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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

PENNY PRITZKER, Secretary, United States Department of Commerce,

Defendant.

No. 10-cv-3105 (FM)

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

ORAL ARGUMENT REQUESTED

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PRELIMINARY STATEMENT

This motion to dismiss by Secretary Pritzker ("Census")—offered, once again, to delay a decision on the merits—challenges Plaintiffs' standing to bring this case, an issue that the Court previously resolved in Plaintiffs' favor. This Court already has ruled that standing is "evaluated at the time the complaint is filed," and that Plaintiffs have standing to bring this claim. *Johnson v. Bryson*, 851 F. Supp. 2d 688, 699 (S.D.N.Y. 2012). The Court should emphatically reaffirm that holding—and for good reason. When Plaintiffs filed this case in April 2010, Census was still hiring temporary workers at a rate of 80,000 people per week. Ex. 69 (Cummings Tr., May 6, 2010) 24:19–11.[1] Each Plaintiff—while meeting the posted requirements of the job—was barred from employment solely because of the criminal-background check. All of the Plaintiffs received a 30-day letter informing them that they would not be considered for positions unless they complied with the terms of the letter (a burden not placed on other applicants). Ex. 3 (Daniels 30-day letter); Ex. 7 (Desphy Tr.) 77:21–25; 79:2–7; Ex. 24 (Houser 30-day letter); Ex. 30 (Gonzalez 30-day Letter); Ex. 18 (Kargbo 30-day letter); Ex. 35 (Riesco 30-day letter); Ex. 40 (Rickett-Samuels 30-day letter); Ex. 44 (Scott 30-day letter). Five of the Plaintiffs also received a letter stating that they were not eligible for hire *because* they failed the check.[2]

Thus, on the day they filed this case, Plaintiffs could have sought preliminary injunctive relief that included hiring. Census's argument that it would not have hired them for other

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[1] Exhibits 1 through 106 refer to the exhibits attached to the Declaration of Ossai Miazad in Support of Plaintiffs' Motion for Class Certification. ECF Nos. 168-70. Exhibits 107 through 121 refer to exhibits attached to the Supplemental Declaration of Ossai Miazad in Further Support of Plaintiffs' Motion for Class Certification. ECF No. 236. Exhibits 122 through 160 are attached to Declaration of Ossai Miazad in Support of Plaintiffs' Opposition to Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

[2] While the other Plaintiffs received no formal response from Census, they were nevertheless barred from advancing in the process due to the criminal-background check screen.

reasons, over three years later and after the close of discovery, cannot undo standing that existed at the outset. *Johnson*, 851 F. Supp. 2d at 700 ("The Plaintiffs clearly had standing to seek injunctive relief when the case was commenced because the Census Bureau concedes that hiring for the 2010 census still was underway at the time the Plaintiffs filed their original complaint[.]")

The only new twist to Census's argument is that it now challenges Plaintiffs' standing to seek *back pay*, yet this represents a serious misunderstanding of Title VII standing. The *sine qua non* of injury-in-fact for standing is a legal injury and, as argued below, the legal injury to Plaintiffs under Title VII was being exposed to racial discrimination. Failed applicants may establish standing under Title VII by showing that they otherwise met the basic job requirements for the position, as Plaintiffs do here, and *not* by proving that they actually would have been hired at some later point in the process based on hypothetical facts.

Census's contention that Plaintiffs lack a financial stake in this case is legally and factually baseless. *First*, its argument omits that Census permitted, even encouraged, applicants to re-take the test to improve their test scores, even after they had entered the eligible applicant pool. Locking the Plaintiffs into the score they received at the time they were derailed by the criminal-background check process fails to account for their ability to retake the test. *Second,* though Census now argues that applicants with higher scores were more qualified for employment, the use of rank-order hiring itself comes into conflict with the requirements of Title VII and may be challenged at a later stage of this case. *See, e.g., United States v. City of New York,* 717 F.3d 72, 79 (2d Cir. 2013).[3] *Finally*, Census's motion boils down to a standing challenge based on affirmative defenses relating solely to damages: (1) the "same-decision" defense, that applies only to disparate-*treatment* claims under Title VII, 42 U.S.C. § 2000e–2(m);

[3] Census's expert Dr. James Outtz himself expresses concern about unvalidated rank order because of the disparate impact it can have on applicant pools. Ex. 109 (Outtz Tr.) 42:20-48:7.

and (2) the after-acquired evidence defense, which merely serves to mitigate damages from the date an employer discovers *new* information. Census failed to plead these affirmative defenses in its operative Answer and, three years into the case, it is too late for it to do so now.

For these reasons, the motion to dismiss on standing should—once again—be denied, and the Court should accordingly proceed to adjudicate the pending class-certification motion.

