶⁴ ECF No. 32-1.

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287. Updating the race policy in this count means updating the 1997 OMB Rule.

288. Under this count, a failure to act means a failure to do one discrete thing: Update the 1997 OMB Rule, which the OMB is required to do under the PRA and the Evidence Act, in light of the administrative record.

289. The Supreme Court has said, "A 'failure to act' is not the same thing as a 'denial.' The latter is the agency's act of saying no to a request; the former is simply the omission of an action without formally rejecting a request — for example, the failure to promulgate a rule or take some decision by a statutory deadline."¹⁶⁵

290. Defendants are under a continuing obligation to comply with the PRA and the Evidence Act, and they violated their statutory obligation by failing to promulgate a new rule revising or updating the race categories from the 1997 OMB Rule.

291. Alternatively, Defendants violated the PRA and the Evidence Act by blindly applying the 1997 OMB Rule (and the race categories) to the 2020 U.S. Census and the 2020 ACS without updating the 1997 OMB Rule.

292. Alternatively, they violated the PRA and the Evidence Act by failing to promulgate a new informal rule to replace the 1997 OMB Rule.

293. Defendants have refused or failed to revise the five OMB race categories in over 20 years, despite an overwhelming amount of evidence in the administrative record that the five OMB race categories are producing inaccurate data. The data, in its current form, is no longer relevant in a multiracial or multiethnic America.

294. Defendants refuse to update the race data collection standards despite a clear duty to do so under their statutory obligations in the PRA or Evidence Act, or by their own policy, instead settling to provide blatantly inaccurate race data.

295. Some of the specific reasons why Defendants need to promulgate a new rule or revise the 1997 OMB Rule is as follows:

Specific Reasons to Update the 1997 OMB Rule

¹⁶⁵ Norton v. Southern Utah Wilderness Alliance, 542 US 55, 63 (2004).

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296. The term "race" needs a better definition to produce more objective and accurate categories that are better understood by Americans completing any statistical form measuring race, like the 2020 U.S. Census/2020 ACS.

297. The definitional criteria for each of the five main races is flawed, factually inaccurate, inconsistent, and confusing.¹⁶⁶

298. The racial categories of Black and White are overinclusive or vague and confusing to Americans that fill out the form.

We are white or we are black. I have a daughter whose skin is light dark. What am I supposed to do? I marked her as white, although she wanted to be marked as black. But she isn't black at all. I told her she wasn't black. For me, a black person has very dark skin. That's why I think the biggest dilemma is race.¹⁶⁷

299. Some Americans, such as the MENA group, are excluded as a race.

300. The lack of distinction between race and ethnicity leads to confusion.

301. The 1997 OMB Rule has internal inconsistency, particularly for American Indians/Alaskan Natives because that race requires tribal affiliation or community attachment, but in the same order, the OMB strictly stated that the Census Bureau should

¹⁶⁶ "Evidence from recent decennial censuses and other federal surveys shows that the application of the 1997 OMB standards to data collection efforts is becoming increasingly problematic. Since a significant proportion of Hispanic respondents do not identify with any of the five OMB race groups ('White,' 'Black or African American,' 'American Indian or Alaska Native,' 'Asian,' or 'Native Hawaiian or Other Pacific Islander'), the 'Some Other Race' population is expected to swell for future data collection efforts." *Measurement of Race and Ethnicity in a Changing, Multicultural America*, Karen Humes and Howard Hogan, Race and Social Problems Article 111, 17 September 2009, Page 126, <https://doi.org/10.1007/s12552-009-9011-5>

¹⁶⁷ *2020 Census Barriers, Attitudes, and Motivators Study (CBAMS) Focus Group Final Report*, United States Census Bureau, Prepared by Sarah Evans, Jenna Levy, Jennifer Miller-Gonzalez, Monica Vines, Anna Sandoval Girón, Gina Walejko, Nancy Bates, & Yazmin García Trejo, January 24, 2019, full report available here: <https://www.census.gov/programs-surveys/decennial-census/2020-census/planningmanagement/final-analysis/2020-report-cbams-focus-group.html>. ECF No. 58-2, Page 33.

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not "establish criteria or qualifications . . . that are to be used in determining a particular individual's racial or ethnic classification."¹⁶⁸

302. The statistical method of imputing race data that is missing on an incomplete decennial census form with race data from nearby households uses a bad or outdated premise. The premise is that people of the same races usually live next to each other, discounting America's growing diversity.

303. Multiracial Americans who do not identify with any single race are not accurately captured in the Defendants race data collection.

304. **Relief Requested:**

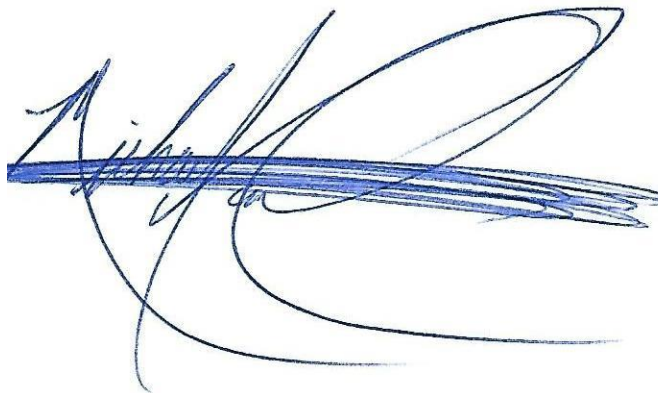
A. This court should utilize 5 U.S.C. § 706(1) to compel the Defendants to update, revise, or reform their race collection system (the 1997 OMB Rule), by promulgating a new rule, to come into compliance with the PRA and the Evidence Act and Policy Directive #1.

B. Enjoin Defendants from using the 1997 OMB Rule to any future statistical surveys, to include the 2030 Census and the 2021 ACS, without some new supplemental policy modifying the current race and ethnicity data standards.

C. Any other relief this court deems just.

305. Van Cleve has suffered and will continue to suffer irreparable harm unless the relief requested in Paragraphs 304 is granted.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be "Van Cleve", written over a horizontal line. The signature is stylized and somewhat illegible due to the cursive nature and overlapping strokes.

¹⁶⁸ *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58782, 58785 (October 30, 1997).

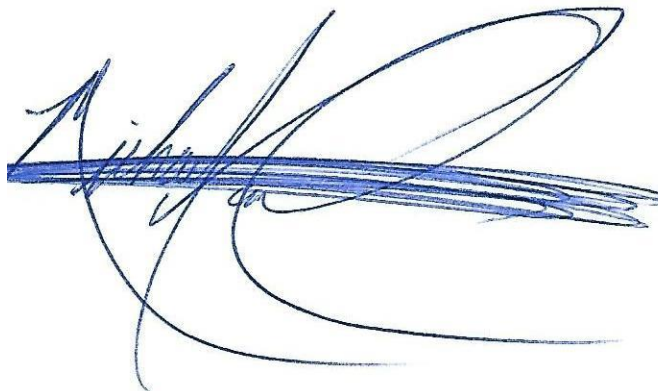
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By _____
MICHAEL VAN CLEVE

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Pro-Se Litigant

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of this document was served by email (Anthony.Pogorzelski@usdoj.gov) to Defendants' counsel on February ____, 2021.

A handwritten signature in blue ink, appearing to read 'Michael Van Cleve', is written over a horizontal line. The signature is stylized and somewhat cursive.

By _____
MICHAEL VAN CLEVE,
ESQ.
FLORIDA BAR NO.: 89413