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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EVELYN HOUSER, ANTHONY GONZALEZ, IGNACIO RIESCO, PRECIOUS DANIELS, FELICIA RICKETT-SAMUELS, CHYNELL SCOTT, VIVIAN KARGBO, and SCOTTY DESPHY on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

PENNY PRITZKER, Secretary, United States Department of Commerce,

Defendant.

No. 10-cv-3105 (FM)

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

ORAL ARGUMENT REQUESTED

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I. Introduction

This case presents exactly the type of class action that the Supreme Court expressly authorized in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). African American and Latino applicant class members were excluded from the Census applicant pool in large numbers based on a uniform and centrally administered biased criminal-history screening process. This is precisely the type of "biased testing procedure" that is the hallmark of a class claim in a Title VII case and a far cry from the cases Census cites in which individual managers made discretionary decisions at local levels. *Id.* at 2553 (internal quotation marks and citation omitted). Here, a handful of individuals located in Suitland, Maryland, administered Census's uniform criminal background check screening process that caused a common injury susceptible to common resolution.

Census's patchwork of arguments and unsubstantiated hypotheses countering Plaintiffs' evidence of disparate impact fails to undermine the class-wide statistical analysis Dr. Marc Bendick provides in support of Plaintiffs' request for certification. Despite Census's violation of its obligation to collect and maintain applicant race and national origin data, Dr. Bendick presents convincing statistical evidence of disparate impact for African Americans and Latinos at levels well above one hundred standard deviations. Strikingly, Census's own experts concede that African Americans have a higher arrest rate than whites.[1] As Census acknowledges, the Court need not make a determination on the merits on a motion for class certification, and instead should only determine whether Plaintiffs' have put forth sufficient evidence to meet the requirements of Federal Rule of Civil Procedure 23. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013) ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage."). Plaintiffs have identified questions that

[1] Ex. 107 (Bushway Tr.) 41:3-15; 68:21-70:14; Ex. 108 (Siskin Tr.) 73:11-22; Ex. 109 (Outtz Tr.) 146:6-12.

depend on the same contention – Census subjected each class member to a challenged selection procedure that disproportionately screened out African Americans and Latinos and was not job-related and consistent with business necessity – and the resolution of those contentions "resolve [] issue[s] . . . central to the validity of each one of the claims in one stroke." *Dukes*, 131 S. Ct. at 2551. Not only have Plaintiffs' provided sufficient evidence of class-wide impact, but Census's opposition and its experts offer defenses of job-relatedness and business necessity common to the class, bolstering Plaintiffs' request for class certification. Plaintiffs have fully satisfied the elements of Rule 23 and, accordingly, the Court should certify the proposed classes.

II. Plaintiffs' Evidence Demonstrates Commonality.

A. The Statistical Evidence Supporting Plaintiffs' Disparate Impact Claim Establishes Commonality.

In its opposition to class certification, Census attempts to chip away at Plaintiffs' commonality showing by pointing to purported flaws in the statistical methodology of Plaintiffs' expert, Dr. Bendick. Despite Census's protests about Dr. Bendick's methodology, which Plaintiffs credibly refute here, a "battle of the experts" is not appropriate at the class certification stage, as the relevant question is only whether Plaintiffs' expert's methodology will apply to the class. *See Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168, 186 (S.D.N.Y. 2008) (citing *Hnot v. Willis Grp. Holdings Ltd.*, 241 F.R.D. 204, 210 (S.D.N.Y. 2007)) (explaining that disagreement on whose statistical findings are more credible is relevant only to the merits of plaintiffs' claim and not to whether plaintiffs have asserted common questions of law or fact). Critically, Census fails to show that Dr. Bendick's analysis is incapable of proving impact on a class-wide basis.

In his rebuttal report, Dr. Bendick both responds to the purported deficiencies and also includes additional statistical studies – notably a logistic regression analysis that specifically controls for location and gender. Ex. 110 (Bendick Rebuttal Decl.) ¶ 4. Dr. Bendick considered

a number of different data sources and methods to assess whether the use of the 30-day letter had an adverse impact on African Americans and Latinos – including analyzing national arrest rates, a randomized sample of 1,500 30-day letters, all applicants using geocoding and name matching, and a logistic regression analysis. All four methods confirm Dr. Bendick's prior expert opinion that the 30-day letter process had a common disparate impact on African Americans and Latinos that is both statistically significant and practically significant.

In response to Plaintiffs' overwhelming statistical evidence, Census claims that an analysis of applicants it actually hired does not support a finding of adverse impact. Def.'s Br. at 15, 21, 27, 31. The Court should reject Census's retreat to a "bottom line" defense. First, the U.S. Supreme Court, in *Connecticut v. Teal*, 457 U.S. 440 (1982), rejected this bottom line approach to determining statistical impact because it doesn't actually address the challenged employment practice. Second, Plaintiffs and the Court do not have the benefit of self-reported race and national origin for all applicants in this case because Census failed to comply with its federally mandated obligation to collect and maintain this information at the application stage.[2] The Court should not only deny Census's invitation to reward its blatant violation of federal guidelines,[3] but the Court can and should draw an inference of adverse impact based on it. *See Wright v. Stern*, 450 F. Supp. 2d 335, 353 (S.D.N.Y. 2006) ("The Uniform Federal Guidelines provide that [w]here [an employer] has not maintained data on adverse impact," an "inference of adverse impact of the selection process" may be drawn) (internal quotations and citations

[2] *See* EEOC's Uniform Guidelines on Employee Section Procedures (hereinafter "Guidelines"), 29 C.F.R. § 1607.1-1607.18, which applies to all selection procedures used to make employment decisions; 29 C.F.R. 1607.4 (requiring records be maintained for "Blacks" and "Hispanic"); Fed. Responsibilities Under Section 717 of Title VII & Section 501 of the Rehab. Act, EEO MD-715 (E.E.O.C. Mgmt. Dir. Oct. 1, 2003); *see also* Ex. 110 (Bendick Rebuttal Decl.) ¶ 5.

[3] The obligation is undisputed even by Census's own expert. *See* Ex. 109 (Outtz Tr.) at 57:8-12; 57:20-58:5 (Q: "I take it under the guidelines, an employer should keep various records which would allow persons trying to determine whether there's adverse impact. . . with regard to applicant hiring, employee hiring? A: "The guidelines so state."), 65:2-4 ("in order to comply with the guidelines, [an employer] should – maintain such records [pursuant to § 1607.4]").

omitted).[4] Further, regardless of its merit, a bottom line argument is a common issue that supports class certification.

1. Commonality is Not Defeated by the Local Character of Hiring.

Throughout Census's opposition it relies on the undisputed fact that temporary workers generally worked within the boundaries of the Local Census Office ("LCO") in which they lived to argue against certification of a nationwide class. The treatment of an LCO as a separate fiefdom ignores the existence of Census's uniform criminal background check policies, its highly centralized system for reviewing rap sheets and sending 30-day letters, and its uniform adjudication criteria applied nationwide.[5] Even at the local level, local managers did not have the discretionary authority to deviate from the uniform and mechanical hiring protocols. ECF No. 176, Pls.' Mem. of Law in Supp. of Class Cert. at 11-12, 14-23.

It also does not mandate the LCO-by-LCO analysis that Census, and its expert Dr. Bernard Siskin, advocates to establish impact. Under Title VII case law, the facts of this case fully support the use of nationwide data to determine the overall impact of a single common employment practice. The uniform criminal background check screen constituted a threshold requirement for entering the eligible applicant pool, regardless of the LCO or the temporary

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[4] *See also Albermarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (the guidelines "constitute '(t)he administrative interpretation of the Act by the enforcing agency,' and consequently they are 'entitled to great deference") (quoting *Griggs v. Duke Power Co.,* 401 U.S. 424, 431 (1971)); *accord Bazile v. City of Houston*, 858 F. Supp. 2d 718, 726 (S.D. Tex. 2012).