LEGAL STANDARD

To establish Article III standing, a plaintiff must allege that it has suffered a concrete injury (injury-in-fact), causation and redressability. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).[4] A motion to dismiss under Rule 12(b)(1) is decided under the same standard as under Rule 12(b)(6). *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 128 (2d Cir. 2003). The Court must accept all material facts alleged in the complaint as true and draw all reasonable inferences liberally in the plaintiff's favor. *Natural Res. Def. Council v. Johnson*, 461 F.3d 164, 171 (2d Cir. 2006). The Court may consider evidence outside of the pleadings to determine subject-matter jurisdiction. *Morrison v. Nat'l Australia Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008).

STATEMENT OF FACTS

I. Census Required Applicants to Meet the Same Minimum Qualifications Nationwide.

Census applied the same minimum job criteria to applicants nationwide. *See* Ex. 56 (2010 Census Operational Recruiting Plan) at USA45163; Ex. 71 (Census Job Application) at USA32563. These were not onerous. All applicants had to fill out the identical application. Ex. 71 (Census Job Application) at USA32563–67. According to the application, in order to qualify for temporary employment with the 2010 Census, applicants had to (1) be over eighteen years of

[4] Though citing causation in a couple of places, Def.'s Mem. of Law in Support of Def.'s Mot. to Dismiss for Lack of Sub. Matter J. (hereinafter "Def.'s Br.") at 2, 15, Census nowhere argues causation independently in its brief, so it is not addressed separately by Plaintiffs.

age, (2) possess a Social Security Number, and (3) take a written test of basic skills. *Id.* at USA32563.[5] The only other requirement for the temporary positions was passing the criminal background check test challenged in this case. Census gave preference to United States citizens over non-citizens, but non-citizens could nonetheless be considered for employment if qualified citizens were unavailable, including if Census needed bilingual speakers for certain positions. *Id.*

In order to qualify for employment, applicants only needed a minimum score of 70 on the Census test. Ex. 56 (2010 Census Operational Recruiting Plan) at USA45163. Plaintiffs all scored above 70. Even applicants who scored below this minimum could be hired in some instances if they meet other qualifying criteria. *Id.* Further, Census permitted and encouraged applicants to re-take the test to improve their score, as Census admits. Def.'s Br. at 3 ("Applicants could the test to improve their test scores. . . . If an applicant took the test more than once, the additional scores were added to DAPPS, and the highest score superseded all other test scores that an applicant may have had."); Willis Decl., ECF No. 205, ¶ 4 (same); Ex. 61 (2010 Census Recruiting and Hiring Assessment Report) at 47 ("Applicant can retake the test. Application can be reconsidered if a minimum score is achieved."); Ex. 7 (Desphy Tr.) 65:13–67:19. Neither the enumerator job nor the clerk job had any unique requirements. *See* Ex. 122 (Enumerator Job Description) at USA3789; Ex. 123 (Clerk Job Description) at USA3782. To the contrary, in fact, virtually all their functions were scripted by Census. *See* Ex. 72 (Groves Tr.) 41:1–11 (testifying that enumerator jobs are low-paying and have a high turnover).

Census required the field office requesting temporary hires to complete a standardized "Job Requisition Form" (D-150) specifying the particular types and numbers of positions, geographic criteria (e.g. state, county, census tract, census block, or zip code) and any other

[5] Male applicants born after 1959 also had to be registered with Selective Service. *Id.*

special criteria, such as language skills. Ex. 65 (Text Version of the Selecting Your Staff Computer-Based Training) at USA1586, USA1604–13. Field offices made employment offers to the highest three eligible applicants on the selection records. Ex. 124 (D-1112 DAPPS Field Division 2010 User Training Guide) at 5147. These applicants were drawn from the pool of applicants who passed through the criminal background check into the eligible applicant pool. If one of the top three candidates declines, the field office then select from the next three. *Id.*

II. The Plaintiffs Met the Minimum Qualifications to Be Hired.

Each of the Plaintiffs met the minimum qualifications for a temporary position with the Census and was therefore qualified to be hired. Plaintiff Precious Daniels is an African American resident of Detroit, Michigan. Ex. 1 (Daniels Tr.) 6:9–12; 156:5–8. Ms. Daniels applied to Census around January 2010 and received a score of 83 on the Census exam. *Id.* 29:20–24; Ex. 126 (Daniels DAPPS record) at USA3809. She is a United States citizen. *Id.* at USA3802. While Ms. Daniels indicated on her application that she preferred to work 28 hours a week, Ex. 2 (Daniels Application) at 2, she was willing to work up to 40 hours a week if needed. Ex. 1 (Daniels Tr.) 152:18–153:19. She also indicated that she was willing to work in either the field or an office, and that she had personal computer experience. Ex. 2 (Daniels Application) at 2. Ms. Daniels received a 30-day letter, dated February 16, 2010. Ex. 1 (Daniels Tr.) 61:22–62:4; Ex. 3 (Daniels 30-day letter). 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 (Daniels Rejection Letter). Census now claims that Ms. Daniels does not have standing because no applicant in her geographic area, without a qualifying language ability and "only 28 hours of availability per week," was hired with a score of 83. Def.'s Br. at 9. Census's argument not only fails as a matter of law as described herein, but also

