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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.

10-cv-3105 (FM)

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

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INTRODUCTION

A core feature of the 2010 decennial census was the temporary employment of approximately one million enumerators and clerical staff throughout the United States. The United States Department of Commerce's Bureau of the Census ("Census" or "Census Bureau") denied Plaintiffs and hundreds of thousands of other African American and Latino applicants the opportunity to fairly compete for these positions based on a plainly discriminatory criminal background check screening process that was uniform, applied nationwide and mandated at the highest level. While neutral on its face, the unvalidated and highly flawed system, which in part presumed employment ineligibility based on arrest records, imported the huge disparities in arrest and conviction rates for African Americans and Latinos into Census's hiring practice. The overwhelming majority of applicants never made it past this presumption because of the severe procedural and substantive hurdles erected by Census.

Starting in 2009, the Census Bureau sent over 850,000 applicants (approximately one quarter of the applicant pool) the same form letter based on criminal record information returned from the Federal Bureau of Investigation ("FBI") notifying them that to send official court documentation of any arrests or fingerprints within 30-days ("30-day letter") to possibly remain eligible. The 30-day letter's ambiguity and failure to provide basic information such as the arrests for which documentation was requested created confusion and set up applicants for non-compliance and rejection. Even where applicants attempted to comply, the letter imposed an insurmountable hurdle. As a result, less than 1% of applicants who received the 30-day letter actually obtained temporary jobs.

The defects in the procedural process that Census Bureau used to sweep out applicants was built on overbroad substantive adjudication criteria applied to all applicants with criminal

histories. Census's adjudication criteria went beyond those used by other federal agencies and directly contravened the U.S. Equal Employment Opportunities ("EEOC") Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII. The resulting disparate impact on African Americans and Hispanics was dramatic, with hiring shortfalls at unprecedented levels – up to 500 standard deviations.

Plaintiffs challenge two aspects of Census's uniform criminal background check process – (1) the 30-day letter process; and (2) the adjudication criteria – raising paradigmatic Title VII disparate impact claims, well-suited for class-wide resolution. Each claim arises out of the uniform criminal background check policies and practices used by Census and all members of the proposed class have claims arising out of these same policies and practices. The facts of this case point to the precise kind of "artificial, arbitrary and unnecessary barriers to employment" that the U.S. Supreme Court held violates Title VII of the Civil Rights Act of 1964 ("Title VII") because it operates as "'built in headwinds' for minority groups [ ] unrelated to measuring job capacity." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). As set forth herein, consistent with recent U.S. Supreme Court precedent addressing class certification, Plaintiffs seek certification on liability and injunctive relief pursuant to Fed. R. Civ. P. 23 ("Rule 23") (b)(2) and monetary damages pursuant to Rule 23(b)(3).

RELEVANT FACTS

I. The Parties

A. Plaintiffs

Precious Daniels is an African-American resident of Detroit, Michigan. Ex. 1 (Daniels Tr.) 6:9-12; 156:5-8.[1] For ten years, Ms. Daniels worked at various hospitals and medical

[1] Unless otherwise noted, all exhibits are attached to the Declaration of Ossai Miazad in Support of Plaintiffs' Motion for Class Certification ("Miazad Decl.").

centers. *Id.* 9:14-10:4. On November 4, 2009, Ms. Daniels was arrested for disorderly conduct while participating in a peaceful protest. *Id.* 109:21-110:21; 111:15-112:2; 153:13-15. She was released at the police station. *Id.* 118:12-21. In Court, the charge was dropped. *Id.* 126:15-129:2.

Ms. Daniels applied for a temporary Census job in January 2010. *Id.* 29:20-24; Ex. 2. She received a 30-day letter, dated February 16, 2010. Ex. 1 (Daniels Tr.) 61:22-62:4; Ex. 3. The letter confused Ms. Daniels. Ex. 1 (Daniels Tr.) 64:12-65:6; 71:25-72:4. She nonetheless checked with the court and was told that no charges had been filed, and that there was no documentation. *Id.* 66:24-67:8; 76:14-77:23; 78:21-79:2. Uncertain how to respond, and unable to get additional information from Census, she sent in her fingerprints. *Id.* 84:13-85:16; 92:6-19; Ex. 4. In late March 2010, Census informed her that her fingerprints matched the FBI records and "based on the nature of the facts disclosed" she was ineligible for hire. Ex. 1 (Daniels Tr.) 103:16-104:10; Ex. 5. Ms. Daniels's FBI rapsheet showed only one arrest on a charge of "public peace" with no disposition. Ex. 6.

Scotty Desphy is an African-American resident of Philadelphia, Pennsylvania. Ex. 7 (Desphy Tr.) 7:3-6, 19-23. She has worked in schools with children, and for 6 years as a psychiatric technician at Friends Hospital. *Id.* 33:20-37:10. During the 2000 Census, Ms. Desphy worked as an enumerator. *Id.* 24:5-7; 25:15-17. Ms. Desphy had only one arrest on her record from 28 years ago that resulted in multiple charges, including aggravated assault. *Id.* 108:18-110:11; Ex. 8. She received a sentence of one year on probation, and was told that if she did not get into any trouble, the record would be expunged. Ex. 7 (Desphy Tr.) 116:18-23. She served the probation without incident. *Id.* 160:13-25. The FBI rapsheet did not indicate the disposition. Ex. 9. When Ms. Desphy applied for temporary employment during the 2000 decennial, she received a 30-day letter, wrote a letter of explanation and was hired. Ex. 7

(Desphy Tr.) 27:24-28:12; 28:20-30:15.

Ms. Desphy applied for the 2010 decennial in December 2009. *Id.* 65:13-67:19. She later received the 30-day letter. *Id.* 77:21-25; 79:2-7. As in 2000, she wrote a letter of explanation, indicating that she did have documentation and that she worked for Census during the 2000 decennial. *Id.* 78:12-25; Ex. 10. She then received a "MORE" letter asking for a detailed explanation and two character references. Ex. 7 (Desphy Tr.) 91:24-92:5; Ex. 11. Ms. Desphy submitted another letter describing her arrest and sent several letters of recommendation and a fingerprint card. Ex. 7 (Desphy Tr.) 90:8-91:2; 93:14-94:13; 101:25-102:7; Ex.12. In early March 2010, Census informed her that she was ineligible for hire "based on the nature of the facts disclosed." Ex. 7 (Desphy Tr. 135:8-19); Ex. 13.

Vivian Kargbo is an African-American resident of Boston, Massachusetts. Ex. 14 (Kargbo Tr.) 7:20-24; 12:16-17. Ms. Kargbo is currently employed as a certified home health aide and also works as a home health aide for private clients. *Id.* 43:6-23, 52:21-53:5. She has also volunteered during state and federal elections by going door-to-door to encourage people to vote, and arranging for their transportation to the polls. *Id.* 172:23-174:6. Ms. Kargbo has never been convicted of a crime. Ms. Kargbo's FBI rapsheet has two dismissed charges for a 1996 juvenile arrest, both of which are sealed under Massachusetts law. Ex. 15 (Kargbo Tr.) 98:15-20, 105:11-16; 108:3-15, 109:18-21; 110:9-22; 112:9-13:19; 114:9-21; 142:7-18; Ex. 16; Ex. 17.

Ms. Kargbo applied for the 2010 Census in approximately March of 2010. Ex. 14 (Kargbo Tr.) 53:11-16. She received a 30-day letter around March 24, 2010, and responded by sending her fingerprints. Ex. 14 (Kargbo Tr.) 95:19-25; Ex. 18; Ex. 19. She never received a response from Census. Ex. 14 (Kargbo Tr.) 126:18-20.

Evelyn Houser is an African-American resident of Philadelphia, Pennsylvania. Ex. 20

(Houser Tr.) 4:23-24; 8:9-11. Ms. Houser worked for the 1990 decennial as an enumerator and as an office worker without incident. *Id.* 31:9-16. Ms. Houser was arrested once, in 1981, after she tried to cash a check which was not hers. *Id.* 72:19-73:5; 95:10-18; 120:22-121:3; 122:19-123:4. Ms. Houser's FBI rapsheet does not indicate the disposition of this arrest. Ex. 21; Ex. 22 at ¶ 55.

Ms. Houser applied for the 2010 Census in January of 2009. Ex. 20 (Houser Tr.) 45:25-46:12; Ex. 23 at USA3885. In early March 2009, Ms. Houser received a 30-day letter. Ex. 20 (Houser Tr.) 85:22-86:19; Ex. 24. Ms. Houser sent in her fingerprints around March 31, 2009. Ex. 25; Ex. 20 (Houser Tr.) 93:20-94:2; 98:16-103:6; 108:18-109:5; 154:9-11. By a letter dated May 21, 2009, Census informed her she was disqualified because she "failed to provide the requested information within the 30-day window provided." Ex. 20 (Houser Tr.) 113:25-114:12; Ex. 26.

Anthony Gonzalez is a Latino resident of Riverview, Florida. Ex. 27 (Gonzalez Tr.) 7:16-18. Mr. Gonzalez applied to Census in approximately February 2010. *Id.* 54:17-24; 88:9-89:19. Mr. Gonzalez's criminal history includes three felonies for burglary and one for weapons possession in the 1980s, the last of which took place on February 3, 1986. Ex. 28. In 1986, Mr. Gonzalez was convicted of attempted burglary and sentenced to forty-two months in prison. Ex. 28; Ex. 27 (Gonzalez Tr.) 177:19-178:14. He was released from parole in 1992. Ex. 27 (Gonzalez Tr.) 124:18-24. Shortly thereafter and for the next 17 years he worked for the New York Department of Correctional Services ("DOCS"). *Id.* 38:5-8.

After applying to Census, Mr. Gonzalez received a 30-day letter around March 11, 2010. Ex. 29; Ex. 27 (Gonzalez Tr.) 97:17-98:3. Knowing he could not get official court documentation in 30 days, he downloaded his records from the DOCS system and submitted

them. Ex. 27 (Gonzalez Tr.) 100:24-101:19; 106:9-18. He also submitted a letter outlining his rehabilitation; copies of his retirement certificate; and a letter from the DOCS Commissioner thanking him for his outstanding service. Ex. 27 (Gonzalez Tr.) 105:11-107:8; Ex. 30. Mr. Gonzalez received no response from Census. *Id*. 181:4-186:5.

Ignacio Riesco is Latino and a resident of Orlando, Florida. Ex. 31 (Riesco Tr.) 22:16-19; 97:18-19. He graduated from Harvard, *id.* 9:3-25; 23:10-14, and speaks fluent Spanish and Portuguese. *Id.* 30:20-31:10. In 2006, Mr. Riesco was wrongly arrested for stealing from his employer and charged with scheming to defraud and grand theft. *Id.* 40:16-45:12; Ex. 32. The charges were dismissed, Ex. 31 (Riesco Tr.) 45:9-12; Ex. 32, which is reflected on his FBI rapsheet. Ex. 33.