[5] *See McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 490 (7th Cir. 2012) (finding commonality when plaintiffs challenged company-wide policy was discriminatory, and rejecting defendant's argument that alleged discrimination would result from "local, highly individualized implementation of policies rather than the policies themselves"); *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 511-12, 514, 531 (N.D. Cal. 2012) (plaintiffs established commonality where they presented, *inter alia*, evidence of common companywide policies that had classwide effect on all regions of company, despite defendant's characterization of employment decisions as being made locally); *Nelson v. Wal-Mart Stores, Inc.*, 245 F.R.D. 358, 368-69 (E.D. Ark. 2007) (finding uniform hiring policy that discriminated against African-Americans although defendant argued that hiring was local).

position.[6]

Central to Census's position is the so-called Simpson's Paradox, which observes that the aggregation of data can lead to "illusory disparities" that "disappear when the data" is disaggregated. Def.'s Br. at 20 (citing to *Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro Dade Cnty.*, 122 F.2d 895 (11th Cir. 1997)).[7] Had Dr. Siskin actually used the data available to him to test this hypothetical critique he would have observed that not only do the disparities not disappear, they are amplified. In his Rebuttal, Dr. Bendick conducted a logistic regression analysis to analyze the 3.7 million job applicants for whom race and Latino ethnicity could be attributed and controlled for the location of the applicant. Ex. 110 (Bendick Rebuttal Decl.) at ¶ 30.[8] Dr. Bendick analyzed the likelihood of an applicant receiving a 30-day letter controlling for applicants' race, Latino ethnicity, gender, and LCO. *Id.* Controlling for geocoding (i.e. applicant location), Dr. Bendick found that African Americans had 2.41 times the chances of whites of receiving the 30-day letter.[9] Ex. 110 (Bendick Rebuttal Decl.) ¶ 31. Similarly, controlling for a combination of name matching and geocoding, Latinos had 3.03 times the chance of receiving the 30-day letter relative to whites.[10] *Id.* Both results are statistically significant and practically significant. *Id.* ¶¶ 4, 36, 38, 55, 56. Contrary to Census's assertion that Plaintiffs have not put forth evidence of impact as to the adjudication criteria, the 30-day letter was triggered by an initial application of the adjudication criteria (referred to by Census as

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[6] *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 654-55 (5th Cir. 1983) (central hiring decisions support nationwide statistical analysis); *Ellis*, 285 F.R.D. at 524 (same with promotion practices); *see also EEOC v. Joint Apprenticeship Committee of the Joint Indus. Bd. of the Electrical Indus.*, 186 F.3d 110, 119 (2d Cir. 1998).

[7] Census relies on *Abram v. UPS*, 200 F.R.D. 424 (E.D. Wis. 2001), however, the plaintiffs alleged that the common policy causing a disparate impact was the employer's "subjective decisionmaking," the court concluded that any discrimination was, "driven by the biases of individual managers" and implicated "the decisions of apparently hundreds of center managers . . . requiring many individualized inquiries." *Id.* at 430, 432.

[8] Of the 3.9 million job applicants there were "approximately 3.7 million job applicants for whom race and Hispanic ethnicity could be attributed using geocoding." Ex. 110 (Bendick Rebuttal Decl.) ¶ 30.

[9] Dr. Siskin concedes that geocoding is a reliable estimates race percentage of applicants. Ex. 108 (Siskin Tr.) 172:9-172:15.

[10] Dr. Siskin acknowledges that name matching reliability for Latinos. Ex. 108 (Siskin Tr.) 117:16-118:15.

"stage 1" or "namecheck") that contained the same exclusionary criminal offenses and timeframes as the ultimate adjudication criteria (referred to by Census as "stage 2"). *See* Ex. 118. In other words, not every applicant with a criminal record received the 30-day letter, only those who did not pass through the adjudication criteria, in its initial application, received the letter.

While Plaintiffs disagree that location must be controlled to assess the overall impact of a uniform employment practice, Dr. Bendick's logistic regression analysis does, in fact, control for location – rendering the question moot.[11] Moreover, controlling for LCO increases the magnitude of the observed differences in selection rates in this case and again confirms that Census utilized a selection device – the 30-day letter – that violates Title VII. Ex. 110 (Bendick Rebuttal Decl.) ¶ 29.

2. Race Data From Random Sample of Applicant FBI Records Reliably Demonstrates Statistical Impact.

Dr. Bendick also utilized a valid method of sampling to evaluate the impact of Census's 30-day letter process. He did this by evaluating the race information recorded on the rap sheets of a random sample of FBI rap sheets returned for applicants who received the 30-day letter. ECF No. 166-5, Bendick Decl. ¶¶ 23-24; ECF No. 182, Bendick Supp. Decl. ¶¶ 2-3.[12] The race identifiers on the FBI rap sheet are clearly reliable and are regularly relied on by "law enforcement administration, operation, and management . . . criminologists, sociologists, legislators, city planners, the media, and other students of criminal justice[, who] use them for a

[11] Controlling for location is a case-specific issue based on the nature of the challenged employment practice. Compare *Davis v. Cintas Corp.*, 717 F.3d 476 (6th Cir. 2013) with *Ellis*, 285 F.R.D. at 523 (finding that because the employers "own promotion practices support a nationwide statistical analysis" that "there [was] good reason to rely on nationwide statistics").

[12] Of the 1,500 sample size, Bendick identified 1,347 individuals who were useable for his analysis. ECF No. 216, Bendick Second Supp. Decl. ¶ 5. Census's expert concurs that Dr. Bendick's sample size was sufficiently large. Ex. 108 (Siskin Tr.) 77:14-79:6, 85:23-86:3.

variety of research and planning purposes." Ex. 111 (Campbell Decl.) ¶ 18 (quoting UCR webpage, A Word About UCR Data).[13]

a. Dr. Bendick Appropriately Drew His Sample From Recipients of the 30-day Letter.

Census, and its expert Dr. Siskin, argues that Dr. Bendick should have drawn his sample from the applicants who responded to the 30-day letter rather than those who received it. ECF No. 201, Siskin Decl. ¶¶ 5-14, 19, 21. Census bases its flawed "bottom-line" premise on the argument that receiving the 30-day letter did not explicitly render an applicant ineligible. In fact, the 30-day letter was not merely a request for information, but an initial determination that an applicant could overcome only if it passed a virtually insurmountable, unvalidated test.[14] Census knew the vast majority of applicants who received the letter would face disqualification because the time limit to receive the benefit of "due process" had expired.[15]

b. Dr. Bendick Studied the Correct Populations to Establish the Impact of the 30-day Letter.

The race statistics on the fraction of applicants who responded and received a second level adjudication excludes the hundreds of thousands of class members who did not or could not respond to the 30-day letter. Census argues that Plaintiffs have not established the reasons why

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[13] Campbell's Declaration illustrates the absurdity of Census's comparison of law enforcements' use of race descriptors with *EEOC v. Kaplan Higher Learning Edu. Corp.*, in which the court rejected a method of ascertaining race by having a panel of experts assign race based on photographs from driver's license photographs. No. 10 Civ. 2882, 2013 WL 322116 (N.D. Ohio Jan. 28, 2013). In *Kaplan* none of the experts had "prior experience in determining race via visual means." *Id.* at *5. In contrast, police officers are the primary consumers of the descriptive data in the FBI database and have a self-interest in its accuracy for their own safety; the FBI conducts triennial audits of state and local agencies data collection to assure its quality; and police officers enter such data in "a routine, business-like manner, generally though observational assessment of the subject[.]" Campbell Decl. ¶ 14

[14] Census's reliance on *EEOC v. Freeman*, No. 09 Civ. 2573, -- F. Supp. 2d ----, No. 09 Civ. 2573, 2013 WL 4464553 (D. Md. Aug. 9, 2013) to support the legitimacy of its 30-day letter process is entirely misplaced. First, unlike here, defendant in Freeman had few "bright-line rules" regarding the effect of an applicant's criminal history on their eligibility. *Id.* at *3. Second, defendant in *Freeman* focused its criminal history evaluation on the past seven years and evaluated whether the criminal offense underlying a particular conviction rendered an applicant unsuitable. *Id.* Census's policy of sending letters to applicants based on *arrests*, irrespective of disposition and in some cases of length of time since arrest and requiring that applicant to obtain their own court records stands in stark contrast.