fails to recognize that it explicitly informed Ms. Daniels that she was ineligible for hire based on the criminal background check in March 2010, foreclosing her from further consideration or from re-taking the test. At that time, Census was still accepting applications, administering tests and a month away from its largest hiring effort in April 2010. Further, by Census's own admission applicants with scores at or below Ms. Daniels's were hired. Census tries to get out from under this fact by claiming that because Ms. Daniels indicated on her application that she was available for 28 hours that she would not have appeared on a selection record. Def.'s Br. at 9–10. First, the number of hours was not a minimum qualification to enter the eligible applicant pool, nor the reason why Census rejected Ms. Daniels. As she testified she would have been available for more than 28 hours if asked and could have amended her availability after she entered the eligible applicant pool. Further, there were applicants who indicated less than 40 hours on their application who were nonetheless listed on job requisition forms in Ms. Daniels's geographic area. *See e.g.*, Ex. 127 (Selection Records for Daniels) USA48191; Ex. 129 (Selection Records for Daniels) at USA48331; Ex. 147 (Selection Records for Daniels) USA48276–79; Ex. 148 (Selection Records for Daniels) USA48283–86; Ex. 149 (Selection Records for Daniels) USA48292–93; Ex. 150 (Selection Records for Daniels) USA48308; Ex. 151 (Selection Records for Daniels) USA48331–36; Ex. 152 (Selection Records for Daniels) USA48351–54; Ex. 153 (Selection Records for Daniels) USA48365–68; Ex. 154 (Selection Records for Daniels) USA48389–93.[6]

[6] Plaintiffs note that Census failed to produce any of the "Job Requisition" forms for the Job Selection Records for Ms. Daniels. Rather, Census produced a screen shot of "BOC Job Openings." The Job Requisition form, *see e.g.* Ex. 158 (D-150 Job Requisition Form) USA50923-24, is what an LCO Assistant Manager completed to initiate a selection process. Willis Decl., ECF No. 205, ¶ 12. This form identified the LCO, the number of employees desired, the position, any availability requirements, whether the selection record was for field or office position and the eligible geographic area. *Id.* ¶ 13. This form is missing from the many of

Plaintiff Scotty Desphy is an African American resident of Philadelphia, Pennsylvania. Ex. 7 (Desphy Tr.) 7:3–6, 19–23. She worked as an enumerator during the 2000 Census. *Id.* 24:5–7; 25:15–17. Ms. Desphy applied for the 2010 decennial in December 2009. *Id.* 65:13–67:19. At the time she applied, Ms. Desphy was a United States citizen. Ex. 128 (Desphy DAPPS record) at 44233. Ms. Desphy earned a score of 75 on the Census exam when she first took it in December 2009. *Id.* at 44239. After submitting her application and taking the test, Census sent Ms. Desphy a 30-day letter. Ex. 7 (Desphy Tr.) 77:21–25; 79:2–7. Ms. Desphy wrote a letter of explanation including the fact that she worked for Census during the 2000 decennial. *Id.* 78:12–25; Ex. 10 (Desphy Letter). 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 (Census Letter to Desphy). 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 (Desphy Response). She also took the exam again in February of 2010 and increased her score to 83. Ex. 128 (Desphy DAPPS record) at USA44239. 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 (Desphy Rejection Letter). Census now claims that Ms. Desphy does not have standing because no applicant in her geographic area, unless they possessed a qualifying language ability or veterans' preference, was hired with a score of 83. Def.'s Br. at 13. Similar to Ms. Daniels, Census informed Ms. Desphy in March

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the selection records. Rather, Census produced a screen shot of the "BOC Job Opening Info," *see e.g.* Ex. 157 (BOC Job Opening Info for Kargbo) USA62233-34.

Census fails to explain why it produced the Job Requisition form for some of the records for some of the Plaintiffs but simply produced a screen shot of the BOC Job Opening Info. for others. Census also does not explain the process it undertook to ensure Census accounted for all Job Requisition forms for each relevant period for each Plaintiff. Notably, Census produced these documents after the close of deposition discovery foreclosing questioning of deponents about the foundation or authenticity of the selection records on which it now seeks to rely.

2010 that it deemed her ineligible based on its criminal background check, foreclosing her from further consideration and from re-taking the test to raise her score as she had done once before.