Mr. Riesco applied for temporary work on April 10, 2010, Ex. 34, and received a 30-day letter. Ex. 31 (Riesco Tr.) 23:16-21; 56:3-15; Ex. 35. Within a few days, he submitted the disposition, showing all the charges had been dropped on June 9, 2006. Ex. 31 (Riesco Tr.) 87:16-20; Ex. 32. Mr. Riesco unsuccessfully made repeated calls to check on his status. Ex. 31 (Riesco Tr.) 90:-93:25; 122:4-7. He did not receive any information from Census on his application.

Felicia Rickett-Samuels is an African-American resident of Stamford, Connecticut. Ex. 36 (Rickett-Samuels Tr.) 6:8-12; 7:3-4. In her late teens and twenties, she was arrested and convicted for drug-related charges. Ex. 37. Her last arrest occurred on September 23, 1998. Ex. 36 (Rickett-Samuels Tr.) 181:14-16; 192:17-18. Her FBI rapsheet indicates that she pled guilty to that charge. Ex. 37. She was released from prison on February 22, 2000. Ex. 36 (Rickett-Samuels Tr.) 163:16-23; Ex. 38. On January 23, 2007, the Division of Parole granted Ms. Rickett-Samuels a Certificate of Good Conduct, which relieved her from "disabilities and

bars to employment and licensing automatically imposed by New York State law." Ex. 38.

On January 15, 2009, Ms. Rickett-Samuels applied to Census. Ex. 36 (Rickett-Samuels Tr.) 135:14-23; Ex. 39. In March 2009, Ms. Samuels received a 30-day letter. Ex. 40. In response, on March 13, 2009, she sent a copy of her Certificate of Good Conduct and her records from the Division of Criminal Justice Services, which listed her last conviction on December 14, 1998. Ex. 36 (Rickett-Samuels Tr.) 144:20-145:23; Ex. 38. Roughly a week later, she received a letter from Census denying her application. Ex. 36 (Rickett-Samuels Tr.) 197:10-16.

Chynell Scott is an African-American resident of Philadelphia, Pennsylvania. Ex. 41 (Scott Tr.) 4:15-19; 14:23-24. Ms. Scott worked for Census during the 2000 decennial and again in approximately 2004, performing address verification and doing door-to-door interviews. *Id.* 52:10-57:23. Ms. Scott applied to the 2010 decennial around December 2009. *Id.* 76:9-13.

Ms. Scott's only criminal charge came from an incident in January 2007, *id.* 117:11-119:20, involving alleged inappropriate behavior by leaving her children unattended. *Id.* Although not arrested, Ms. Scott complained to the officers' supervisor. *Id.* 120:9-121:7. Over a year after her complaint, she discovered that four misdemeanors and two summary offenses had been filed against her. *Id.* 119:24-120:8; 122:13-123:3; Ex. 42. On September 8, 2009, Ms. Scott pled guilty to the summary offense of disorderly conduct and paid a fine. Ex. 41 (Scott Tr.) 88:20-89:24. The FBI rapsheet shows all other charges were dropped. Ex. 43.

Census sent Ms. Scott a 30-day letter on December 16, 2009. Ex. 41 (Scott Tr.) 96:15-97:6; Ex. 44. Ms. Scott mailed Census a letter and the Common Pleas Court Case Summary. Ex. 41 (Scott Tr.) 98:22-99:6; 103:9-15; Ex. 42. On February 3, 2010, Census rejected her based on her criminal record. Ex. 41 (Scott Tr.) 150:12-151:11.

B. Defendant

Census, headquartered in Suitland, Maryland, is an agency within and under the jurisdiction of the U.S. Department of Commerce. The Bureau is responsible for providing demographic information about the population of the United States. Ex. 45.[2] The primary mission of Census is conducting the Population and Housing Census which involves counting every resident in the United States every ten years (hereinafter "decennial census"). Ex. 46.[3] The budget for the 2010 decennial census was over $14 billion. Ex. 47 (Mesenbourg Tr.) 18:14-19:11. Census came in under budget by $2.5 billion. *Id.*; Ex. 48 (Jackson Tr.) 118:14-22.

II. The 2010 Decennial Was Centrally Designed and Managed.

The policies and practices for conducting the 2010 decennial were developed at Census headquarters and implemented uniformly. Census dictated a uniform timeline for operations, centralized software, and procurement of hardware and services; as well as standardized policies and practices related to field operations, including the recruiting and hiring of temporary workers to complete the work of the 2010 decennial. Ex. 49; Ex. 50 at p. 35 (showing 2010 Census organizational structure); Ex. 52 p. 11-13; Ex. 53 at USA4696-99.

A. Uniform and Coordinated Field Operations.

The 2010 decennial census consisted of over 20 different field operations which began with the "Address Canvassing" operation in the spring of 2009, peaked with the largest operation, "Non-Response Follow-Up", in the spring of 2010 and ended with the "CCM Final Housing Unit Follow-up" in the summer of 2011. Ex. 49; Ex. 54 (Willis Decl.) ¶2 ("two largest field operations are Address Canvassing and Nonresponse Follow Up ("NRFU") . . ."). Census relied on temporary workers in each of these operations and dictated the uniform policies and

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[2] *Available at* http://www.census.gov/aboutus/ (last visited on June 27, 2013).

[3] *Available at* http://www.census.gov/2010census/about/ (last visited on June 27, 2013).

practices for screening and hiring. Ex. 54 (Willis Decl.) ¶2.

The Bureau operated twelve Regional Census Centers ("RCCs"), located in Atlanta, GA; Boston, MA; Charlotte, NC; Chicago IL; Dallas, TX; Denver, CO; Detroit, MI; Kansas City, MO; Los Angeles, CA; New York, NY; Philadelphia, PA; and Seattle, WA; which covered their surrounding regions. Ex. 56 at USA45164, USA45169. A group of twelve Regional Directors ("RDs"), all of whom reported directly to the Chief of the Field Division at Census headquarters, oversaw each of the twelve RCCs. Ex. 58 (Willis Tr.) 34:19-35:7; Ex. 60 at USA1973. Field Division headquarters staff provided training to the managers in the RCCs. Ex. 59 at ix, 8.[4] Census headquarters determined the geographical scope of each RCC and LCO. Ex. 47 (Mesenbourg Tr.) 211:15-212:11; Ex. 57 (Monaghan Tr.) 148:7-19.

In preparation for the 2010 decennial operations, Census also opened 494 Local Census Offices ("LCOs") nationwide, with about forty LCOs in each RCC. Ex. 48 (Jackson Tr.) 97:2-3; Ex. 61 at p. 2; Ex. 50 at p. 39 (explaining organization, reporting, and training structure of LCOs and RCCs).

Each LCO served the same functions, which included conducting the actual collection of census data, as well as recruiting, testing and hiring the temporary workers to perform the data collection. Ex. 62 at USA1623-33; Ex. 63 (Christy Tr.) 182:17-184:1. Census set detailed hiring policies and practices and payroll for all temporary staff, and issued step-by-step instructions to the field. Ex. 58 (Willis Tr.) 15:14-20; 80:2-5. Training documents on "selecting your staff" and related topics were developed at headquarters. Ex. 64 (Cummings II Tr.) 21:9-14; Ex. 65. Headquarters also determined pay rates for temporary workers nationwide. Ex. 63 (Christy Tr.) 165:9-167:11; Ex. 61 p. 6, § 2.5.1. Pay rates for all temporary Census positions were based on a

[4] Available at http://www.census.gov/2010census/pdf/2010_Census_Field_Office_Admin_Payroll_Assessme nt.pdf (last visited on June 27, 2013).

uniform pay rate methodology using wage data from the Bureau of Labor Statistics. Ex. 61 at 6. Enumerator pay rates were established based on an average of all wages for all labor categories in the county or counties within the LCO area. *Id.* Field Division headquarters closely monitored the recruiting activity of the RCCs and LCOs throughout the 2010 decennial. *Id.* at 2.

B. National Recruiting Plan for 2010 Decennial Hiring.

Census spent significant resources on recruiting. *See* Ex. 56 at USA45165. The Bureau estimated that it would need approximately 1.2 million temporary workers for the 2010 decennial operations. *Id.* at USA45155. Census headquarters dictated a national operational recruiting plan that among other things directed the recruitment of an applicant pool up to five-fold the number of projected hires. *Id.* at USA45163. The recruiting plan indicated that this excess in the applicant pool was required because "[t]he Recruiting . . . Experience [showed] that many people [were] lost before we obtain[ed] productive employees," and described the uniform criminal background check process as one of the two major reasons why applicants were expected not to qualify for hire. *Id.*

Recruitment material focused on the jobs that the Bureau needed to fill and advertised the pay rate. Ex. 58 (Willis Tr.) 271:20-272:2. The recruiting website, www.2010censusjobs.gov, provided information about jobs, pay, application materials, and job qualifications. Ex. 56 at USA45166. The website also included Spanish language pages, with Spanish language recruitment materials. *Id.* at USA45166; Ex. 61 at 14. As a result of early recruitment efforts and the high national unemployment rate, recruitment exceeded expectations. Ex. 61 at 2-3; Ex. 47 (Mesenbourg Tr.) 152:20-24; Ex. 58 (Willis Tr.) 93:3-7; 94:3-13.

Census began actually administering the application process around the fall of 2008. Ex. 58 (Willis Tr.) 151:22-152:6; Ex. 47 (Mesenbourg Tr.) 119:11-21. By early 2009, approximately

1.2 million applicants had already applied. Ex. 47 (Mesenbourg Tr.) 33:9-14. An estimated 4 million applicants applied for temporary employment during the entire decennial hiring cycle. Ex. 68.

C. Uniform Process for Screening Decennial Job Applicants.

Census used the same application and criminal background check process for all temporary non-supervisory applicants regardless of the location, field operation or position for which they applied.[5] Ex. 69 (Cummings I Tr.) 11:5-15; Ex. 64 (Cummings II Tr.) 50:17-51:8; Ex. 58 (Willis Tr.) 198:22-199:3; Ex. 55 (Patterson Decl.) ¶2. Applicants nationwide completed a standardized application (BC-170D) that was entered the centralized Decennial Application Payroll Processing System ("DAPPS"). Ex. 71; Ex. 69 (Cummings I Tr.) 13:13-18.