[15] Miazad Decl. Ex. 72 (Groves Tr.) 176:25-177:9; Miazad Decl. Ex. 79 (Patterson Tr. II) 150:23-151:21.

applicants did not respond to the letter. Def.'s Br. at 24-25. An individualized inquiry as to why an applicant did not respond to the 30-day letter is not necessary when the central issue common to the class is whether the 30-day letter constitutes a valid test.[16] Insofar as each Plaintiff's individual fact situation is relevant to class certification, they appear only as manifestations of the broad discriminatory policy they seek to eradicate. *See Mark v. GE Co.*, 329 F. Supp. 72, 74 (E.D. Pa. 1971); *see also Carter v. Newsday, Inc.*, 76 F.R.D. 9, 14 (E.D.N.Y. 1976).

It also inaccurately equates responding with passing the 30-day letter test, if not the adjudication criteria. As evident in the record, just because an applicant sent in a response does not mean it was the required response that would actually get them to a second-level adjudication. For example, if an applicant sent in fingerprints that matched an arrest record without also sending the "official court records," Census would disqualify them without any further consideration and simply on the basis that they did not comply with the letter in time. Miazad Decl.[17] Ex. 47 (Mesenbourg Tr.) 116:2-5; Miazad Decl. Ex. 70 at USA43538-540.

3. It Is Not Necessary to Analyze Hiring Selections by Gender.

Dr. Bushway argues that Dr. Bendick should have controlled for gender in his analysis, based on the fact that his review of National Longitudinal Youth Survey 1997 ("NLYS97") data, the flaws of which are addressed below, indicate that African American and Latino women do not have a "meaningful or statistically significant" higher incident of arrest as compared to white women. ECF No. 200, Bushway Decl. ¶¶ 2, 3(e). Significantly, the actual applicant data does

[16] *Duling v. Gristede's Operating Corp.*, 267 F.R.D. 86, 98 (S.D.N.Y. 2010) ("[I]ndividual circumstances . . . do not bear upon whether Plaintiffs have raised common questions of law or fact as to [defendant's] employment policies and practices."); *Smith v. City of Joliet*, No. 93 Civ. 3401, 1995 WL 68749, at *3, *6 (N.D. Ill. Feb. 16, 1995) (same hiring "tests and procedures" although applicants differed factually); *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 561 (8th Cir. 1982) (same with discriminatory promotion policy); *Mathers v. Northshore Mining Co.*, 217 F.R.D. 474, 485 (D. Minn. 2003) (same); *Wright v. Stern*, Nos. 01 Civ. 4437, *et. al*, 2003 WL 21543539, at *5-6 (S.D.N.Y. July 9, 2003) (same); *Rodolico v. Unisys Corp.*, 199 F.R.D. 468, 475-76 (E.D.N.Y. 2001) (same with discriminatory termination policy).

[17] Citations to the "Miazad Decl." refer to the Declaration of Ossai Miazad in Support of Plaintiffs' Motion for Class Certification, ECF No. 168, and accompanying exhibits.

not support the conclusion Census puts before the Court. In response to Dr. Bushway's assertion, Dr. Bendick conducted an analysis that controlled for gender for the "approximately 3.7 million job applicants for whom race and Hispanic ethnicity could be attributed using geocoding" and found that this control makes essentially no difference in the estimated adverse impact. Ex. 110 (Bendick Rebuttal Decl.) ¶¶ 30, 34-35, 58(e). In any case, the Court should reject Census's efforts to dilute the significance of Plaintiffs' statistics.[18]

4. Dr. Bushway's Alternative Methodology, Based on an Inadequate Database and Flawed Presumptions, Although Problematic Still Identifies Impact.

Dr. Bushway, who admits he is not an expert in statistics and has never served as an expert in statistics or labor economics in any previous cases puts forward what he claims is a more reliable source, NLYS97, for assessing statistical impact. Bushway Decl. ¶ 2; Ex. 107 (Bushway Tr.) 5:21-10:25. Dr. Bushway glosses over the multitude of reliability issues associated with the NLYS97 and the applicability of the NLYS97 to an analysis of the Census applicant pool. The NLYS97 relies completely on self-reporting without any cross checking against actual arrest record, and the study, itself, acknowledges self-reporting surveys present a variety of problems. Such problems include: attrition, Ex. 112 and Ex. 107 (Bushway Tr.) 169:14-170:22, Ex. 113 (Nakamura Rebuttal Rep.) at 4; refusal to answer "sensitive" questions,[19] Ex. 114 and Ex. 107 (Bushway Tr.) 148:5-14; 149:13-150:2; and African Americans underreported, Ex. 107 (Bushway Tr.) 138:18-139:1, 142:9-143:22; *see also* Ex. 115 (Western Rep.) at 1-6 (African Americans less likely to self-report). In addition the dataset is particularly

[18] *See Barnes v. GenCorp Inc.*, 896 F.2d 1457, 1466 (6th Cir. 1990) (rejecting defendants attempt to define protected class so that statistics would not show discrimination); *Bridgeport Guardians, Inc. v. City of Bridgeport*, 735 F. Supp. 1126, 1131 (D. Conn. 1990).

[19] Additionally, while Dr. Bushway touts the manner in which the NLYS97 asks sensitive questions, Bushway Rep. p.8 n.12, up to fourteen percent of respondents could not participate in the sensitive question process because they answered survey questions over the telephone. Ex. 107 (Bushway Tr.) 125:20-127:10.

ill-suited and unreliable in this case because the data collection stops at age twenty-six, not accounting for seventy percent of the Census applicants, *id.* at 7-8, and fails to account for birth cohorts, (*id.* at 9-10) where respondents to the NLYS97 were all born between 1980 and 1984; while the Census applicant birth cohort was 1940 to 1992. *Id.*

5. The Court Should Grant a Presumption in Favor of Plaintiffs, Not Census, for Census's Flagrant Disregard of Its Federally Mandated Obligation to Collect Race Information from Job Applicants.

Because it "does not maintain data on the race or national origin of applicants," Def.'s Br. at 30, Census asks the Court to look at the race and national origins of the people it actually hired when determining disparate impact. Census's argument flies in the face of reason and well-established legal precedent, incentivizing other employers to similarly flout federal mandates. Not even the cases to which Census cites support its position that the Court should allow it to decide the appropriate comparison for the disparate impact analysis.[20] *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977), held that the racial composition of the school district's work force should be compared to the racial composition of the pool of qualified candidates. It did not say that other comparisons would be irrelevant, or that this was the only proper way to make a statistical comparison. *See id.* at 310 (counseling, on remand, that it might be necessary to compare numbers of black applicants to black employees hired).[21] Second, the U.S. Supreme Court, in *Teal*, rejected Census's "bottom line" approach to determine statistical impact. The

[20] Census's argument is also foreclosed by the Second Circuit cases it cites. *See* Def.'s Br. at 30-31. As those cases note, it is "error" for a district court to reject "out of hand [a plaintiff's] statistical analysis simply because it failed to conform to the *preferred* methodology described in *Wards Cove*, given the Supreme Court's express endorsement in that decision of alternative methodologies if the preferred statistics are 'difficult' or 'impossible' to obtain." *Malave v. Potter*, 320 F.3d 321, 326, 27 (2d Cir. 2003); *see Wards Cove Packing Co., Inc., v. Atonio* , 490 U.S. 642, 651 (1989) ("in cases where such labor market statistics will be difficult if not impossible to ascertain, we have recognized that certain other statistics . . . are equally probative").