Plaintiff Evelyn Houser is an African American resident of Philadelphia, Pennsylvania. Ex. 20 (Houser Tr.) 4:23–24; 8:9–11. In 1990, she worked for Census as an enumerator and an office worker. *Id.* 31:9–16. Ms. Houser applied for a temporary position with Census in January 2009, at which time she was a United States citizen. *Id.* at 45:25–46:12; Ex. 130 (Houser DAPPS record) at USA3885, 3878. She earned a score of 72 on the Census exam. *Id.* at USA3886. In early March 2009, Ms. Houser received a 30-day letter. Ex. 20 (Houser Tr.) 85:22–86:19; Ex. 24 (Houser 30-day letter). By a letter dated May 21, 2009, Census informed her that she was disqualified because she "failed to provide the requested information within the 30-day window provided." Ex. 26 (Rejection Letter) USA43503. Census claims that none of the applicants in Ms. Houser's geographic hiring area who were selected on or after the date she applied had a score of 72 or lower and lacked the required foreign language ability. Def.'s Br. at 6–7. First, applicants with scores of 72 or less appear on the selection records (without language requirements) produced by Census although none appear to have ultimately been selected. Ex. 131 (Selection Record for Houser) USA50100, USA50115, USA50387. Second, Ms. Houser applied and was rejected by Census during Address Canvassing operation which occurred one year prior to the Non-Response Follow-Up (NRFU), foreclosing and/or deterring her from taking the test again in preparation for NRFU hiring. Finally, Census failed to produce many of the "Job Requisition" forms for the Job Selection Records for Ms. Houser. Rather, it produced a screen shot of "BOC Job Openings." *See* supra 6, n.6.

Plaintiff Anthony Gonzalez is a Latino resident of Riverview, Florida. Ex. 27 (Gonzalez Tr.) 7:16–18. Mr. Gonzalez applied to Census around February of 2010. *Id.* at 54:17–24; 88:9–

89:19. As Census's application data for Mr. Gonzalez reflects, he earned a 92 on the Census exam and, is a United States citizen and fluent in Spanish. *Id.* at 82:20–83:15; 85:5–13; Ex. 159 (Gonzalez DAPPS record) at USA3852, USA3855. Mr. Gonzalez received a 30-day letter around March 11, 2010. Ex. 29 (Gonzalez 30-day letter); Ex. 27 (Gonzalez Tr.) 97:17–98:3. Mr. Gonzalez responded to the 30-day letter on March 15, 2010 and never heard back from Census. Ex. 30 (Gonzalez Letter). Census claims that based on the selection records that were generated on or after the day Mr. Gonzalez applied, Census did not select any applicant with a test score of 92, who could not speak Haitian-Creole, and who lacked veterans' preference. Def.'s Br. at 7–8. Census failed to produce a single "Job Requisition" form for the Job Selection Records for Mr. Gonzalez. Rather, it produced a screen shot of "BOC Job Openings." *See* supra 6, n.6.

Plaintiff Vivian Kargbo is an African American resident of Boston, Massachusetts. Ex. 14 (Kargbo Tr.) 7:20–24; 12:16–17. Ms. Kargbo applied for a position with Census around March of 2010, and received a score of 80. *Id.* at 53:11–16; Ex. 132 (Kargbo DAPPS record) at USA43537. Ms. Kargbo indicated on her application that she was a permanent resident of the United States and not a citizen. *Id.* at USA43530. She also did not claim any special language skills. *Id.* at USA43533. After receiving her test results, a Census employee told Ms. Kargbo that she had qualified and that she would be contacted in the next few days regarding her place of employment. Ex. 14 (Kargbo Tr.) 61:11–25; 70:5–19; 86:23–87:12. She received a 30-day letter around March 24, 2010, and responded by sending her fingerprints. *Id.* at 95:19–25; Ex. 18 (Kargbo 30-day letter); Ex. 19 (Kargbo fingerprint sheet). She never received a response from Census. Ex. 14 (Kargbo Tr.) 126:18–20. Census failed to produce a single "Job Requisition" form for the Job Selection Records for Ms. Kargbo. Rather, it produced a screen shot of "BOC Job Openings." *See* Ex. 133 (Selection Records for Kargbo) USA50691–96; Ex. 134 (Selection

Records for Kargbo) USA50697–701; Ex. 157 (BOC Job Opening Info for Kargbo) USA62233–34; *see* supra 6, n.6.

Plaintiff Ignacio Riesco is a Latino resident of Orlando, Florida. Ex. 31 (Riesco Tr.) 22:16–19; 97:18–19. Mr. Riesco submitted an application for employment with Census on approximately April 10, 2010. Ex. 34 (Riesco Application) at USA3824. Although Mr. Riesco was not a United States citizen, he was a lawful permanent resident when he applied to Census. *Id.* at USA3822. In addition, he speaks Spanish and Portuguese fluently. *Id.* at USA3823; Ex. 31 (Riesco Tr.) at 30:20–31:3. He also indicated that he was willing to work either in the field or an office, and that he had personal computer experience. Ex. 34 (Riesco Application) at USA3823. Within a few days of receiving a 30-day letter, Mr. Riesco submitted the disposition, showing all the charges had been dropped Ex. 31 (Riesco Tr.) 23:16–21; 56:3–15; Ex. 35 (Riesco 30-day letter). He did not receive any information from Census on his application. *Id.* 122:2–7.