The requirements for the position, apart from the criminal background screen, were minimal. Census required applicants to be at least 18 years old and have a social security number. Ex. 71. Census did not consider academic background or prior work experience. Ex. 57 (Monaghan Tr.) 53:22-54:4. Generally, applicants had to be U.S. citizens who could take a written test in English and/or Spanish. Ex. 56 at USA45168. Census hired non-U.S. citizens to meet specific language needs. *Id*. Only after an applicant completed the application process and passed the centralized criminal background check screen could the field offices select an applicant for hire. Ex. 58 (Willis Tr.) 184:10-15; 213:8-214:6; Ex. 54 (Willis Decl.) ¶9 ("Once applicants were found suitable for federal employment, they became eligible for hire.").

The hiring selection process was also uniform. Ex. 65; Ex. 54 (Willis Decl.) ¶11. Census required the field office requesting the temporary hires to complete a standardized "Job Requisition Form" (D-150) specifying the particular types and numbers of positions, geographic

[5] All applicants also took the same multiple choice test, aside from the field operations supervisors, who took a management test. Ex. 69 (Cummings I Tr.) 11:5-15.

criteria (e.g. state, county, census tract, census block, or zip code) and any other special selection criteria, such as language skills. Ex. 65 at USA1586; USA1604-13.

D. Uniform Job Duties of Temporary Workers.

Census employed temporary workers for the 2010 decennial from approximately late March 2009 through June 2011. Ex. 58 (Willis Tr.) 152:7-16; 175:10-176:2; Ex. 47 (Mesenbourg Tr.) 20:16-21. According to the raw data provided to Plaintiffs, Census hired approximately 848,654 temporary workers from 2008 through 2011. Ex. A (Kozhevnikova Decl., Ex. 1).[6] The majority of temporary workers were hired as enumerators. *Id.*, Ex. 2 (702,290 enumerators). Census hired the second largest pool of temporary employees to work as clerks. *Id.* (73,897 clerks). The remaining hired applicants filled roles such as recruiting assistants, office operations supervisors, crew leaders, and crew leader assistants. *Id.*

Census hired enumerators to perform work for various operations, although most were hired for Address Canvassing and NRFU. Ex. 57 (Monaghan Tr.) 53:5-16; Ex. 64 (Cummings II Tr.) 33:7-15.[7] The Address Canvassing operation involved verifying the accuracy of addresses listed in Census's master nationwide address database. Ex. 64 (Cummings II Tr.) 20:4-21:1. Census hired approximately 160,000 temporary workers during the address canvassing operation. Ex. 58 (Willis Tr.) 157:20-22; Ex. 47 (Mesenbourg Tr.) 19:16-20:15; 21:8-10; Ex. 73 at USA23616. Address Canvassing Enumerators ("ACEs") worked in the field from March 30, 2009 to mid-July 2009. Ex. 47 (Mesenbourg Tr.) 20:16-21.

ACEs had uniform job duties. They received uniform training and were required to follow the same policies and procedures. Ex. 74. ACEs were hired to verify address information

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[6] An assessment report of the 2010 recruiting and hiring, states that Census hired "857,185 non-managerial temporary employees." Ex. 61 at 17.

[7] Ex. 49 at USA42877-88 (timeline of all 2010 Census operations).

using a hand-held GPS device. *Id.*; Ex. 47 (Mesenbourg Tr.) 19:12-20:14; Ex. 63 (Christy Tr.) 85:6-16. They did this by going near the residence and pushing the GPS device. Ex. 47 (Mesenbourg Tr.) 19:24-20:14; Ex. 74 at USA52662, USA52666-68. Their function was not to gather personally identifying data from residents. Ex. 47 (Mesenbourg Tr.) 24:14-18 ("there should have been no reason why they had to knock on anyone's door to do that. . . . [T]hey would get to the front of the housing unit, hit the clicker, and they were done . . . ."). On an occasion in which the ACEs interacted with residents, they were required to follow detailed scripts either to verify addresses, assess the number of units in a structure, or make a courtesy contact. Ex. 74 at USA52703-04.[8]

The NRFU operation, which lasted from approximately May through July 2010, required enumerators to go door-to-door to follow up with households that did not return a questionnaire. Ex. 49 at USA42878; Ex. 58 (Willis Tr.) 128:17-129:8; 168:21-170:3; Ex. 61; Ex. 47 (Mesenbourg Tr.) 118:22-119:5; Ex. 75 at USA44113-142.

Enumerators were closely supervised and received training for approximately three to five days before being sent out into the field. Ex. 57 (Monaghan Tr.) 57:25-58:9; Ex. 64 (Cummings II Tr.) 35:12-36:5; Ex. 63 (Christy Tr.) 20:4-18; 21:1-5. Crew Leaders trained enumerators using a scripted training, called a Verbatim Training Guide, on how to perform their work. Ex. 63 (Christy Tr.) 20:11-25. Enumerators generally reported directly to Crew Leaders on a daily basis. Ex. 64 (Cummings II Tr.) 35:12-36:5. Crew leaders were responsible for,

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[8] For example, when making a "a Courtesy Contact" the temporary worker was required to follow the following script:

> *Hello. My name is I'm with the U. S. Census Bureau. Here is my identification badge. (Show your ID.) We're getting ready for the 2010 Census. I just wanted to let you know that I will be here for a few minutes to update the census Address List and maps. Are there any additional places in this building where people live or could live? (Hand the respondent the Confidentiality Notice.) Here is some information about the purpose of my visit. Thank you!* Ex. 74 at USA52703.

among other things observing enumerators at work, regularly meeting with them and recommending dismissal for those who failed to perform their required duties. *Id.*; Ex. 60 at USA2021-22.

All enumerators were required to wear Census badges while performing their work. Ex. 63 (Christy Tr.) 21:25-22:3; Ex. 57 (Monaghan Tr.) 62:8-10. They were also instructed not to knock on doors after dark or in the early morning. Ex. 75 at USA44081. Census provided enumerators with a printed questionnaire to hand to residents and scripted questions to ask during the interviews, and instructed enumerators to read the questions as written. Ex. 58 (Willis Tr.) 193:16-21; Ex. 63 (Christy Tr.) 21:6-24. Generally the enumeration process took five to ten minutes for each resident. Ex. 64 (Cummings II Tr.) 34:17-35:2; Ex. 75 at USA44119.

Census also hired temporary clerks. Ex. 64 (Cummings II Tr.) 50:17-22; Ex. 60 at 2025. Any contact clerks had with the public was by telephone. Ex. 64 (Cummings II Tr.) 52:21-53:3

III. Uniform Criminal Background Check Policies and Practices.

Census required all applicants for 2010 decennial jobs to pass a uniform, centralized criminal background check process prior to entering the eligible applicant pool. Ex. 69 (Cummings I Tr.) 11:5-15; Ex. 64 (Cummings II Tr.) 50:17-51:8; Ex. 56 at USA45163. In stark contrast to the detailed and documented development, planning, budgeting, testing and training that went into other aspects of the 2010 decennial, Census's criminal background check process did not undergo thorough evaluation, analysis and testing and the employees responsible for the development of the process had little or no training in validity testing or criminology. *See* supra Relevant Facts § II; *see also* Ex. 76; Ex. 50; Ex. 77 (Hamilton Tr.) 19:6-22:9; 27:4-23; 29:4-19; Ex. 78 (Brown Tr.) 25:22-26:14; 31:1-32:5. In fact, the criminal background check policies and practices used during the 2010 decennial were largely imported from the 2000 decennial with no

evidence that Census did anything to improve upon the system, make changes to the flaws that its own assessments and feedback highlighted, or to evaluate the racial impact of its policies. Ex. 47 (Mesenbourg Tr.) 66:16-22; Ex. 79 (Patterson II Tr.) 65:4-23; 127:8-11; 162-68; 284:7-12; 286:12-20; 287:20-25; 297:5-7. Sandra Patterson, Assistant Division Chief of the CHEC office, testified that Census did not evaluate the 2000 decennial because it was a "successful program." Ex. 79 (Patterson II Tr.) 69:9-22.

A. Namecheck Adjudication.

The CHEC Office, located at Census headquarters, transmitted each applicant's name, date of birth, and social security from DAPPS to the Federal Bureau of Investigation ("FBI") for a "Namecheck" against the FBI criminal history database. Ex. 79 (Patterson II Tr.) 162:6-10; Ex. 81 (Bettwy Tr.) 42:2-11. The FBI's criminal history database has well-documented deficiencies. Ex. B (Lundquist Report at 27). Census decided to use Namechecks instead of Fingerprint-based checks, despite the FBI's and Lockheed Martin's warning that Namechecks were unreliable.[9] Ex. 101 at USA4432-33; *see also* Ex. 102 at USA4437. Census actually received a waiver from OPM in order to conduct the unreliable Namechecks, to the detriment of applicants. Ex. 103 at USA4434-36; Ex. 104 at USA4429-31. Namechecks, which are performed using personal identifiers submitted by the applicant and not based on a positive biometric identification ("Fingerprint check"), resulted in multiple hits for a single applicant as well as false hits, for among other reasons, common names and alias. Ex. 77 (Hamilton Tr.) 129:25-130:10; 174:16-175:15; Ex. 47 (Mesenbourg Tr.) 238:3-25; Ex. 66 at 60672l.

If an applicant passed the Namecheck without a "hit" in the FBI's database, the CHEC office made the applicant "Available" through DAPPS. Ex. 81 (Bettwy Tr.) 15:7-14; 150:14-

[9] Ex. 66 (USA60665-751), produced by Defendant on June 26, 2013, just two days before the filing of this motion, is a Business Case Study by Lockheed Martin.

151:2. Approximately 3.8 million applicants applied for 2010 decennial work and entered the CHEC system. Ex. 61 at 1; Ex. 69 (Cummings I Tr.) 21:7-22:2; Ex. 47 (Mesenbourg Tr.) 120:13-15. Approximately 2.4 million passed through the FBI's Namecheck with no rapsheet returned. Ex. 47 (Mesenbourg Tr.) 124:11-125:16; Ex. 68 at USA43541. The remaining 1.4 million had one or more rapsheets returned. Ex. 68 at USA43541.

Once the CHEC office received the rapsheets, CHEC staff made a manual determination of whether the rapsheet matched the applicant. Ex. 77 (Hamilton Tr.) 158:10-159:19; Ex. 78 (Brown Tr.) 66:20-67:4; Ex. 105 at USA5318. Of the approximately 1.4 million applicants for whom the FBI returned rapsheets, approximately 373,665 were identified as "NOT SAME" (false positive) and made available for hire. Ex. A (Kozhevnikova Decl., Ex. 2).