[21] In *Wards Cove*, the Court expressly stated that "employers falling within the scope of the [Guidelines] are required to maintain . . . records . . . of person by identifiable race . . . or ethnic group," and that "respondents presumably took full advantage of these opportunities to build their case before the trial in the District Court was held." 490 U.S. at 657-58.

Court stated that Title VII "speaks, not in terms of jobs and promotions, but in terms of *limitations* and *classifications* that would deprive any individual of employment *opportunities*," in order to "achieve equality of employment opportunities and remove barriers" that favor white employees over other employees. *Teal*, 457 U.S. at 448 (internal quotation marks and citation omitted). Recognizing that *Teal* is dispositive of commonality, Census characterizes *Teal* as narrowly holding only that an employer cannot defend against a discriminatory test by using evidence of the percentages of African Americans in the workforce versus the applicant pool to show that a "subsequent affirmative action program overcame the test's adverse impact." Def.'s Br. at 31. Census ignores the Court's actual holding "that the 'bottom line' does not preclude respondent employees from establishing a *prima facie case*," or provide [the] employer with a defense to such a case." [22] *Teal*, 457 U.S. at 442.

B. The Mechanical Application of the Uniform Adjudication Criteria Supports Commonality.

Census does not dispute that CHEC staff used uniform adjudication criteria to screen applicants and to determine whether to send them a 30-day letter. *See* Def.'s Br. at 12. While the adjudication criteria may affect individual applicants in different ways because of their different criminal histories (or lack thereof), that is "not sufficient to deny class treatment to the claims that have a common thread of discrimination." *Paxton*, 688 F.2d 552 at 561.23.

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[22] Census also argues that *Teal* cannot apply because Plaintiffs lack "applicant flow data" which the *Teal* plaintiffs had. Def.'s Br. at 31. This distorted reading of *Teal* ignores the plain language of the decision. *Teal*, 457 U.S. at 454 ("Under Title VII, a racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.") (citations and internal quotation marks omitted).

[23] Census's assertion that the adjudication criteria did not have a disparate impact on African Americans or Latinos because an equal percentage of black and white 30-day letter respondents were favorably adjudicated and a greater percentage of Latinos were favorably adjudicated as compared to non-Latino respondents is equally unpersuasive. Even assuming that Census's statistical analysis on this point is accurate, which Plaintiffs do not concede, this argument is simply another version of the "bottom line" argument which the Supreme Court has soundly rejected. *See Teal*, 457 U.S. at 450-51.

Census argues that the "application of the adjudication criteria is inherently an individualized process." Def.'s Br. at 29. The evidence in the record, however, does not support this assertion and instead points to a highly mechanical and controlled process designed to deal with screening hundreds of thousands of applicants for whom the FBI returned rap sheets. A small, centralized population of decision makers using the same criteria determined whether an applicant received the 30-day letter, providing significant support for a finding of commonality. See Pls.' Mem. of Law in Supp. of Class Cert., at pp. 20-21; Miazad Decl. Ex. 88 at USA20776 (CHEC office organizational chart); *Duling*, 267 F.R.D. at 98-99 (finding commonality where, inter alia, plaintiffs presented evidence that all hiring decisions company-wide were made by a small group of individuals).

Further, the 30-day letter itself asked for only official court records of all arrests and did not provide the opportunity to send information on mitigating factors such as whether a crime occurred while the applicant was a juvenile, or an applicant's rehabilitation efforts. In other words, Census did not even seek the information it would need to make individualized determinations. Only after receiving the responses from applicants did Census send a second letter, called the MORE letter, to a fraction of the applicants asking them supplement with information including letters of reference and a detailed explanation of the crimes within 15 days. Miazad Decl. Ex. 81 (Bettwy Tr.) 176:4-177:9; Ex. 11. By the time an applicant made it to a stage 2 adjudication there were only between 20 and 25 CHEC office staff, all working from Census headquarters, who could authorize the applicant's release into the eligible applicant pool. Miazad Decl. Ex. 81 (Bettwy Tr.) 80:5-84:2.

C. Census Raises Common Job-Related and Business Necessity Defenses.

Census defends its criminal background check process as job-related and justified by business necessity because public perception about safety was critical to an effective decennial census and there were strict time constraints during which to perform background checks.[24] Def.'s Br. at 4-7. Plaintiffs' expert, Dr. Kathleen Lundquist, credibly rebuts Census's job-related and business necessity defenses, which are common issues best addressed on a class-wide basis. In support of its defenses, Census offers the expert report and testimony of Dr. James Outtz. Relying on Census's own premises and conclusions, Dr. Outtz concludes in one swoop that the criminal background check policies and practices at issue in this case are job-related and justified by business necessity. Ex. 116 (Lundquist Rebuttal Rep.) at 2-4, 6-7, 10-16, 19-21, 24; ECF No. 202, Outtz Rep. at 20; Ex. 109 (Outtz Tr.) at 96, 98-99, 160, 197, 143-44, 166). Dr. Outtz criticizes Dr. Lundquist's findings based on premises that are unsupported in the record, contradictory, and/or run counter to professional standards and his own prior opinions. Ex. 116 (Lundquist Rebuttal Rep.) at 2-3, 7-10, 16-20; Outtz Rep. at 31, 44; Ex. 109 (Outtz Tr.) at 229). While the Court need not engage in a merits determination at this stage, there is a notable lack of support for Dr. Outtz's conclusion that Census actually validated its criminal background screening criteria. Outtz Rep. at 31-32, 44. For example, he reports that Sandra Patterson among others validated the background check process through "content validation" *Id.* at 31-33; Ex.

[24] Census argues that because the threshold issue of disparate impact has not yet been established, the Government's proof of business necessity and job-relatedness – and expert responses to those defenses – is not yet "relevant." (Def.'s Br. at 14). Census's position does not find support in the plain language of Rule 23 or relevant case law. *See* Fed. R. Civ. P. 23(a)(3) (one factor for certification is "claims *or defenses* of the representative parties are typical of the claims *or defenses* of the class") (emphasis added); *id.* 23(b)(3)(A) ("class members' interests in individually controlling the prosecution *or defense* of separate actions") (emphasis added); *M.O.C.H.A. Soc'y, Inc. v. City of Buffalo*, No. 98 Civ. 99, 2008 WL 343011, at *3 (W.D.N.Y. Feb. 6, 2008) ("job-relatedness" and "business necessity" a common issue); *Easterling v. Conn. Dep't of Corrs.*, 278 F.R.D. 41, 49-50 (D. Conn. 2011) (whether policy "was justified by business necessity" was common issue); *see also* ECF No. 233, at 6-9, Pls.' Opp. to Def.'s Mot. in Limine.

109 (Outtz Tr.) at 96-101), yet he could not point to any evidence of this validation process or even inquire into it when he interviewed Ms. Patterson. *See* Ex. 109 (Outtz Tr.) at 122-23, 215-16; Outtz Rep. at 2 (citing SIOP Principles); Exhibit 120. Remarkably during his deposition, he retracted to "Sandra Patterson was not responsible for validating the adjudication criteria." Ex. 109 (Outtz Tr.) at 215-16. The Court need not determine at this stage whether Census can credibly prove that it had a valid and reliable criminal background check screen, although the weight of evidence speaks against it. Census has failed to refute the only relevant question on class certification of whether Dr. Lundquist's methodology and findings apply to the class. Whether the background check process was job-related and justified by business necessity is a question common to the class, the resolution of which resolves issues central to each one of the claims in one stroke.