Plaintiff Felicia Rickett-Samuels is an African American resident of Stamford, Connecticut. Ex. 36 (Rickett-Samuels Tr.) 6:8–12; 7:3–4. Ms. Rickett-Samuels applied to Census on approximately January 15, 2009, and is a United States citizen. *Id.* at 135:14–23; Ex. 135 (Rickett-Samuels DAPPS record) at USA44224. She received a score of 88 on the Census test. Ex. 135 (Rickett-Samuels DAPPS record) at USA44230. In March 2009, Ms. Rickett-Samuels received a 30-day letter. Ex. 40 (Rickett-Samuels 30-day letter). 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. Ex. 36 (Rickett-Samuels Tr.) 144:20–145:23; Ex. 38 (Rickett-Samuels letter). Roughly a week later, she received a letter from Census denying her application. Ex. 36 (Rickett-Samuels Tr.) 197:10–16. Census claims that no applicant with a test score of 88 who lacked any foreign language ability was selected on or after the day Ms. Rickett-Samuels

applied. Def.'s Br. at 10. Census failed to produce "Job Requisition" forms for many of the Job Selection Records for Ms. Rickett-Samuels. Rather, it produced a screen shot of "BOC Job Openings." *See* Ex. 136 (Selection Records for Rickett-Samuels) USA50715–17; Ex. 137 (Selection Records for Rickett-Samuels) USA50724–29; Ex. 138 (Selection Records for Rickett-Samuels) USA50730–31; Ex. 139 (Selection Records for Rickett-Samuels) USA50732–33; Ex. 140 (Selection Records for Rickett-Samuels) USA50734–35; Ex. 141 (Selection Records for Rickett-Samuels) USA50736–41; Ex. 142 (Selection Records for Rickett-Samuels) USA50847–48; Ex. 143 (Selection Records for Rickett-Samuels) USA50863–65; Ex. 144 (Selection Records for Rickett-Samuels) USA50866–71; Ex. 160 (BOC Job Opening Info for Rickett-Samuels) USA62228-32. *See* supra 6, n.6.

Plaintiff Chynell Scott is an African American resident of Philadelphia, Pennsylvania. Ex. 41 (Scott Tr.) 4:15–19; 14:23–24. She worked for Census during the 2000 decennial and in 2004 performing address verification and doing door-to-door interviews. *Id.* 52:10–57:23. Ms. Scott applied to Census around December 11, 2009. Ex. 145 (Scott Application) at USA 1569. Ms. Scott was willing to work in an office or in the field, and had computer experience. *Id.* at 1568. She testified that her score was approximately 100 percent. Ex. 41 (Scott Tr.) 80:4–15. Census produced no record of her score. It sent Ms. Scott a 30-day letter on December 16, 2009. *Id.* 96:15–97:6; Ex. 44 (Scott 30-day letter). She mailed Census a letter and the Common Pleas Court Case Summary. Ex. 41 (Scott Tr.) 98:22–99:6; 103:9–15; Ex. 42 (Scott Criminal Records). On February 3, 2010, it rejected her based on her criminal record. Ex. 41 (Scott Tr.) 150:12–151:11; Ex. 146 (Rejection Letter) USA1371 ("We have received and reviewed the information you sent regarding your previous arrests and the dispositions of these charges. However, based on the nature of the facts disclosed we find you to be ineligible for this temporary position.").

Census claims that Ms. Scott would not have appeared on any selection records because she had provided false information in her application. Def.'s Br. at 11–12. First, Census did not disqualify Ms. Scott based on an alleged misstatement on her application; it sent her a 30-day letter, processed her response and disqualified her based on that response. *Smith v. Tuckahoe Union Free Sch. Dist.,* No. 03 Civ. 7951, 2009 WL 3170302, at *11–*12, at *39 (S.D.N.Y. Sept. 30, 2009) (finding issue of fact whether employer would have fired employee for false information on job application despite affidavits from employer asserting that the employee would never have been hired or would have been fired once it was discovered that his prior employer asked him to resign); *Quinby v. WestLB AG,* No. 04 Civ. 7406, 2007 WL 1153994, at *16, at *47–*48 (S.D.N.Y. Apr. 19, 2007) (dispute of fact whether employer had policy by which it would have terminated employee for misstatement on job application, even where application warned that "falsified statements on this application shall be grounds for dismissal"); *Flores v. Buy Buy Baby, Inc.*, 118 F.Supp.2d 425, 432–33 (S.D.N.Y. 2000) (dispute of fact whether defendant would have fired plaintiff solely on basis of false application). Second, Ms. Scott did not provide false information. As she testified, Ms. Scott did not disclose her guilty plea to a summary offense because she was told she merely had to pay a fine. *Id.* 89:8–24; 133:8–22. In fact, the judge explained to her that all charges had been reduced to a fine and told Scott that it was equivalent to putting the trash out on the wrong side of the street. *Id.* 135:20–136:1. Thus, her application was not false, as Census contends, but a reasonable, good-faith interpretation of what the application sought.