The remaining approximately 1 million applicants entered the entangled web of Census's criminal background check process. Ex. B (Lundquist Report, Ex. B-2 "Figure 1: Overview of Census Bureau Criminal Background Check Process"). Namecheck staff reviewed the individual rapsheets against the Namecheck adjudication criteria to determine whether to make the applicant "Available" or to send a 30-day letter. Ex. 47 (Mesenbourg Tr.) 127:12-130:14; Ex. 79 (Patterson Tr. II) 121:7-22. If the reviewer determined that the applicant met the Namecheck adjudication standards, she could recommend the applicant be made "Available," subject to a supervisor's approval. Ex. 47 (Mesenbourg Tr.) 260:12-16; Ex. 81 (Bettwy Tr.) 80:9-18.[10] Otherwise, the reviewer would send a 30-day letter. *Id.* 42:23-43:11.

The numbers bear out the CHEC office's motto of "when in doubt, send a letter." *See*

[10] The Namecheck adjudication criteria applied a more stringent standard than the final adjudication criteria because they dictated that applicants whose rapsheets contained arrests within their parameters receive a 30-day letter regardless of whether the rapsheet contains disposition information. Ex. 105 at USA5278-85; s*ee also* Ex. B (Lundquist Report at 40, 50). In other words, an applicant would receive a 30-day letter requesting official court documents or fingerprints based on the arrest alone, even where the rapsheet indicated that the individual was not convicted. *Id.*

Ex. 78 (Brown Tr.) 91:4-93:16; Ex. 67 at USA12164. Only approximately 142,000 of the 1 million—or approximately 1 out of 7—applicants with rapsheets passed the Namecheck adjudication screen without receiving a 30-day letter. Ex. 68 at USA43541. The staff responsible for this process gave contradictory and varying explanations as to why applicants were selected to receive the 30-day letter. For example, Michael Hamilton, the Namecheck Staff Chief, testified that he believed *all* applicants with a rapsheet were sent a 30-day letter, Ex. 77 (Hamilton Tr.) 228:4-8, and Team Lead Julie Brown (formerly Julie Higgs), the Namecheck staff's primary trainer when asked to provide examples of arrests that would not trigger a 30-day letter could only give the example of a 20-year jay-walking arrest. Ex. 78 (Brown Tr.) 70:5-71:23. Ms. Brown also testified that there was no list provided to adjudicators to guide them on who should not get a letter. *Id.* 70:5-75:25.

B. Census Subjected Applicants to the Same Severely Flawed Screening Device Based on Unidentified Arrest Records.

The 30-day letter shifted the burden of obtaining final dispositions and court documents off of Census and onto the applicant. Ex. 67 at USA12158-173; Ex. 70 at USA43538-540. The letter required applicants to send "official court documentation on any and all arrest(s) and/or conviction(s) in your past, or to provide a set of original fingerprints" within 30 days. Ex. 70 at USA43538.

By the end of April 2010, approximately one-quarter of the total applicant pool had received a 30-day letter. Ex. 81 (Bettwy Tr.) 76:6-11; Ex. 82 at USA32636.

Census devised a process that was near impossible for applicants to meet due to its several critical flaws:

- it screened out applicants who had arrests but no convictions, Ex. 106 at USA5278-85;

- it required documentation, at a significant cost of money and time to the applicant, of "any and all" arrests, even where the charges were no longer pending and there had been no conviction, Ex. 70 at USA43538-540;

- it did not identify the arrest/s for which Census sought Official Court documentation, *id.*;

- it was revised to penalize applicants who elected to provide fingerprints by automatically disqualifying them if the results matched one of the unidentified rapsheets, *id.* at USA43539;

- it required applicants to produce official court records within 30 days, without any consideration of whether this would be enough time from the applicants' perspective. Ex. 72 (Groves Tr.) 176:25-177:9 (could well be a real problem for applicants who had an FBI hit that was 10 years old, for example, or 5 years old);

- it did not provide a way for applicants to get additional information on the arrests in question. Ex. 78 (Brown Tr.) 122:23-124:2; Ex. 83 at USA46153-56;

- after the expiration of 45 days, CHEC closed the applicant's file and sent a letter stating that the applicant had failed to provide the required information in the 30-day window and the applicant was no longer being considered, Ex. 26; and

- CHEC's policy was not to re-open an applicant's file even when the applicant later was able to provide information. Ex. 84 at USA31333-35.

As Census could have predicted from the 2000 decennial, the vast majority (95%) of the applicants subjected to the 30-day letter never made it into the eligible applicant pool. Ex. 82 at USA32636. An estimated 759,302 applicants did not respond in time and of the remaining 95,152 applicants who did respond, 42,782 were adjudicated as a "RISK." Ex. 68 at 43541. In fact, less than 8,000 of the applicants who received a 30-day letter, or less than 1%, were ever actually made available and hired. *Id.*

1. Three Versions of the 30-day Letter.

Throughout the 2010 decennial operations Census used 3 versions of the 30-day letter. In January 2010, right before the NRFU operation, Census revised the first version of the letter to add language 1) addressing applicants who had self-disclosed prior convictions on the

application;[11] and 2) informing applicants that if they sent in fingerprints matching the criminal record, and did not provide court documentation, they would be ineligible for hire. Ex. 47 (Mesenbourg Tr.) 116:2-5; Ex. 70 at USA43538-540. Version 3, sent to applicants on or after May 28, 2010, was the same as Version 2 except that the letter informed applicants that hiring was near completion and even if they sent information they likely would never be hired. Ex. 47 (Mesenbourg Tr.) 116:11-18; Ex. 70 at USA43540.

Census did not take any steps to determine whether any of the versions of the 30-day letter were an adequate, comprehensible, job-related screening device. Ex. 79 (Patterson Tr. II) 130:6-132:15; 139:21-140:9; 150:3-155:4; 162:6-167:22; 225:6-16; 162:6-167:22; 225:6-16; Ex. 47 (Mesenbourg Tr.) 228-232. To the contrary, Sandra Patterson testified that Census was not concerned with the 93% non-response rate to the 30-day letter, Ex. 79 (Patterson Tr. II) 139:20-140:9, Census did not send a 30-day letter to a sample group to test the response rate, Ex. 79 (Patterson Tr. II) 225, and when asked whether Census did anything at all to determine whether 30 days would be enough time to allow an applicant to adequately respond, Ms. Patterson testified, "we did nothing." Ex. 79 (Patterson Tr. II) 150:23-151:21. Plaintiffs' testimony illustrates the same conclusions about the letter that were reached after the 2000 decennial.[12] Ex. 20 (Houser Tr.) 110:15-11:25; Ex. 36 (Rickett-Samuels Tr.) 144:20-23 ("It [30-day letter] was very confusing to me."); Ex. 31 (Riesco Tr.) 56:13-15, 57:11-14; Ex. 27 (Gonzalez Tr.) 95:14-96:11; Ex. 1 (Daniels Tr.) 86:3-14.

2. The CHEC Office Did Not Have Adequate, Sufficiently Trained Staff.

The poor planning and mismanagement in the CHEC office led to significant delays and

[11] Prior to this, although applicants were asked to self-disclose and provide information on convictions in the last 10 years, this information was not reviewed by Namecheck Adjudication staff.

[12] Ex. 86 at USA12736; Ex. 87 at USA12555, USA12558, USA12560-61; USA12565 (the 30-day letter was confusing and caused issues for applicants).

backlogs that adversely impacted applicants subjected to Census's criminal background check screening process. Ex. 79 (Patterson Tr. II) 238:5-240:7. The CHEC office had delays in processing applicants through the Namecheck adjudication process, Ex. 77 (Hamilton Tr.) 207:6-20; Ex. 85 at USA20971; sending 30-day letters to applicants, Ex. 89 at USA23359-61; responding to applicant inquiries, Ex. 77 (Hamilton Tr.) 203:24-204:5; and processing the correspondence received from applicants in response to the 30-day letter. Ex. 89 at USA23359-61 ("It's been 3 months, so I wanted to update you on the two applicants that have been stuck in the murky mess of CHEC Review.").

The delays and backlog related to severe understaffing. Ex. 79 (Patterson Tr. II) 238:15-20. The number of employees in CHEC reviewing rapsheets and determining whether an applicant should receive a 30-day letter or made "Available" for hire was remarkably small. Ex. 94 at USA3793 (only 57 reviewers for the entire CHEC background check review operation); Ex. 78 (Brown Tr.) 104:17-105:19 (only about 30 people doing Namecheck adjudication review). There was an even smaller sub-set who had supervisory review authority required to make an applicant with a rapsheet "Available" without a 30-day letter. Ex. 81 (Bettwy Tr.) 88:13-89:4.

CHEC's decennial operations were broken down into two branches: the Namecheck decennial staff headed by Michael Hamilton and the Fingerprint decennial staff headed by Philip Bettwy. Ex. 88 at USA20776; Ex. 77 (Hamilton Tr.) 81:20-82:24; Ex. 81 (Bettwy Tr.) 54:11. Mr. Hamilton, whose CHEC experience was largely in information technology, was temporarily elevated to head the Namecheck Staff. Ex. 77 (Hamilton Tr.) 11:24-12:17; 12-22; 24:19-24; 74:23-75:4. The Namecheck Staff, responsible for processing approximately 1.4 million rapsheets, had only two team leads, Julie Brown (formerly known as Higgs) and Kimber Reeves.

Ms. Brown developed the Namecheck training materials, and trained contractors and CHEC employees to review rapsheets and adjudicate applicants at the namecheck phase. Ex. 78 (Brown Tr.) 29:14-32:5; 41:21-43:12; 46:1-25; 49:4-7. Ms. Brown conducted two-hour adjudication trainings for the Namecheck staff, of which staff only had to attend one training. Ex. 78 (Brown Tr.) 46:9-19; 48:19-49:7; 51:1-11. The other Namecheck Team Lead, Kimber Reeves, was a "Temp Assignment" elevated to this position after the former Team Lead left filing a letter of complaint about poor staffing and operations in the CHEC office. Ex. 91 at USA21072; Ex. 77 (Hamilton Tr.) 88:3-13; 98:9-104:15; 114:9-18.

C. Census Subjected All Applicants with Arrest Records to the Same Overbroad, Unvalidated Adjudication Criteria.

CHEC staff applied an adjudication criteria to screen out over 800,000 job applicants that was arbitrarily drawn, dramatically over-inclusive, unguided by professional principles or social science, and based largely on irrational instincts. *See* Ex. B (Lundquist Report at 18-26, 36-40); Ex. 47 (Mesenbourg Tr.) 94:13-104:7; Ex. 81 (Bettwy Tr.) 103:7-106:19; 132:6-16; Ex. 79 (Patterson Tr. II) 296:23-297:7; 304:24-305:21; 307:21-308:4; 314:5-20.