III. Plaintiffs Have Established the Remaining Rule 23(a) Requirements.

A. Census's Merits Defenses Do Not Defeat Typicality.

Census does not dispute the fact that each of the Named Plaintiffs received the 30-day letter based on Census's namecheck adjudication criteria and that none of them were released into the eligible hiring pool by the time the last temporary worker was hired. *See* ECF No. 205, Willis Decl., ¶ 2; ECF No. 206, Patterson Decl., ¶¶ 10-17. Instead it argues that the Plaintiffs lack typicality because "all were allegedly affected by different aspects of the policies." Def.'s Br. at 34. Unlike the plaintiffs in *Oakley v. Verizon Commc'ns Inc.*, No. 09 Civ. 9175, 2012 WL 335657 (S.D.N.Y. Feb. 1, 2012), cited by Census, who identified "nine distinct policies," Plaintiffs here *do* "identify a single uniform policy that applies to all class members." *Id.* at *14. It is undisputed that the *same* 30-day letter process and adjudication criteria applied nationwide. Census's myriad of arguments to defeat typicality fails to undermine the key requirement for

typicality, which Plaintiffs here have shown: that they and the class they seek to represent were all affected by Census's uniform, centralized 30-day letter and adjudication policies. *See Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993).

Census attempts to obscure the fact that Plaintiffs challenge a uniform set of policies by overwhelming the Court with details suggesting that the Plaintiffs' claims are too individualized to satisfy typicality. *See* Def.'s Br. at 34-35. This is also a red herring. Plaintiffs satisfy the requirements for typicality because their claims *do* – contrary to Census's suggestion – arise "from the same course of events." *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 245 (2d Cir. 2007). Each of the Plaintiffs was barred from the applicant hiring pool due to one or more of the three hiring policies challenged in this lawsuit. "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux*, 987 F.2d at 936-37. Because their claims share the same "essential characteristics" as those of the class they seek to represent, Plaintiffs have established typicality. Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 3:29 (5th ed.) ("*Newberg*") ("The plaintiffs' claims need not be identical to those of the class; typicality will be satisfied" as long as their "claims share the same essential characteristics as the claims of the class at large") (internal quotation marks omitted).

Census's argument that some Plaintiffs "were not harmed" by the 30-day letter because they timely responded to it, Def.'s Br. at 34,[25] and that other Plaintiffs who were adjudicated

[25] Even those Plaintiffs who were able to timely respond to the 30-day letter testified that it was confusing. Miazad Decl. Ex. 36 (Rickett-Samuels Tr.) 144:20-23 (30-day letter "was very confusing ."); Ex. 31 (Riesco Tr.) 56:13-15 (letter was "confusing"), 57:11-14 (made several phone calls to try and "figure out what the letter was about"); Ex. 27 (Gonzalez Tr.) 95:14-96:11 ("I didn't really understand the letter completely"); Ex. 1 (Daniels Tr.)

ineligible "cannot be typical of other individuals who committed different crimes at different times," *id.* at 35,[26] is not unique to Plaintiffs. In rejecting a similar argument, the court in *Velez v. Novartis*, 244 F.R.D. 243 (S.D.N.Y. 2007) explained that it "is, of course, always the defendant's contention in class action discrimination claims" that the named plaintiffs' claims are "unique." *Id.* at 268; *accord Duling v. Gristede's*, 267 F.R.D. at 97-98. The facts surrounding Plaintiffs' claims need not be identical to those of the class, so long as they arise "from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *United States v. City of New York*, 258 F.R.D. 47, 65 (E.D.N.Y. 2009).

Census's argument that Plaintiffs cannot establish typicality because the adjudication process involved highly individualized inquiries also rings hollow. First, it is undisputed that CHEC staff used uniform adjudication criteria to screen applicants. *See* Def.'s Br. at 12. Second, Plaintiffs' claims here are plainly different than the claims at issue in the cases relied upon by Census. *See Elizabeth M. v. Montenez*, 458 F.3d 779, 787 (8th Cir. 2006) (typicality could not be satisfied in case against a state mental health agency, because substantive due process claims which plaintiffs alleged required "an exact analysis of circumstances before any abuse of power is condemned.") (internal quotation marks and citation omitted); *Lewis Tree Serv., Inc. v. Lucent Tech. Inc.*, 211 F.R.D. 228, 234 (S.D.N.Y. 2002) (finding no typicality in a fraud class action about a defective product where "the representations and negotiations made by the defendants were highly individualized and differed from case to case"). Finally, although Census argues

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64:12-65:6 ("couldn't make heads or tails of" the 30-day letter). This is further evidenced by the fact that both Ms. Daniels and Ms. Kargbo were apparently deemed unsuitable for employment because they did not properly respond to the 30-day letter. *See* Patterson Decl. dated Oct. 28, 2013, ¶ 10 (Plaintiff Daniels was made ineligible because she submitted fingerprints instead of disposition documentation), ¶ 14 (Plaintiff Kargbo was determined unsuitable for same reason).

[26] Census asserts it is "telling" that Dr. Lundquist found only that approximately 25 percent of the crimes included in the adjudication criteria were not job-related. Def.'s Br. at 35 n.92. Not only is this percentage significant, but Census also glosses over Dr. Lundquists's remaining analysis, including that over 80 percent of the offenses included that were job-related used exclusionary time periods that were too long relative to the job requirements. Miazad Decl. Ex. B (Lundquist Report) at 1, n. 1; Ex. B-1 (Lundquist Technical Report).

that Ms. Scott's claims are not typical of those of the class, as with the other Plaintiffs and potential class members, she was deemed ineligible only after receiving the 30-day letter and attempting to comply with it. Miazad Decl. Ex. 41 (Scott Tr.) 96:15-97:6, 98:22-99:6, 103:8-15,150:12-151:11. Accordingly, her claims too share the same "essential characteristics" as those of the class she seeks to represent. *Newberg* § 3:29.

B. Census Fails to Demonstrate that Plaintiffs Are Not Adequate Class Representatives.

Rule 23(a)(4) requires only that the representative plaintiffs do not have interests that are antagonistic to the class. *See Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000) ("Generally, adequacy of representation entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class" and 2) qualifications of plaintiffs' attorneys). Where "class representatives are prepared to prosecute fully the action and have no known conflicts with any class member," the adequacy requirement is met. *See Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 253 (2d Cir. 2011). None of Census's arguments suggest Plaintiffs have interests antagonistic to the class.

Census argues that the named Plaintiffs are inadequate class representatives because none has a claim to back pay. Def.'s Br. at 36. Census's position on Plaintiffs' adequacy and standing are both legally and factually unfounded. Census's argument that Plaintiffs would not have been hired even if they passed the criminal background check screen because they did not score high enough on the Census test, lacked foreign language ability, or lacked other criteria that Census asserts was required for hiring is at odds with established precedent on Title VII. Census confuses whether Plaintiffs would actually have been hired with whether they were qualified to be hired. Plaintiffs' position is that they were denied the opportunity to compete for a position with Census.

Moreover, Census's own documents and witnesses establish that the Named Plaintiffs met the minimum qualifications for positions and were therefore *qualified* to be hired. *See Teal*, 457 U.S. at 448 (Title VII, "speaks not in terms of jobs and promotions, but in terms of *limitations* and *classifications* that would deprive any individual of employment opportunities."). This Court recently agreed in denying Census's request to file a motion for summary judgment, noting that in order to establish standing, Plaintiffs "need not show that they would have been hired, merely that they were qualified to be hired." ECF No. 183, Aug. 9, 2013 Order at 1.[27] Applicants only needed a minimum score of 70 in order to qualify for employment. *See* Miazad Decl. Ex. 56. Census does not dispute that all of the Plaintiffs had scores above this minimum threshold. Willis Decl. dated Oct. 28, 2013, ¶ 43 (Houser scored a 72), ¶ 50 (Rickett-Samuels scored an 88); ¶ 68 (Desphy scored a 75 and an 83); ¶ 78 (Daniels scored an 83); ¶ 85 (Gonzalez scored a 92); ¶ 93 (Kargbo scored an 80); ¶ 97 (Riesco scored a 93).[28] Furthermore, Census's reliance on *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395 (1977), is misplaced because unlike here, in *Rodriguez* there was "abundant evidence that the[] plaintiffs lacked the qualifications to be hired." *Id.* at 403.