ARGUMENT

I. As This Court Has Already Held, Standing Is Measured on the Date of Filing.

Out of the gate, Census ignores a jurisdictional principle already decided by this Court: standing is determined by a snapshot of the justiciability of each Plaintiff's claim at the time of filing. *Johnson*, 851 F. Supp. 2d at 699; *see also Comer v. Cisneros*, 37 F.3d 775, 787 (2d Cir. 1994) ("These constitutional minima are assessed as of the time the lawsuit is brought."). The proper inquiry for standing is whether Plaintiffs alleged an injury caused by Census for which the Court could grant relief on the day the complaint was filed. As demonstrated above, Census denied each of the Plaintiffs an opportunity to compete for a temporary position because of its criminal background check process. When this case was filed in August 2010, Plaintiffs at that time could have been hired to positions and recovered back pay. When their claims are viewed in the 2010 timeframe, therefore, Plaintiffs have standing.

II. Plaintiffs Have Standing Because They Were Qualified for the Job, and Were Exposed to Racial Discrimination in the Hiring Process in Violation of Title VII.

A. Standards For Statutory Standing Under Title VII Are Very Generous.

In cases that analyze statutory rights such as Title VII, the Supreme Court establishes two standing propositions. *First*, Congress's creation of a private cause of action to enforce a statutory provision (such as 42 U.S.C. § 2000e-5(f) and (g) here) implies that Congress intended the enforceable provision to create a statutory right. *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (injury required by Article III can exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing") (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, n. 3 (1973)); *accord Fulton v. Goord*, 591 F.3d 37, 41 (2d Cir. 2009) (decided under the ADA and Rehabilitation Act). *Second*, the violation of a statutory right is usually a sufficient injury-in-fact to confer standing. *Warth*, 422 U.S. at 500 ("Essentially, the standing question in such cases is

whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.").

Title VII permits a "person claiming to be aggrieved" by an unlawful employment practice to pursue a claim. 42 U.S.C. § 2000e–5(b), (f)(1)(A). Title VII standing includes anyone with an interest arguably sought to be protected by statutes. *Thompson v. North Am. Stainless, LP*, 131 S. Ct. 863 (2011). *Thompson* held that Title VII follows the "zone of interests" standard that applies under the Administrative Procedures Act (APA). *Id*. at 870. While not representing the full breadth of Article III,[7] the zone-of-interests standard in Title VII still sets a "low bar." *Howard R.L. Cook & Tommy Shaw Found. ex rel. Black Emps. of Library of Cong., Inc. v. Billington*, 737 F.3d 767, 771 (D.C. Cir. 2013). A Title VII plaintiff satisfies the requirement unless her "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Thompson*, 131 S. Ct. at 870 (*quoting Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399–400 (1987)). As the Supreme Court observes, the zone-of-interests standard "is not meant to be especially demanding." *Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (*quoting Clarke,* 479 U.S. at 399).

A key interest vindicated by Title VII is the employee's right to be free from racially discriminatory classifications. As the Supreme Court held in its germinal disparate-impact case, *Griggs v. Duke Power Co*., 401 U.S. 424 (1971), Congress's primary objective in enacting Title VII was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id*. at 429–30. Congress crafted Title VII's remedies as a "spur or catalyst" to cause employers "to

[7] Article III standing is even less rigorous than Title VII standing. *Thompson*, 131 S. Ct. at 869. If plaintiffs fall within the "zone-of-interests," they perforce meet Article III standing.

self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of discrimination. *Id*. at 417–18; *see Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976) (Title VII provides "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring").

The injury in a Title VII hiring case thus is *not* solely losing out on a job and wages, as Census would have it, but exposure to a discriminatory classification. Title VII confers on applicants a right to be free from discrimination on the basis of race with respect to "limit[ing] … or classify[ing] … applicants for employment … in any way which would deprive or tend to deprive any individual of employment opportunities." 42 U.S.C. § 2000e-2(a)(2). The invasion of Plaintiffs' Title VII rights occurred when they first encountered racial barriers to employment. *Id.* When they hit that barrier, they "suffered injury in precisely the form the statute was intended to guard against." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982) (Fair Housing Act). Thus, a plaintiff may be injured when a "discriminatory classification prevent[s] the plaintiff from competing on an equal footing." *Northeastern Fla. Chapter, Assoc. Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 667 (1993) (holding that when the government erects a barrier, in order to establish standing, a group seeking to challenge the barrier need not allege they would have attained the benefit but for the barrier).[8]

[8] *See also Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 281 (1978) (holding that an applicant need not show that he would have attained the seat in admitted class in order to have standing); *Wooden v. Bd. of Regents of the Univ. Sys. of Ga*., 247 F.3d 1262, 1280 (11th Cir. 2001) (injury in race discrimination case for admission to university is not the denial of the sought-after benefit, but rather direct exposure to unequal treatment); *Alexander v. Estepp*, 95 F.3d 312, 315 n. 5 (4th Cir. 1996) ("all the plaintiffs had standing, including those who would not have been hired even in the absence of the department's affirmative action program"). And even if the same-decision defense did apply to this case after the 1991 act amendments, such a defense does not *eliminate*, but only *limits* remedies (which plaintiffs would still have standing to

The Court in *Connecticut v. Teal*, 457 U.S. 440, 448 (1982), cemented this principle:

> A disparate-impact claim reflects the language of 703(a)(2) and Congress' basic objectives in enacting that statute: "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." . . . When an employer uses a non-job-related barrier in order to deny a minority or woman applicant employment or promotion, and that barrier has a significant adverse effect on minorities or women, then the applicant has been deprived of an employment opportunity "because of . . . race, color, religion, sex, or national origin."