There were six versions of the adjudication criteria that Census used during the 2010 decennial census. Ex. 47 (Mesenbourg Tr.) 93:21-94:3; 106:15-107:14. Changes were made in an arbitrary manner. Among other things, adjudication criteria explicitly contained absolute bars on certain arrests, even when the applicant was not convicted. Ex. 47 (Mesenbourg Tr.) 175:10-176:12, Ex. 92 at USA9256A-9259A; Ex. 79 (Patterson Tr.) 323:2-8; Ex. 72 (Groves Tr.) 87:9-88:10; and even after the EEOC warned Census that complete bars on employment could well have a racially discriminatory impact in violation of Title VII. Ex. 93.

The first version was based on the 2000 adjudication criteria. Ex. 47 (Mesenbourg Tr.) 66:16-22; Ex. 79 (Patterson II Tr.) 287:20-25. Versions one through three reflect minor changes,

such as moving a certain offense (e.g. fraud) from being a financial crime to a crime of dishonesty and were in effect from April 2009 through January 5, 2010. *See* Ex. 95 at USA1545-49; Ex. 96 at USA1550-55; Ex. 97 at USA12151-157. The fourth version which went into effect in January 2010, during the heaviest period of recruitment, reflects the most restrictive change, adding absolute bans to employment based on automatically disqualifying criteria. *See* Ex. 47 (Mesenbourg Tr.) 94:4-6. For instance, any felony conviction for certain types of arrests, regardless of timeframe, was automatically unfavorable. Ex. 92 at USA9256A-9259A. Additionally, for certain enumerated felonies, analysts could not consider extenuating circumstances.[13] Ex. 92 at USA9256A-9259A. Even mere "proof" that an applicant had engaged in certain types of felonies would lead to an automatic "unfavorable" determination. *Id*. "Proof" included: probation before judgment, probation, or deferred adjudication (even if the outcome was dismissed). *Id*. If an applicant had been convicted of one misdemeanor in the past three years before applying, or three or more misdemeanor arrests in the past five years before applying, they would be automatically disqualified. *Id*. The fourth version was used from January 6, 2010, through February 17, 2010. Ex. 47 (Mesenbourg Tr.) 107:9-10. The fifth version, in place for only one month from February 18, 2010, through March 29, 2010, Ex. 47 (Mesenbourg Tr.) 107:11-12, merely reversed the rule about probation, making it slightly more lenient. Ex. 98 at USA43449-52.[14] Finally, the sixth version was a revision to the fourth, and strictest version. Ex. 99 at USA32023-26. The sixth version was used from March 30, 2010,

[13] The CHEC process left little room for applicants to demonstrate extenuating circumstances. The 30-day letter was sent with no consideration to factors other than the arrest record. The 30-day letter itself asked for Official Court documentation or fingerprints and made no mention of providing additional information. Ex. 70 at USA43538-40. Only if an applicant responded to the 30-day letter in time and the reviewer decided she wanted more information rather than make the applicant ineligible would the applicant receive a "MORE" letter requesting additional information such as character references within 15 days, Ex. 81 (Bettwy Tr.) 176:4-177:9. Even then, sending the "MORE" letters became an administrative burden. Ex. 79 (Patterson II Tr.) 208:6-20.

[14] It is unclear why this change was made. Ex. 47 (Mesenbourg Tr.) 98:19-24.

through the end of hiring. Ex. 47 (Mesenbourg Tr.) 107:13-14. According to Mr. Mesenbourg, he personally made the criteria stricter in response to alleged criminal conduct by an enumerator while the enumerator was off duty. Ex. 47 (Mesenbourg Tr.) 99:14-101:21; Ex. 100 at USA31594-97.

D. Census's Disregard for the EEOC's Warnings.

Census officials admit that the adjudication criteria used during the 2010 decennial was more restrictive than those used by other government agencies. Ex. 72 (Groves Tr.) 119:21-120:23; Ex. 66 at USA60675 ("The name check procedure is designed to err on the side of caution and *exclude* applicants if there is *even a possibility* they have a criminal history.") (emphasis added). In a letter dated July 10, 2009, addressed to Acting Director Thomas L. Mesenbourg, the U.S. Equal Employment Opportunity Commission ("EEOC"), alerted Census that its criminal background screening process could well have a racially discriminatory impact in violation of Title VII. Ex. 93. Census failed to address the EEOC's warning or revise its screening procedures in any way to rectify the problem. Ex. 47 (Mesenbourg Tr.) 162:7-11. Census in fact did make changes both to the 30-day letter and its adjudication criteria several times after the letter from the EEOC, and in each circumstance made the process procedurally and substantively more stringent and burdensome. *Id.* 162:12-163:3; Ex. 79 (Patterson Tr. II) 208:4-20.

TITLE VII DISPARATE IMPACT FRAMEWORK

Title VII prohibits employment practices that are facially neutral, but which have a disparate impact because they fall more harshly on a protected group than on other groups and cannot otherwise be justified. *Malave v. Potter*, 320 F.3d 321, 325 (2d Cir. 2003) (citing *Waisome v. Port Authority of New York & New Jersey*, 948 F.2d 1370 (2d Cir.1991)). A plaintiff

establishes *prima facie* disparate impact discrimination by demonstrating that the employer "uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin," 42 U.S.C. § 2000e–2(k)(1)(A)(i); or where the elements of the employer's decision-making process are not capable of separation for analysis as one employment practice. 42 U.S.C. § 2000e–2(k)(1)(B)(i). This statute requires a plaintiff to (1) identify a specific employment practice or unified process; (2) demonstrate that a disparity exists; and (3) establish a causal relationship between the two. *Chin v. Port Auth. of New York & New Jersey*, 685 F.3d 135, 151 (2d Cir. 2012) *cert. denied*, 133 S. Ct. 1724 (U.S. 2013). The burden then shifts to the employer to attempt to prove, as an affirmative defense, that the challenged practice or policy is "consistent with business necessity." *See Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 161 (2d Cir. 2001). A plaintiff also can establish employer liability by demonstrating the existence of a less discriminatory "alternative employment practice" that would serve the employer's legitimate operational interests. 42 U.S.C. § 2000e-2(k)(1)(A)(ii). As set forth below, this is a paradigmatic Title VII disparate impact case, where Plaintiffs' statistical evidence establishes a *prima facie* violation.

ARGUMENT

I. The Court Should Certify the Proposed Class Because Plaintiffs Meet All of the Rule 23 Requirements.

Plaintiffs' Title VII disparate impact claims are well-suited for class certification. Plaintiffs challenge two uniform and mandatory employment screening practices designed, approved and implemented at the Census headquarter level: (1) the unvalidated 30-day letter process requiring applicants to produce official court documentation of all arrests or fingerprints; and (2) the unvalidated adjudication criteria used in screening applicants out of the eligible applicant pool. Substantial evidence shows that the procedural and substantive aspects of

Census's criminal background check policies and practices had a disparate impact on African-American and Latino job applicants, that its 30-day letter and its adjudication criteria, which were at the heart of the process, were not job-related or consistent with business necessity and that Census failed to implement less discriminatory alternatives.

The 30-day letter, sent to over 850,000 applicants based on arrest information contained in FBI rapsheets associated with the applicant, created a multiplicity of hurdles, which the great majority of applicants did not overcome. The burden of this process fell most heavily on African Americans and Latinos who are arrested in numbers disproportionate to their representation in the general population. The unvalidated 30-day letter screening process, which was the same across the proposed class, will drive resolution of a key question in this case: (1) whether the use of the 30-day letter in the applicant screening process had a disparate impact on African-American and Latino job applicants; (2) whether it is not job related or consistent with business necessity; and (3) whether a less discriminatory alternative exists. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (certification is warranted where the evidence is capable of "generat[ing] common *answers* apt to drive the resolution of the litigation") (internal quotation marks omitted); *Myers v. Hertz Corp.*, 624 F.3d 539, 549 (2d Cir. 2010) (certification is appropriate where "evidence generally applicable to the class" may answer the key issues). Failure to consider the racial impact of its criminal background check screening process, driven by the 30-day letter, or to validate it with anecdotal evidence and statistical and social science expert analysis - establish common questions of fact. Similarly, the validity of the adjudication criteria creates issues common to the class and capable of resolution through the class action device.

Courts give Rule 23 a "liberal rather than restrictive construction," and "adopt a standard

of flexibility." *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006); *Marisol A. v. Guiliani*, 126 F.3d 372, 377 (2d Cir. 1997) (as long as "affidavits, documents, or testimony, [satisfy] each Rule 23 requirement") (internal quotation marks omitted). Merits unrelated to a Rule 23 requirement need only be considered and resolved where a Rule 23 requirement and a merits issue overlap. *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 seek to certify the following classes pursuant to Rule 23(b)(2) for the liability phase of the case and for class-wide injunctive relief:

> *All African American and Latino applicants who applied for temporary employment during the 2010 decennial and were harmed by one or both of the following employment practices: (1) Defendants' use of the 30-day letter as a screening device; (2) Defendants' use of adjudication criteria to screen applicants.*

Plaintiffs request certification for post-liability monetary relief claims under Rule 23(b)(3), or in the alternative as an issues class under Rule 23(c)(4), for the class members who are entitled to make-whole relief. Plaintiffs request certification of the following sub-classes for purposes of the individualized monetary damages phase:

> *All African American and Latino applicants who applied for temporary employment during the 2010 decennial and were barred for one of the following reasons: (1) based solely on the procedural requirements imposed by the 30-day letter; (2) based solely on the delay in adjudicating the applicant; (3) based on exclusions that are not job related.*

This liability/monetary damages hybrid approach has been approved in numerous pre- and post-*Dukes* class cases in the Second Circuit. *See United States v. City of New York*, 276 F.R.D. 22, 34 (E.D.N.Y. 2011); *see also Easterling v. Connecticut Dept. of Correction*, 278 F.R.D. 41 (D. Conn. 2011); *Jermyn v. Best Buy Stores,* 276 F.R.D. 167, 169 (S.D.N.Y. 2011); *Robinson*, 267 F.3d at 167-68.

Rule 23(b)(3) certification for individual monetary relief is also consistent with *Comcast Corp. v. Behrend,* 133 S. Ct. 1426, 1432 (2013). *See, e.g., Parra v. Bashas', Inc.*, -- F.R.D.--, 2013 WL 2407204, at *2-4, *28, *31-32 (D. Ariz., May 31, 2013) (discussing *Comcast* and certifying 23(b)(3) Title VII pay discrimination class). Plaintiffs first litigate liability, and if the Court finds disparate impact liability, it may enter class-wide injunctive relief without investigating the validity or value of individual class members' claims. *See Easterling*, 278 F.R.D. at 46 (citing *Robinson,* 267 F.3d at 159). After a finding of liability, the damages calculations for eligible damages sub-class members will be largely formulaic because Plaintiffs are seeking only to recover back pay for temporary jobs with limited terms and standardized hourly rates.