Whether or not Plaintiffs actually would have been hired is a damages inquiry. *See Cohen v. W. Haven Bd. of Police Comm'rs*, 638 F.2d 496, 502 (2d Cir. 1980); *United States v. City of New York*, No. 07 Civ. 2067, 2012 WL 1999860, at *1, *3 (E.D.N.Y. June 3, 2012). Even *Bates v. UPS, Inc.*, 465 F.3d 1069 (9th Cir. 2006), cited by Census, Def. Br. at 16, supports this. *Id.* at 1079.[29] Census's arguments do not present standing or adequacy issues, but a

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[27] On December 16, 2013, Census nonetheless filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, ECF No. 226, after the Court granted permission on reconsideration. ECF No. 188. Census's motion is without basis and Plaintiffs will fully respond to the standing arguments in their opposition.

[28] Although Census could not locate a record of Ms. Scott's score, Ms. Scott testified that her score was approximately 100 percent. Ex. 119 (Scott Tr.) 80:4-15.

[29] *Gilty v. Vill. of Oak Park*, 919 F.2d 1247 (7th Cir. 1990), does not advance Census's standing argument. *Gilty* involved an individual disparate impact claim, which the court dismissed because in addition to lacking

damages issue that is inappropriate at this time.[30]

C. Plaintiffs Exceed Numerosity Requirements.

Census concedes numerosity as to the Rule 23(b)(2) liability phase class." Def.'s Br. at 37. As to Plaintiffs' Rule 23(b)(3)/(c)(4) monetary damages phase class, Census concedes numerosity concerning applicants who were barred based on procedural requirements imposed by the 30-day letter, and argues, incorrectly, that there is no evidence of numerosity for applicants who were barred based on "the delay in the adjudication process," and "exclusions that are not job-related." *Id.*. There is ample evidence and support for both.

Numerous applicants were barred based on "the delay in adjudicating the applicant." For example, applicants who were sent a 30-day letter had to wait an average of 8.5 months between application and hire, if they were hired at all.[31] ECF No. 166, Kozhevnikova Decl., Table 1. Since most enumerators were hired in a 2-3 month span, an 8.5 month delay proved fatal to an applicant's ability to be considered for a job. *See* Miazad Decl. Ex. 61 at 5. An estimated 95,152 applicants responded to the 30-day letter and received some additional consideration, of those approximately 52,000 were adjudicated "favorably," however less than 8,000 applicants who received a 30-day letter were actually made available and hired. Miazad Decl. Ex. 68 at 43541.

Likewise, many applicants were barred based on exclusions that are not job-related. For

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statistical evidence to support his claim, the plaintiff could not establish that he was qualified for the position. *Id.* at 1255. The basis for Census's reliance on *Quest Commc'ns Int'l Inc. v. FCC*, 240 F.3d 886 (10th Cir. 2001), and *Jackson-Bey v. Hanslmaier*, 115 F.3d 1091 (2d Cir. 1997), is unclear as neither involved Title VII or class action claims, and Census does not cite to any particular part of either decision.

[30] Even if Census could demonstrate that all of the current Named Plaintiffs lack standing, such a showing would not require dismissal of the suit. It is well-settled that a class representative in a putative class action may be replaced without depriving the class of the benefit of the original filing. *See In re IPO Sec. Litig.*, Nos. 21 MC 92SAS, *et al.*, 2004 WL 3015304, at *4-5 (S.D.N.Y. Dec. 27, 2004) (goals of *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974)), are best served by tolling the applicable statute of limitations for the substitution of class representatives). Courts have the discretion to substitute class action plaintiffs where a named plaintiff is found to be inadequate. *See Shahriar*, 659 F.3d at 253; *Billhofer v. Flamel Techs., S.A.*, No. 07 Civ. 9920, 2010 WL 3703838, at *2 (S.D.N.Y. Sept. 21, 2010) (courts have the ability to withdraw and substitute plaintiffs throughout the litigation of a class action).

[31] An applicant who was never sent a 30-day letter only had to wait an average of 4.2 months.

example, over 20,000 applicants received a 30-day letter based on arrests that were over *thirty years* old. Ex. 121 (Kozhevnikova Supp. Decl.) ¶ 15.

IV. Plaintiffs Have Proven that Certification Pursuant to Rule 23(b)(2) Is Appropriate.

The applicant class satisfies Rule 23(b)(2) because injunctive relief is the primary relief sought: adoption of a non-discriminatory alternative to the 30-day letter and adjudication criteria used in screening applicants out of the eligible pool. The class claims are sufficiently cohesive because a single judgment will provide relief for all. *See Dukes*, 131 S. Ct. at 2557 (stating that "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class."). An injunction can both restrain actions and mandate that certain actions be taken. *See* Fed. R. Civ. P. 65 (d)(1)(C). Moreover, Title VII confers courts with "broad equitable powers" in order to provide victims of employment discrimination with "complete relief." *Loeffler v. Frank*, 486 U.S. 549, 558 n.6 (1988); *United States v. Brennan*, 650 F.3d 65, 90 (2d Cir. 2011). The Court can craft an order that both enjoins the 30-day letter screening process and mandates that the adjudicative criteria be revised and tested to provide a comprehensive, job-related screening device, as well as provide hiring preference to class members for future Census temporary jobs.

The applicant class seeks final injunctive relief for a specified injury: Census's arbitrary, overbroad practices that resulted in a disparate impact on minority applicants. Far from the situation in *Cholakyan v. Mercedes-Benz, U.S.A., LLC*, 281 F.R.D. 534 (C.D. Cal. 2012), cited by Census, Def.'s Br. at 38, where a car buyer sought to certify a class of all automobile owners of the same make and model under California's warranty laws for a variety of defects, the applicant class here seeks redress for one specific injury: the arbitrary, over inclusive employment practices of the 30-day letter process and adjudication criteria that kept them from being able to compete fairly. Contrary to Census's argument, nothing in Rule 23(b)(2) requires

Plaintiffs to show that the effects of the 30-day letter were felt the same way or that all class members did not reply to the 30-day letter for the same reasons. The plaintiffs in *Easterling* did not have to show that the discriminatory running test affected each female applicant identically, nor did the firefighter applicants in *City of New York* need to show that they were injured by the written test in the same way. Those courts certified the applicant classes under Rule 23(b)(2) for the liability-phase based on a single, targeted employment practice where defendants "acted or refused to act on grounds that apply generally to the class." *See United States v. City of New York*, 276 F.R.D. 22, 35 (E.D.N.Y. 2011); *Easterling*, 278 F.R.D. at 26 (same).

Under Title VII, a federal "district court has the duty to render a decree that will eliminate the discretionary effects of past discrimination and prevent like discrimination in the future." *United States v. City of New York*, 717 F.3d 72, 95 (2d Cir. 2013). Thus:

> When it has been established that a selection procedure has been unlawfully used, an appropriate compliance remedy should forbid the use of that procedure, or its disparate racial impact, and may properly assure the establishment of a lawful new procedure. When it also appears that the employer has discriminated prior to the use of the challenged selection procedure, then it may also be appropriate to fashion some form of affirmative relief, on an interim and long-term basis, to remedy past violations[.]

Guardians Ass'n of the N.Y.C. Police Dep't. Inc. v. Civil Serv. Comm'n, 630 F.2d 79, 108 (2d Cir. 1980); *see generally Albemarle Paper Co.*, 422 U.S. at 418 ("[w]here racial discrimination is concerned, 'the (district) court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future'") (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)). The presumptive remedy under Title VII is equitable, thus fitting for Rule 23(b)(2). *See Easterling*, 278 F.R.D. at 46 (consistent with *Dukes*, in a hiring case, "as soon as systemic

adverse treatment or impact is established, a court may enter class-wide injunctive relief without investigating the validity or value of individual class members' claims").[32]

Census's objection to injunctive relief, Def.'s Br.at 37-40, reduces to an assertion that no matter how a hiring-process injunction is written, it will not benefit all class members equally. This argument proves too much. No Title VII injunction can ever accomplish that goal. There will only be a finite number of job opportunities, and not every class member will be eligible for a berth. This does not mean that the class lacks cohesion or cannot obtain Rule 23(b)(2) certification. *See Ellis*, 285 F.R.D. at 536 (Rule 23(b)(2) certification appropriate even if class members will not benefit equally from injunction).