Census would distinguish *Teal* on the narrow ground that Connecticut "made no showing that the plaintiffs were ineligible for promotion on the basis of any criteria independent of the discriminatory test." Def.'s Br. at 21–22. That distinction, however, ignores the case's express ruling. *Teal* described what constitutes an "injury-in-fact" in a Title VII case (encountering a barrier to promotion), and Plaintiffs meet that test. Whatever else might have occurred thereafter at most may go to liability and remedy; but does *not* dislodge Plaintiffs from standing.

Thus, as the Seventh Circuit held in *Kyles v. J.K. Guardian Sec. Services, Inc*., 222 F.3d 289 (7th Cir. 2000), employment testers—individuals who apply in black-white pairs to investigate racial discrimination—have standing under Title VII to challenge hiring practices even if they were not actually seeking employment (and thus would not have been hired):

> When Congress made it unlawful for an employer "to limit, segregate, or classify his employees or applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee . . . because of such individual's race . . . ," 42 U.S.C. § 2000e–2(a)(2), it created a broad substantive right that extends far beyond the simple refusal or failure to hire. Cf. § 2000e–2(a) (1). When a job applicant is not considered for a job simply because she is African–American, she has been limited, segregated or classified in a way that would tend to deprive not only her,

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pursue). *See* 42 U.S.C. § 2000e-5(g)(2)(B)(i) (should employer demonstrate that it would have taken the same action in the absence of the impermissible motivating factor, employee may still seek "declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs").

> but any other individual who happens to be a person of color, of employment opportunities. In other words, she suffers an injury "in precisely the form the statute was intended to guard against," just as she would if, as a housing tester, she were falsely informed that a vacant apartment was unavailable. She therefore has standing to sue, even if she has not been harmed apart from the statutory violation—even if, for example, she was not genuinely interested in the job she applied for and in that sense was not harmed by the employer's refusal to hire her.

Id. at 298 (citations omitted). Of course, in this case the Plaintiffs are all *bona fide* applicants and so, if anything, possess an even greater claim to personal standing than the testers in *Kyles*.

The detachment of Census's argument from Title VII is manifest: the large majority of the cases it cites are *not* employment discrimination cases. And even among the Title VII cases cited, few support its standing argument. For instance, Census (Def.'s Br. at 15, 19) cites *Tabor v. Hilti, Inc*., 703 F.3d 1206, 1227 (10th Cir. 2013); *Gilty v. Vill. of Oak Park*, 919 F.2d 1247, 1248–49 (7th Cir. 1990); and *Carpenter v. Bd. of Regents of Univ. of Wisconsin Sys*., 728 F.2d 911, 915 (7th Cir. 1984), yet these were not jurisdictional/standing cases, but rather appeals from summary judgment on the merits, so the language cited by Census is inapposite. That plaintiffs in each of those cases did not prove their claims on the merits did not mean that they lacked standing. Three other cases cited by Census likewise had nothing to do with standing to bring a hiring claim. Def.'s Br. at 16. *Aurecchione v. Schoolman Transp. Sys., Inc*., 426 F.3d 635, 638 (2d Cir. 2005), addresses whether there could be a stand-alone Title VII claim for attorney's fees, which the circuit held that there is. *Robinson v. Overseas Military Sales Corp*., 21 F.3d 502, 507 (2d Cir. 1994), concerned *personal* jurisdiction rather than standing. Finally, *Luckett v. Bure*, 290 F.3d 493, 496–97 (2d Cir. 2002), addressed the *Feres* immunity doctrine, and so is immaterial.

Thus Plaintiffs, who were screened out of the applicant pool, suffered an injury-in-fact.

B. Plaintiffs Need Only Show That They Met the Job Requirements, Not That They Would Have Been Hired.

For jurisdictional purposes under Title VII, there is a marked difference between a job candidate who is *un*qualified for a job—in the sense of not meeting the basic requirements—and one who is qualified but *in retrospect* would not have made the final cut. Only the former status, meeting the basic job requirements, bears on standing. Whether an applicant would have actually gotten the job implicates liability or relief, but not whether the applicant has standing. All of the Plaintiffs in this case, as demonstrated above, have shown that they met this standard.