A. Plaintiffs Meet Each Rule 23(a) Requirement.

Rule 23 requires that: (1) the class be so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the class claims or defenses; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

1. The Proposed Class is Sufficiently Numerous.

Rule 23(a)(1) requires that "the class [be] so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). To establish numerosity, plaintiff is not required to show "evidence of exact class size or identity of class members." *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993). Here, there are thousands of members of the proposed class. Miazad Decl. ¶ 3. Census sent the 30-day letter to over 850,000 applicants, of which less than 1% made it through to hire. Ex. A (Kozhevnikova Decl., Table). Plaintiffs' expert estimates that

approximately 400,000 of those who received the letter were either African American or Latino. Ex. C (Bendick Report) ¶¶ 32-33.

2. The Case Presents Many Common Issues of Law and Fact.

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Courts should liberally construe this requirement, *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 198 (S.D.N.Y. 1992), and find it satisfied if plaintiffs point to at least one common issue. See *Marisol A.*, 126 F.3d at 376.

Commonality does not mandate that all class members make identical claims and arguments, "only that common issues of fact or law affect all class members." *Trief*, 144 F.R.D. at 198. Individual variation among plaintiffs' questions of law and fact does not defeat underlying legal commonality, because "the existence of shared legal issues with divergent factual predicates is sufficient" to satisfy Rule 23. *Chenensky v. New York Life Ins. Co.*, No. 07 Civ. 11504, 2011 WL 1795305, *2 (S.D.N.Y. Apr. 27, 2011). The U.S. Supreme Court recently reiterated: "Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen*, 133 S. Ct. at 1191. A unifying thread among the claims satisfies this requirement. *Gulino v. Bd. of Ed. of the City School Dist. of the City of New York*, 201 F.R.D. 326, 331 (S.D.N.Y 2001) (commonality met when questions "at the heart of the suit" included whether "defendants' use of [standardized certification] tests violates Title VII" under disparate impact theory).

Dukes clarified Rule 23's commonality requirement in two respects. First, it held that the common questions should generate classwide answers "apt to drive the resolution of the litigation." 131 S. Ct. 2541, 2551. Second, the Supreme Court identified two types of questions that generate common answers that may result in a viable employment discrimination class

action: 1) if a plaintiff shows that an employer used a "biased testing procedure to evaluate" applicants and employees; or 2) presents "significant proof that an employer operated under a general policy of discrimination . . . if the discrimination manifested itself . . . in the same general fashion, such as through entirely subjective decisionmaking processes." *Id.* at 2553 (citations omitted). Consistent with *Dukes*, Plaintiffs challenge two centralized uniform, written, mandatory policies that were centrally developed and implemented that collectively disadvantage African-American and Latino applicants, which most certainly should generate common answers.

i. Plaintiffs Challenge Specific Employment Practices Which Raise Common Questions.

Plaintiffs challenge uniform agency-wide criminal background policies and practices used in making employment eligibility determinations, the components of which are largely undisputed. These components include: 1) an unvalidated 30-day letter process; and 2) unvalidated adjudication criteria. Census's 30-day letter process includes several uniform components that collectively disadvantage African Americans and Latinos (i.e. requiring applicants to produce official documentation of all arrests, including those that for example did not lead to a conviction, were sealed or stale; failing to provide information on the arrests in question; and the 30-day deadline). Similarly, Census's adjudication criteria includes multiple uniform components that collectively disadvantage African Americans and Latinos (i.e. absolute bars; failure to consider mitigating circumstances; disqualification based on stale arrests, and minor arrests).

The specific employment practices challenged here present common questions capable of "generat[ing] common answers apt to drive the resolution of the litigation." *Dukes*, 131 S. Ct. at 2551. These questions include: (1) whether the 30-day letter process had an adverse impact on

African Americans and Latinos and, if so, was it job-related and justified by business necessity; and are there less discriminatory alternatives; and (2) whether the adjudication criteria had an adverse impact on African Americans and Latinos and, if so, was it job-related and justified by business necessity; and were there less discriminatory alternatives.

ii. Plaintiffs' Statistical Evidence Supports Commonality.

Plaintiffs typically make their *prima facie* disparate impact showing through statistical evidence demonstrating a substantial or significant disparity caused by the challenged employment practice.[15] *See Robinson,* 267 F.3d at 160; *see also Watson v. Fort Worth Bank & Trust Co.,* 487 U.S. 977, 987 (1988). Here, labor economist Dr. Marc Bendick, Jr. presents significant statistical evidence supporting the claim that Census's unvalidated procedural and substantive requirements had a disparate impact on African Americans and Latinos.[16] This statistical showing governs all class members' disparate impact claims and establishes commonality. At this stage, courts only determine whether expert opinion is probative of an inference of discrimination. *See In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d at 41-42 (finding that relevant evidence should be assessed); *Moore v. Napolitano*, 269 F.R.D. 21, 30 n. 3 (D.D.C. 2010).

Dr. Bendick engaged in analysis of racial and ethnic patterns among persons with criminal records and their implications for the Census Bureau's hiring of temporary employees. Dr. Bendick's conclusions strongly support a finding that Census's unvalidated 30-day letter and

[15] It is well documented that African American and Latino workers are overrepresented in the criminal justice system and, as a result, are more likely to have an arrest record. *See, El v. SEPTA*, 479 F.3d 232, 236-37(3rd Cir. 2007); *Green v. Missouri Pac. R. Co*., 523 F.2d 1290, 1294 (8th Cir. 1975).

[16] Dr. Bendick intends to conduct additional analysis, based on a random sample of the FBI rap sheets for 1500 applicants who received the 30-day letter, the production of which Defendant only recently completed. Miazad Decl. ¶ 4.

adjudication criteria resulted in a disparate impact on African-American and Latino applicants.[17] Specifically, Dr. Bendick concludes that African-American applicants had arrest records at approximately 2.5 times the rate for non-African Americans; and Hispanic applicants had arrest rates 1.7 times for non-Hispanics. Ex. C (Bendick Decl.) ¶ (8)(b). Based on those arrest rates, he further concludes that the differences in arrest rates between African Americans and non-African Americans and between Hispanics and non-Hispanics are highly "statistically significant" -- that is, far too large to have arisen by chance alone. Ex. C (Bendick Decl.) ¶ (8)(c). Specifically, the difference in arrest rates for African Americans corresponds to 501 "standard deviations," and the difference in arrest rates for Hispanics corresponds to 260 "standard deviations."[18] *Id.* ¶ (8)(c). The Second Circuit has held that if the observed disparity "is greater than two or three standard deviations, a *prima facie* case is established." *Guardians Ass'n of N.Y. City Police Dep't, Inc. v. Civil Serv. Comm'n of City of N.Y.,* 630 F.2d 79, 86-87 (2d Cir. 1980) (internal quotation marks and citation omitted). Further, Dr. Bendick estimates that 7.5% of the arrest records triggering 30-day letters were not for rapsheets that matched the job applicant, that 48.4 % of the 30-day letters were sent based on arrests not followed by convictions, that 17% of the letters were for minor offenses unlikely to be job related, that 13% of the letters were triggered by such old arrests as to be unlikely to be relevant for the temporary jobs in question, and as a result between 48.5% and 85.9 % of the 30-day letters to African Americans and Hispanics were "off target." Ex. C (Bendick Decl.) ¶ 8.

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[17] Dr. Bendick's conclusions are based on data from well-established statistical sources, including the U.S. Department of Labor's Bureau of Labor Statistics, the U.S. Department of Justice's Bureau of Justice Statistics, and the U.S. Census Bureau itself (in its role as a statistical agency, not as an employer), as well as published scholarly research,

[18] The probability that a difference this large arose by chance alone is less than one chance in many billions.

Plaintiffs' reliance on statistics drawn from general population data and potential applicant pool figures is appropriate to consider at the *prima face* stage of a Title VII disparate impact case, especially where, as here, Defendant failed to collect the race and statistical data.[19] *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) (finding use of national and regional population data appropriate means of establishing a *prima facie* case); *EEOC v. Joint Apprenticeship Comm. of the Joint Indus. Bd. of the Elec. Indus*., 186 F.3d 110, 119 (2d Cir. 1998) (noting that general population data and potential applicant pool data "often form the initial basis of a disparate impact claim"); *Reynolds v. Sheet Metal Workers Local 102*, 498 F. Supp. 952, 960 (D.D.C. 1980) (finding pre-employment arrest record inquiry adversely impacted African Americans based on, inter alia, nationwide arrest rate demographics); *Gregory v. Litton Systems, Inc*., 316 F. Supp. 401, 403 (C.D. Cal. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972) (finding employment policy disqualifying applicants with "a number of arrests without any convictions" to violate Title VII in light of national statistics showing that African Americans suffered a disproportionately high percentage of arrests); *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 650-51 (1989) ("In cases where such labor market statistics will be difficult if not impossible to ascertain, we have recognized that certain other statistics-such as measures indicating the racial composition of 'otherwise-qualified applicants' for at-issue jobs-

[19] Census failed to follow the federal government's own mandate. The EEOC's Management Directive 715 states that federal agencies must "develop systems for the evaluation of program effectiveness and barrier identification and elimination; ensuring that the agency has adequate data systems for effective analyses of applicant flow . . . ." *available at* http://www.eeoc.gov/federal/directives/md715.cfm (para. 8(a)(2)), last visited June 28, 2013. According to Census's own 2010 Recruiting and Hiring Assessment, applicant race data was collected during the 2000 decennial, but not for the 2010 decennial. Ex. 61 at 40-41 (recommending that Census "[o]btain OMB & OPM approval to . . . capture applicants' self-identification of race and ethnicity at the time of application and testing," because the date is useful to "identify possible deficiencies in the applicant pool," and the inability to collect the information in 2010 "negatively impacted [Census's] ability to assess [its] progress in building an applicant pool that reflects the diversity of the communities in which they live").

are equally probative for this purpose.") (*citing New York City Transit Auth. v. Beazer*, 440 U.S. 568, 585 (1979)); *see also Smith v. Xerox Corp.*, 196 F.3d 358, 368 (2d Cir. 1999) *overruled on other grounds by Meacham v. Knolls Atomic Power Lab.*, 461 F.3d 134 (2d Cir. 2006) ("In the typical disparate impact case the proper population for analysis is the applicant pool or the eligible labor pool.").

iii. Drs. Lundquist and Nakamara's Reports Further Support Commonality.

Although not Plaintiffs burden, they also provide substantial social science expert evidence that Census's criminal background check system, in particular the 30-day letter and the adjudication criteria were not job-related. Industrial/Organizational Psychologist Dr. Kathleen Lundquist characterizes Census's criminal background check process as "problematic (i.e., unreliable and not job-related) in the best case, and in the worst, impossible to comply with." Ex. B (Lundquist Report at 3-4). Dr. Lundquist concludes "the implementation of the 30-day letter in the criminal background check process eroded the extent to which the overall process yielded valid, job-related predictions concerning the likelihood of criminal or otherwise undesirable behavior on the job." *Id.* at 33.