The focus of class certification is not to give every class member an identical remedy, but to create one framework for awarding relief to whichever class members may ultimately benefit. Courts certify classes and award injunctive relief in the form of a process to determine which class members may be hired, such as by future hiring preferences. *See, e.g.*, *Godfrey v. City of Chicago*, No. 12 Civ. 8601, 2013 WL 5405713, at *1 (N.D. Ill. Sept. 25, 2013) (out of 1,658 class members seeking jobs, lottery system randomly sorted these applicants by number, and the first 975 were invited to proceed in the hiring process for 111 jobs); *Lane v. Kitzhaber*, 283 F.R.D. 587, 601-02 (D. Or. 2012) (certifying Rule 23(b)(2) ADA class; injunctive relief "does not mean that defendants must provide a community job to every qualified individual who wants one, but only that it must 'provide supported employment services to all qualified class members, consistent with their individual needs'"). A future hiring preference or priority instatement for

[32] Ignoring this pertinent authority, Census string-cites non-Title VII statutory cases, void of Title VII's special grounding in equitable relief: *Jamie S. v. Milwaukee Pub. Schs*., 668 F.3d 481, 499 (7th Cir. 2012) (Individuals with Disabilities Education Act (IDEA)); *Gates v. Rohm & Haas Co*., 655 F.3d 255, 264 (3d Cir. 2011) (Comprehensive Environmental Response Compensation and Liability Act); *Blackman v. District of Columbia*, 633 F.3d 1088, 1094 (D.C. Cir. 2011) (IDEA); *Felix v. Northstar Location Serv., LLC*, 290 F.R.D. 397, 407 (W.D.N.Y. 2013) (Fair Debt Collection Practices Act (FDCPA)); *Cholakyan*, 281 F.R.D. at 559 (California's Consumer Legal Remedies Act); *Morrow v. Washington*, 277 F.R.D. 172, 196 (E.D. Tex. 2011) (§ 1983 Fourth Amendment); *Agostino v. Quest Diagnostics Inc*., 256 F.R.D. 437, 469 (D.N.J. 2009) (FDCPA).

the coming decennial operations, for example, would serve as an appropriate form of injunctive relief in this case. This is not a case – such as criticized in *Dukes* – where each class member would need "a different injunction or declaratory judgment against the defendant" for various individual pay and promotion decisions. *Dukes*, 131 S. Ct. at 2557. Plaintiffs seek one equitable process for a uniform employment practice. Finally, the class is cohesive in the relevant sense that all of the applicants were denied the opportunity to advance in the process either because of the 30-day letter process and/or the adjudication criteria.

V. Plaintiffs Have Proven that Certification Pursuant to Rule 23(b)(3) Is Appropriate.

A. Alleged Individualized Inquiries Do Not Predominate Over Common Liability Issue of Whether the 30-Day Letter and Adjudication Criteria Caused a Disparate Impact.

Despite Census's contention that certifying a Rule 23(b)(3) class for damages is inappropriate because it has a "right to litigate individualized defenses,"[33] federal law mandates a different standard. For Plaintiffs to meet their burden under Rule 23(b)(3), they need demonstrate that common questions predominate over individual questions – not, that there are no individual questions. Indeed, the text of Rule (23)(b)(3) itself contemplates that such individual questions exist in class suits. *See* Fed. R. Civ. P. 23(b)(3); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012) ("Individual questions need not be absent. The text of Rule 23(b)(3) itself contemplates that such individual questions will be present.").

Potential for individualized damages at the remedial phase do not preclude a predominance finding because resolution of the central liability issue involves NO individual questions. The liability stage, pursuant to Rule 23(b)(2), will be resolved on the basis of

[33] *See* Def.'s Br. at 40.

generalized proof: by showing, through class-wide statistical evidence, that the 30-day letter and adjudication process had an unlawful disparate impact on African American and Latino applicants, and that no business justification exists for that employment practice or a less discriminatory alternative existed that achieved the same business objective. *See* Ex. 117 (*Easterling*, Nov. 22, 2011 Order) at 11 (finding Rule 23(b)(2) liability class and Rule 23(b)(3) damages class appropriate and denying defendant's motion for de-certification of applicant disparate impact class post-*Dukes*).

In contrast, the remedial stage of a Title VII class action can address individualized proof:

> Each class member must show that he or she was among those adversely affected by the challenged policy or practice. If this showing is made, the class member is entitled to individual relief unless the employer in turn can establish by a preponderance of the evidence that a legitimate non-discriminatory reason existed for the particular adverse action.

Robinson v. Metro-N. Commuter R.R., Co., 267 F.3d 147, 161-62 (2d Cir. 2001).[34] The goal of the remedial stage will be to recreate "as nearly as possible . . . the conditions and relationships that would have been had there been no unlawful discrimination." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 372 (1977) (internal quotation marks and citation omitted). At that stage, where the number of applicant class members exceeds the number of openings lost to the class through discrimination, and "identification of the individuals entitled to relief would drag the court into a quagmire of hypothetical judgments," class-wide calculation and pro-rata

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[34] Census is wrong that *Robinson* has been abrogated on this point:

> *Robinson's* holding requiring Rule 23(b)(2) certification of the liability phase of pattern-or-practice disparate treatment cases is, however, technically undisturbed by *Wal-Mart*, and remains the law in this Circuit. *Wal–Mart* interpreted only Rule 23(a)(2) and (b). The Supreme Court did not have occasion to decide whether a district court may order (b)(2) certification, under Rule 23(c)(4), of particular issues raised by disparate impact or pattern-or-practice disparate treatment claims that satisfy (b)(2)'s requirements.
>
> *City of New York*, 276 F.R.D. at 33.

distribution of back pay is appropriate. *Robinson*, 267 F.3d at 161 n.6 (internal quotation marks and citations omitted); *Ingram v. MSG Ctr., Inc.*, 709 F.3d 807, 812-13 (2d Cir. 1983) ("The fairer procedure . . . [is] to compute a gross award for all the inured class members and divide it among them on a pro rata basis."). For example, in *City of New York*, applicant class members alleged they were disqualified early in the hiring process based on a discriminatory test. 276 F.R.D. at 27. The court found that "[b]ecause it is impossible to determine exactly which non-hire victims would have received job offers . . . the court must first determine the aggregate amount of individual relief to which the subclasses are entitled and then distribute that relief pro rata to eligible claimants." *Id.* at 44.

Here, the challenged employment practices occurred in the earliest stages of the selection process. As Census points out, it disqualified the putative class so early that it did not have a chance to evaluate other selection criteria, such as the ten "hiring criteria" Census listed on pages 42 through 44 of its Response. Like *Easterling* and *City of New York*, the Court need not be dragged into a "quagmire of hypothetical judgments" about who it would have ultimately hired that Census asks the Court to do; instead, it can make an aggregate calculation of back pay after calculating the hiring shortfall. In fact, while Title VII affords Census with the right to assert defenses to individual claims for relief, whether such hearings will be needed and, if so, their number and manageability, is better left until after liability to the class is determined and the grounds for any such liability are established. *See City of New York*, 276 F.R.D. at 48-49 (quoting *Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010)). But generally, the distribution of pro rata relief would be largely formulaic: class members were denied temporary employment that lasted a finite term and had set hourly rates, making the back pay determination a "purely mechanical process." *See Parra v. Bashas', Inc.*, 291 F.R.D. 360, 393 (D. Ariz. 2013)

(recognizing that a "purely mechanical" damages determination lends itself to 23(b)(3) certification) (internal quotation marks omitted).