As part of her expert analysis, Dr. Lundquist also asked an associate to convene a multidisciplinary focus group comprised to independently establish whether the criminal background exclusions were job related. The results indicate that over one-quarter of the crimes excluded by Census were not job-related, and over 80% of those that were job-related used exclusionary time periods that were too long relative to the job requirements. Ex. B (Lundquist Report at 1, n. 1; Ex. B-1 (Lundquist Technical Report).

Finally, criminologist, Dr. Kiminori Nakamura concludes "[t]he Census's adjudication criteria, especially the type of criminal offenses that triggers permanent disqualification, seem to

be based on the empirically unfounded perception that those who committed certain types of crimes in the past continue to have a heightened risk of reoffending, and such a perception is not consistent with the empirical research findings from redemption research." Ex. D (Nakamura Report at 3). Relying on his research on recidivism, Dr. Nakamura explains "recidivism risk of those with a prior criminal record falls below the risk of arrest for the general population approximately after 4-7 years for violent offenders, 4 years for drug offenders, and 3-4 years for property offenders." *Id*. Because some applicants may have had multiple arrests, he concluded that 10 years from release should be the upper limit, and less for some types of crimes. Ex. D (Nakamura Report at 3, 5).

3. The Proposed Named Plaintiffs Have Claims that Are Typical of Those of the Class.

Rule 23(a)(3) is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A.*, 126 F.3d at 376. "[M]inor variations in the fact patterns underlying individual claims" do not defeat typicality when the defendant directs "the same unlawful conduct" at the named plaintiff and the class. *Robidoux*, 987 F.2d at 936-37. The claims of plaintiffs and the class "only need to share the same essential characteristics, and need not be identical." *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 158 (S.D.N.Y. 2008). The typicality requirement is not "highly demanding." *Id.*

Plaintiffs are typical of the class they seek to represent. They applied for temporary decennial work, received the 30-day letter to produce official court documentation or fingerprints based on the results of an FBI namecheck search, and were either barred from the eligible applicant pool because they did not respond in time, were adjudicated as a "Risk," or were made eligible months after they applied and hiring had ended. *See* Statement of Relevant Facts, *supra*

§§ I–III.

4. The Named Plaintiffs Are Adequate Class Representatives.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Plaintiffs clearly fulfill the adequacy requirement. They either properly exhausted their remedies and class claims with the Census Bureau's Equal Employment Opportunity Office ("EEOO"), or they were granted leave to "piggyback" their claims on the exhausted claims. *See Johnson v. Locke*, No.10 Civ. 3105, 2011 WL 1044151 (S.D.N.Y. Mar. 14, 2011); *Johnson v. Bryson*, 851 F. Supp. 2d 688 (S.D.N.Y. 2012). All eight Plaintiffs testified to their commitment to the class at their full-day depositions. *See* Ex. 27 (Gonzalez Tr.) 219:23-220:3 ("My obligations as a class representative is to continue to try to work and correct the social injustice done on me and that it doesn't continue to happen to others and it needs to stop.); Ex. 31 (Riesco Tr.) 108:11-14 ("I'm seeking that the Census changes its policy, the way it conducts its business and that's my main goal, and I'm seeking, yes, of course, that things are made right."); Ex. 1 (Daniels Tr.) 148:9-11 ("I'm just a simple person, I just want a more fairer chance for other people to get work."); Ex. 36 (Rickett-Samuels Tr.) 301:7-12 ("This is not about money. This is about principle; that we were discriminated based upon our race and also criminal convictions."); Ex. 41 (Scott Tr.) 171: 12-21; 180:16-19 ("I hope that the government will change its policies and procedures for hiring applicants and again, that they would be more clear and concise in screening their applicants and giving them information or a better outlook on being hired and that people would not be discriminated against on being hired by the Census.") ("Being as this is still a class action suit . . . I represent a large number of people who are not hired by the Census."); Ex. 20 (Houser Tr.) 162:12-16 (Census's hiring plan is arbitrary because "no matter how tedious or whatever the charge is, you're out.");

Ex. 7 (Desphy Tr.) 189:15-190:16 (understanding of disparate impact is that "[b]lacks are more prone to be locked up for crimes that [] basically the white race does not receive records for . . . it causes us to not have jobs which basically keeps a lot of our people at the lower economic level."); Ex. 14 (Kargbo Tr.) 133:19-25 ("if the process was done appropriately . . . that would have been sufficient."). Additionally, there is no evidence that the Plaintiffs' and the class members' interests are at odds. *See Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 616 (S.D.N.Y. 2012) (finding adequacy met where there was no evidence of conflict); *Johnson v. Brennan*, No. 10 Civ. 4712, 2011 WL 4357376, at *5 (S.D.N.Y. Sept. 16, 2011) (same).

Class Counsel also meet the adequacy requirement of Rule 23(a)(4), as defined in Rule 23(g).[20] Outten & Golden LLP ("O&G"), Center for Constitutional Rights ("CCR"), Community Legal Services of Philadelphia ("CLS"), Community Service Society of New York ("CSS"), the Indian Law Resource Center of Helena, Montana ("ILRC"), LatinoJustice PRLDEF of New York ("PRLDEF"), the Lawyers Committee for Civil Rights, of Washington, D.C. ("LCCR"), and the Public Citizen Litigation Group, of Washington, D.C. ("PCLG"), together bring a wealth of relevant experience with federal class action litigation in the employment arena. Miazad Decl. ¶ 2. The individual counsel of record have decades of combined experience, and a record of success, in class and other complex litigation. *Id.*

Further, O&G and CCR, CLS, CSS, ILRC, PRLDEF, LCCR, and PCLG have committed substantial resources to prosecuting this case thus far and will continue to do so in the future. For these reasons, the Court should appoint O&G and CCR, CLS, CSS, ILRC, PRLDEF, LCCR, and PCLG as Class Counsel.

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[20] As a result of the 2003 amendments to the Federal Rules of Civil Procedure, the issue of appropriate class counsel is guided by Rule 23(g) rather than Rule 23(a)(4). *Spencer v. No Parking Today, Inc.*, No. 12 Civ. 6323, 2013 WL 1040052, at *23 (S.D.N.Y. Mar. 15, 2013) (citing 2003 Advisory Comm. Notes to Rule 23).

B. Certification Is Appropriate Under Rule 23(b)(2) and Rule 23(b)(3).

A court may certify a class as long as one Rule 23(b) requirement is met. Fed. R. Civ. P. 23(b); *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 484 (2d Cir. 1995). In this case, Plaintiffs ask the Court to certify a Rule 23(b)(2) issues class on liability and injunctive relief issues and a separate Rule 23(b)(3) class on issues of individualized relief, as permitted under Rule 23(c)(4).

1. The Court Should Certify A Rule 23(b)(2) Issues Class on Liability and Injunctive Relief.

Plaintiffs' proposed disparate impact class on the issue of liability and injunctive relief easily meets the requirements of Rule 23(b)(2). Rule 23(b) is satisfied when "a party opposing the class has acted or refused to act on grounds generally applicable to the class," making injunctive or declaratory relief "appropriate . . . with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). As the Supreme Court has held, "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) classes. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *Gulino*, 201 F.R.D. at 333 (presumptively appropriate to certify under Rule 23(b)(2) with government defendant); *Corner v. Cisneros*, 37 F.3d 775, 796 (2d Cir. 1994) (same for state and local officials).

For a class action to be appropriate under Rule 23(b)(2)'s "generally applicable" provision, the defendant does not have to act directly against each class member. *See* Adv. Comm. Notes to 1966 Amendment, Fed. R. Civ. P. 23. The standard is whether defendants' actions have generally impacted all persons similarly situated in a way that pertains to the class as a whole. *See* Charles Wright & Arthur Miller, 7AA FEDERAL PRACTICE & PROCEDURE § 1775 (3d ed. 2008). Here, the defendant's policies and practices applied to the proposed class generally, caused the injury, and thereby satisfy the Rule 23(b)(2) standard. *See Marisol A.*, 126

F.3d at 378, *Gulino*, 201 F.R.D. at 333-34.

2. The Court Should Certify Plaintiffs' Claims for Individualized Damages Under Rule 23(b)(3).

Plaintiffs seek class certification for individualized back pay remedies pursuant to Fed. R. Civ. P. 23(b)(3). Plaintiffs request certification of 3 damages subclasses: applicants with criminal history records who were barred (1) based solely on the procedural requirements imposed by the 30-day letter; (2) based solely on the delay in the adjudication process; (3) based on exclusions that are not job related. Entitlement to relief for these damages sub-classes will flow directly from the Court's findings on liability. The calculation of the individual damages will be largely formulaic. Plaintiffs were denied temporary employment that lasted a short finite term and had set hourly rates. Because damages can be systematically determined by taking into account the set rate and period of employment for each class position, the back pay determination is a "purely mechanical process" and therefore appropriate for 23(b)(3) certification. *See Parra*, 2013 WL 2407204, at *29 (recognizing that a "purely mechanical" damages determination lends itself to 23(b)(3) certification).

Certifying a class for damages under Rule 23(b)(3) is consistent with the language of the rule and ensures that class members have an opportunity for notice and can opt out if they choose to pursue their claims individually. *See Dukes*, 131 S. Ct. at 2258-59; *Comcast*, 133 S. Ct. at 1432 ("Congress's addition of procedural safeguards for (b)(3) class members beyond those provided for (b)(1) or (b)(2) class members [include] an opportunity to opt out . . . .") (citing *Amchem*, 521 U.S. at 615).

In making this determination, courts look to whether "questions of law or fact common to class members predominate over any questions affecting only individual members" and whether "a class action is superior to other available methods for fairly and efficiently adjudicating the

controversy." Fed. R. Civ. P. 23(b)(3). Predominance and superiority both serve the goals of judicial economy and reduce the possibility of multiple lawsuits. *In re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762, 790 (E.D.N.Y. 1980); *Guippone v. BH S&B Holdings LLC*, 09 Civ. 1029, 2011 WL 1345041, at *7 (S.D.N.Y. Mar. 30, 2011) (citing *Labbate–D'Alauro v. GC Servs. Ltd. Pshp.,* 168 F.R.D. 451 (E.D.N.Y. 1996)) ("Considerations of judicial economy and efficiency are of paramount importance and, where, as here, determination of the common, predominant issues shared by the Class Members will dispose of the matter, class certification should be ordered.").

i. Common Questions of Law and Fact Predominate Over Individual Questions.

Certification under Rule 23(b)(3) is appropriate here because the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. In the Second Circuit, predominance of class-wide issues exists "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *UFCWLocal 1776 v. Eli Lilly & Co.,* 620 F.3d 121, 131 (2d Cir. 2010); *Stinson v. City of New York*, 282 F.R.D. 360, 369 (S.D.N.Y. 2012) (granting 23(b)(3) certification where proposed class could be "hundreds of thousands."). Though the inquiry is "more demanding than Rule 23(a)," *Comcast,* 133 S. Ct. at 1432, it "requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen,* 133 S. Ct. at 1191 (emphasis in the original). Accordingly, "the office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the metho[d] best suited to adjudication of the controversy fairly and efficiently." *Id.*

The Supreme Court recently revisited the 23(b)(3) predominance inquiry in the context of damages, holding that "the proper standard for evaluating certification" requires a showing "that damages are capable of measurement on a classwide basis[]." *Comcast*, 133 S. Ct. at 1433. In that anti-trust action, the Supreme Court reversed class certification, holding that the Third Circuit should not have "simply concluded that respondents provided *a* method to measure and quantify damages on a classwide basis, without deciding whether the methodology [was] a just and reasonable inference or speculative." *Id.* (internal quotation marks and citations omitted).

Following *Comcast,* courts continue to certify new classes and have declined to decertify existing classes, based upon its narrow holding. *See, e.g., Parra*, 2013 WL 2407204, at *32 (certifying a class of grocery workers on their pay discrimination claims after careful examination of the 23(b)(3) factors; holding that "[h]ere, unlike *Comcast,* if putative class members prove [plaintiffs'] liability, damages will be calculated based on the wages each employee lost due to [defendant's] unlawful practices."); *In re Urethane Antitrust Litig.*, MDL 1616, 2013 WL 2097346 (D. Kan. May 15, 2013) (denying defendant's decertification motion after consideration of *Comcast*); *Munoz v. PHH Corp.*, No. 1:08 Civ. 0759, 2013 WL 2146925 (E.D. Cal. May 15, 2013) (granting class certification in part after consideration of *Comcast*); *Wallace v. Conahan*, 2013 WL 2042369, (M.D. Pa. May 14, 2013) (granting class certification; holding that "I am not inclined to extend *Comcast* beyond its facts and holding."); *Martins v. 3PD, Inc.*, Civ. A. 11-11313, 2013 WL 1320454 (D. Mass. Mar. 28, 2013) (granting class certification in part; holding that "I interpret [*Comcast*] not to foreclose the possibility of class certification where some individual issues of the calculation of damages might remain, as in the current case, but those determinations will neither be particularly complicated nor overwhelmingly numerous").

As shown in *Parra* above, if liability is found the individualized damages issues are few. 2013 WL 2407204, at *32. There are no claims for punitive damages or compensatory loss besides back pay for a temporary job, with a finite period of employment and standardized hourly rates. Because damages are easily determined by a formula that takes into account the set rate and finite period of employment, such back pay determination is a "purely mechanical process." *Id.* at *32 (internal quotation marks omitted). Unlike *Comcast,* Plaintiffs' methodology for calculating back pay demonstrates that such damages are "capable of measurement on a classwide basis." *See Comcast,* 133 S. Ct. at 1433. If putative class members prove Plaintiffs' liability, damages easily will be calculated based on the wages each employee lost due to Census's unlawful practices. *See Parra*, 2013 WL 2407204, at *32.

Furthermore, also in sharp contrast to *Comcast*, back pay determinations will rely purely upon "objective factors," *id.* at *32, supporting a finding that predominance is met. As in the *Parra* decision, where the court found predominance met in a pay discrimination class action:

> [T]hrough . . . the individual employee payroll record (dates of employment[,] job position, hours worked) and the wage scale, which is part of the record, the plaintiffs will be able to calculate back pay losses for *each* eligible class member. . . . [T]here is no concern, as there was in *Comcast,* that [q]uestions of individual damages calculations will inevitably overwhelm questions common to the class[ ]. . . . In addition, also in sharp contrast to *Comcast,* plaintiffs' methodology for calculating back pay correlates the legal theory of the harmful event with the economic impact of that event.

Id. at 32 (internal quotation marks omitted) (citing *Comcast*, 133 S. Ct. at 1433). Here, Plaintiffs could first estimate the hiring shortfall and second, estimate the wages that the shortfall hires would have earned had they been hired. In terms of the individual distribution, courts in the Second Circuit have consistently held that class-wide calculation and pro rata distribution of back pay is appropriate when "the number of qualified 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." *Robinson*, 267 F.3d at 161 n. 6 (quoting *Catlett v. Mo. Highway and Transp. Comm'n*, 828 F.2d 1260, 1267 (8th Cir.1987)); *see also Easterling*, 278 F.R.D. at 49 ("Rather than resort to 'mere guesswork,' the court will make an aggregate calculation of the back pay to which the class is entitled. This sum can then be distributed to eligible class members on a pro rata basis."); *United States v. City of New York*, 276 F.R.D. at 44 ("Because 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."). Because damages can be easily and formulaically calculated from purely objective documents and distributed on a pro-rata basis, predominance is met.

ii. A Class Action is Superior to Alternative Methods for Resolving This Dispute.

Class treatment is the far superior method for adjudicating Plaintiffs' discrimination claim. The purpose of the superiority requirement is to ensure that the action is the most "fair and efficient" method of resolving a case. *See In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 230 (2d Cir. 2006) (citing Fed. R. Civ. P. 23(b)(3)). In analyzing this element, courts consider four nonexclusive factors: (1) the interest of the class members in maintaining separate actions; (2) "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;" (3) "the desirability or undesirability of concentrating the litigation of the claims in the particular forum;" and (4) "the difficulties likely to be encountered in the management of a class action." *Id.* (quoting Fed. R. Civ. P. 23(b)(3)). Because all of these factors, including efficiency and fairness considerations, favor class certification, the superiority element is met.

With regard to efficiency and fairness, class treatment is the superior method because it is less costly and more efficient as all class members' allegations are based on a uniform policy and practice giving rise to common questions of law and fact. *See, e.g., Spencer*, 2013 WL 1040052; *see also Flores v. Anjost Corp.,* 284 F.R.D. 112, 131 (S.D.N.Y. 2012); *Whitehorn v. Wolfgang's Steakhouse, Inc.,* 275 F.R.D. 193, 200 (S.D.N.Y. 2011). Moreover, "[c]onsolidating a class involving so many potential plaintiffs would promote judicial economy, and individual lawsuits could lead to inconsistent results." *Stinson*, 282 F.R.D. at 383.

Next, with regard to the first factor of class member interest in maintaining separate actions, as low-wage hourly workers looking for employment, this case requires significant resources which would deter or prevent individual claims. *See, e.g., Castano v. Am. Tobacco, Co.,* 84 F.3d 734, 748 (2d Cir. 1996) (the "most compelling rationale for finding superiority in a class action [is] the existence of a negative value suit"); *Flores,* 284 F.R.D. at 131 ("class action is superior where . . . the damages suffered are small in relation to the expense and burden of individual litigation") (internal quotation marks and citation omitted).

The second factor supports class superiority. Plaintiffs' counsel are aware of only one other case against Census based on its 2010 decennial criminal background check policies and practices and that case, *Robinson v. Blank*, No. 11 Civ. 2480 (S.D.N.Y.), is brought by a Plaintiff who alleges he was wrongly fired, and is represented by O&G and CSS. This particular "court and the class counsel are already familiar with much of the statistical evidence on which an aggregate assessment of back pay . . . relief will depend," this factor is met. *Easterling*, 278 F.R.D. at 50.

The third factor also favors class certification. There is no reason to believe that concentrating this action in this Court is undesirable. Plaintiffs have already conducted extensive

discovery and litigation, and "it would be a more efficient use of scarce judicial resources to continue litigating questions relating to [plaintiffs'] damages claims in a single forum. Therefore, class treatment of common issues is superior to other available methods for fairly and efficiently adjudicating the controversy." *United States v. City of New York*, No. 07 Civ. 2067, 2011 WL 2259640, at *17 (E.D.N.Y. June 6, 2011).

The fourth and final factor considers "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(D). Any difficulties likely to arise can be managed by the "management tools" the Court has at its disposal. *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001); *Sykes v. Mel Harris & Associates, LLC*, 285 F.R.D. 279, 294 (S.D.N.Y. 2012). "[F]ailure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored, and should be the exception rather than the rule." *In re Visa Check,* 280 F.3d at 140; *see also In re Nassau Cnty. Strip Search Cases,* 461 F.3d at 231; *United States v. City of New York*, 276 F.R.D. 22, 50 (E.D.N.Y. 2011). Because the Court is amply equipped to respond to any manageability concerns that may arise, and any individual questions can be dealt with during the claims process, Plaintiffs meet this factor.

C. In the Alternative, Common Issues As To Remedies May Be Certified For Determination Under Rule 23(c)(4).

Although Plaintiffs have established above that the class claims can be resolved within the framework of a Rule 23(b)(2) and (b)(3) class, the Court has the alternative under Rule 23(c)(4) of isolating the common question of liability while leaving the issue of damages for individual hearings. Pursuant to Rule 23(c)(4), which allows for class certification "with respect to particular issues," the Court could bifurcate the issue of liability for class-wide resolution from damages determinations.

Rule 23(c)(4) provides flexibility to district courts considering class certification. Thus,

the Second Circuit has encouraged district courts to "take full advantage of [Rule 23(c)(4)] to certify separate issues in order . . . to reduce the range of disputed issues in complex litigation and achieve judicial efficiencies." *Robinson*, 267 F.3d at 167 (internal quotation marks and citation omitted); *see also In re Nassau Cnty. Strip Search Cases*, 461 F.3d at 227 (class can be certified for particular issues under Rule 23(c)(4) "to single out issues for class treatment when the action as a whole does not satisfy [the] Rule 23(b)(3) [predominance requirement]"); *City of New York*, 276 F.R.D. at 33 ("[t]he Second Circuit has consistently endorsed a broad reading of Rule 23(c)(4)"). In *In re Nassau Cnty. Strip Search Cases*, the Second Circuit explained that a class can be certified under Rule 23(c)(4) as to particular issues in order to single out issues for class treatment when the action as a whole does not satisfy Rule 23(b)(3)'s predominance requirement. 461 F.3d at 227. These holdings remain undisturbed post-*Dukes*. *See, e.g., United States v. City of New York*, 276 F.R.D. 22 (E.D.N.Y. 2011). Moreover, with the express goal of bifurcating common liability claims from individual damage assessments to aid judicial efficiency, the *Comcast* decision, which addressed only non-bifurcated damages, does not apply. If this Court determines that 23(c)(4) is appropriate, this Court remains vested with the power to bifurcate the liability issue from the individual damages determinations.

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.

Dated: July 8, 2013
New York, New York

Respectfully submitted,

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