Moreover, such an aggregate back-pay determination is consistent with the strong presumption in favor of granting back-pay awards to victims of unlawful discrimination – discrimination that prohibits them from fairly competing for jobs. *See Albermarle Paper Co.*, 422 U.S. at 421 ("[B]ackpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."); *EEOC v. Joint Apprenticeship Comm. of Joint Indus. Bd.*, 186 F.3d 110, 122 (2d Cir. 1999) ("[B]ackpay is the rule rather than the exception under Title VII.") (internal quotation marks and citation omitted).

Census also argues that being forced to present individualized defenses in a remedial phase would be a "trial by formula," discouraged by the Second Circuit in *Myers*. However, *Myers* is not instructive on this point because it is not a Title VII disparate impact Rule 23(b)(2) liability/Rule 23(b)(3) damages class that would allow for individualized damages hearings (if necessary). Instead, *Myers* is a FLSA collective/state wage and hour case, where the court found that plaintiffs seeking overtime failed to prove that the "more 'substantial' aspects of this litigation will be susceptible to generalized proof for all class members" because plaintiffs failed to show a common policy that affected all workers the same. *See id.* at 551. Here, the substantial aspect of this litigation is the central liability issue of whether the targeted employment practices (namely, the 30-day letter and adjudication criteria used to disqualify ALL putative class members) caused a disparate impact on the Class. That liability issue will be shown through generalized proof and therefore, *Myers* is inapposite.

Lastly, Census argues that predominance is not met because there are simply too many class members with different reasons for failing the targeted employment practice. This argument fails because as one court recently held, for Title VII disparate impact determinations:

> The question is not one of scale; instead it is whether certification would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. **The mere fact that there are a great many people with plausible claims that the City has discriminated against them is hardly a reason to conclude that the individual issues that will arise in their claims will diminish the economies achieved by resolving those issues common to the claims of all the City's victims in a single class proceeding.** The number of potential claimants says nothing about the relationship between common and individual issues.

United States v. City of New York, 276 F.R.D. at 48 (quoting *Myers*, 624 F.3d at 547) (emphasis added; quotation marks omitted).

Because Plaintiffs here likewise have shown that the core liability question of whether the targeted employment practices caused a disparate impact on African American and Latino applicants can be proven without need for individualized considerations, and a remedial phase can address individualized damages, predominance is met.

B. Comcast *Does Not Prohibit Certification.*

Plaintiffs' proposed methodology for the Rule 23(b)(3) damages phase is to estimate the hiring shortfall and second, estimate the wages that the shortfall hires would have earned had they been hired. *See* Pls' Br. at 41. Census relies upon *Comcast Corp.v. Behrend*, 133 S. Ct. 1426, 1430-31 (2013), to argue that such a plan "overcompensates" class members because some would not have been hired. *See* Def.'s Br. at 47. In sum, Census argues that the need to determine damages on an individual basis is sufficient to prevent class certification. If true, then Rule 23 and all of disparate impact law would be eviscerated beyond recognition. Fortunately, the Supreme Court's decision in *Comcast* requires no such holding.

In *Comcast*, the plaintiffs brought four theories of antitrust impact. 133 S. Ct. at 1430-31. The district court accepted only one of those theories and limited class certification to one particular theory. *Id.* at 1431. Plaintiffs' damages assessment failed to "isolate damages resulting from any one theory of antitrust impact" without providing either a method for disaggregation or separate damages calculations for each antitrust theory. *Id.* The Supreme Court found that the plaintiffs' damages calculations were flawed for that reason, and rejected class certification based on the basic evidentiary standard that "the first step in a damages study is the translation of the legal theory of the harmful event into an analysis of the economic impact of that event." *Id.* at 1434-35.

In contrast to Census's argument, *Comcast* does not hold that class certification is inappropriate if determining damages would require any level of individual analysis. In fact, the Supreme Court acknowledged that the expert's regression model "might have been sound, and might have produced commonality of damages" if all four antitrust impact theories had remained in the case. *Id.* Here, unlike the plaintiffs in *Comcast*, Plaintiffs' proposed methodology for calculating back pay will not include "damages that are not the result of the wrong." Instead, using well-established hiring shortfall methodologies (as used in similar disparate impact analyses, such as *City of New York* and *Easterling*), the number of job openings lost to the class through discrimination will be calculated easily through data analysis as set forth *supra* at Section II. But again, the scope and structure of the remedy phase is better left until after liability to the class is determined and the grounds for any such liability are established. *See City of New York*, 276 F.R.D. at 48-49.

VI. Rule 23(c)(4) Bifurcation Remains a Viable Alternative Model.

The Court also possesses the option of certifying the liability question of whether Census's employment practices (the 30-day letter and adjudicative criteria) violate Title VII. Census argues that Rule 23(c)(4) bifurcation still leaves the Court "needing to conduct thousands of mini-trials." Def. Br. at 48.[35] To the contrary, certifying liability promotes judicial economy over numerous individual proceedings and avoids inconsistent outcomes.

A court may employ Rule 23(c)(4) "when it is the only way that a litigation retains its class character, *i.e.,* when common questions predominate only as to the particular issues of which the provision speaks." *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006) (internal quotations omitted). Further, the notes to the Federal Rule "illustrate that a court may properly employ this technique to separate the issue of liability from damages." *Id.* The decision to bifurcate is discretionary. *See Brown v. Kelly*, 609 F.3d 467, 486 (2d Cir. 2010). The Second Circuit has already rejected Census's argument that the focus must be on whether individual plaintiffs "were actually engaged" in conduct, rather than determining first whether a defendant's response to such conduct was unlawful. *Id.* It held that the district court did not abuse its discretion granting certification because the imperative under this subsection is to determine whether defendant's response had a legal basis and therefore common issues cut across them. *Id.* The court can then manage the follow-on procedures after a liability finding:

> The district court . . . possesses tools with which to manage the individualized inquiries that this action may require, including creating subclasses, decertifying the class with respect to claims where individualized inquiries become too burdensome, . . . We leave the management of these issues to the sound discretion of the court.

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[35] Census's reliance on *Oakley* is misplaced. *Oakley* is not a Rule 23(c)(4) determination, and in that FMLA suit, the court merely held that "the possibility that the same law was violated in a variety of ways does not lead to the 'common answers' that make class litigation a productive endeavor." *Id.*, 2012 WL 335657 at *14 (S.D.N.Y. Feb.1, 2012). Such is not the case here. Census violated the law in one way: implementation of an overbroad and untried employment screening procedure.

Id. Courts address individual issues by "holding separate trials for plaintiffs subject to individual defenses that remain after the common questions of law and fact are resolved." *Id.* at 486; *see Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988) ("that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible").

Thus, should this Court not find predominance or superiority, it retains discretion to bifurcate the issue of whether the targeted employment practices violate Title VII. *See In re Nassau Cnty. Strip Search Cases*, 461 F.3d at 225 ("[A] court may employ Rule 23(c)(4)(A) to certify a class on a particular issue even if the action as a whole does not satisfy Rule 23(b)(3)'s predominance requirement."). "Management difficulties" that might accompany bifurcated certification are "certainly no greater than the management difficulties that would inevitably result from hundreds of separate trials." *MacNamara v. City of New York*, 275 F.R.D. 125, 148 (S.D.N.Y. 2011) (citing *In re NASDAQ Market–Makers Antitrust Litig.*, 169 F.R.D. 493, 529 (S.D.N.Y.1996) (management issues significant "only if they make the class action a less 'fair and efficient' method of adjudication than other available techniques.")). Resolution of common issues here "achieve[s] economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Brown,* 609 F.3d at 483.

VII. Conclusion

For the reasons set forth above, Plaintiffs respectfully request that this Court certify the proposed subclasses and designate the Named Plaintiffs as Class Representatives and Plaintiffs' Counsel as Class Counsel.

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Respectfully submitted,

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