For Title VII standing purposes, Plaintiffs need only show that they met the *basic job requirements* for the job, as plaintiffs have established above. This standard is articulated in the very cases cited by Census. Def.'s Br. at 2, 17–8. *Breiner v. Nev. Dep't of Corr*., 610 F.3d 1202, 1207 (9th Cir. 2010) ("We conclude that besides the female-only restriction, there was no other qualification standard that prevented [plaintiff] from applying for the job. He accordingly satisfies the injury, causation, and redressability prongs of *Lujan*, and therefore has standing.") (citation and quotation marks omitted); *Santana v. City and Cnty. of Denver,* 488 F.3d 860, 866 (10th Cir. 2007) (plaintiff "met the minimum qualifications necessary to be considered for promotion to the open position of captain"); *Bates v. United Parcel Serv., Inc*., 465 F.3d 1069, 1078 (9th Cir. 2006) ("[d]etermining whether [plaintiff] was 'injured' requires examining whether [he] was 'qualified' for the driving position he desired in the sense that, aside from the DOT standard he is challenging and all prerequisites connected to that standard, he meets the basic job requirements for the desired position"), *aff'd on reh'g en banc*, 511 F.3d 974, 986 (9th Cir. 2007); *Melendez v. Ill. Bell Tel. Co*., 79 F.3d 661, 668 (7th Cir.1996) ("standing principles . . . require an individual Title VII plaintiff alleging disparate impact to establish that he was qualified for the position sought"); *Coe v. Yellow Freight Sys. Inc*., 646 F.2d 444, 451 (10th Cir.

1981) (on disparate impact claim, plaintiffs must show that "they were qualified for the positions that they sought"); *Jones v. Mukasey*, 565 F. Supp. 2d 68, 81 (D.D.C. 2008) (plaintiff produced evidence that he was as qualified as white applicants who were hired); *King v. Stanislaus Consol. Fire Prot. Dist*., 985 F. Supp. 1228, 1234 (E.D. Cal. 1997) (plaintiff must "establish that he was eligible for the position sought"). *See also Phillips v. Cohen*, 400 F.3d 388, 397 (6th Cir. 2005) (proof that plaintiff "was qualified for the opportunity sought and was denied it and therefore" established standing). Because plaintiffs met the basic qualifications for the positions they sought, other than the criminal-background check itself, they have standing in this case. It is thus unnecessary to consider for standing purposes whether Plaintiffs would have in fact been hired.

C. Plaintiffs' Injuries Are Redressable with Back Pay and Equitable Relief.

Census's motion also ignores the remedial framework for disparate impact cases. Back pay is a presumptive remedy under Title VII. *See Albermarle Paper Co. v. Moody,* 422 U.S. 405, 421 (1975) (back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination); *EEOC v. Joint Apprenticeship Comm. of Joint Indu. Bd. of Elec. Indus.*, 186 F.3d 110, 122 (2d Cir. 1999) ("back pay is the rule rather than the exception"). Our Circuit holds that, to establish a *prima facie* entitlement to back pay, plaintiffs show that (1) they applied for the job and (2) were not hired. *Ass'n Against Discrimination in Emp't, Inc.*, 647 F.2d at 289; *Cohen v. West Haven Bd. of Police Comm'rs*, 638 F.2d 496, 502 (2d Cir. 1980). Lost pay is redressable. *See, e.g., Montone v. Jersey City*, 709 F.3d 181, 197–98 (3d Cir. 2013). Because each Plaintiff meets this basic threshold here, all are presumptively entitled to back pay.

Even if Census were correct that one or more Plaintiffs would not have been hired, that does not foreclose their entitlement to participate in economic relief. Should the class prevail in establishing liability, *all* members of the class—not just those who would have been hired—may be awarded back pay. Because it is often difficult to re-create which candidates might have been hired, our circuit provides that *pro rata* amounts may be awarded instead to the entire class. *See, e.g., United States v. City of New York*, 847 F. Supp. 2d 395, 408 (E.D.N.Y. 2012) (*pro rata* class awards allowed "where the facts are not so clear as to allow a determination as to which class members should be awarded backpay"); *Easterling v. Conn. Dept. of Corr.*, 278 F.R.D. 41, 48 (D. Conn. 2011) ("class-wide calculation and pro rata distribution of back pay is appropriate" where number of qualified applicants exceeds openings and identifying specific class members who would have been hired "would drag the court into a quagmire of hypothetical judgments"). Thus, Plaintiffs have a financial interest in the back-pay remedy whether or not they would have been hired, because they could share equally in the *pro rata* distribution.

Census also admits (at 23 n.6) that it lost redressability before this Court in the March 3, 2012 order (ECF No. 101, at 13), which held that Plaintiffs have standing to seek prospective relief: "Because the allegedly unlawful polices complained of in the Second Amended Complaint were ongoing at the time the Plaintiffs filed their Original Complaint, they have standing to seek injunctive relief, and their claims seeking equitable relief should be dismissed only if they are moot." Census offers no legal or factual basis for the Court to revisit its measured decision.

If anything, since that Order, another court in this District confirmed that the failure to be hired because of Census's criminal-background check is redressable under Title VII by additional equitable relief, *i.e.*, correcting the files of applicants who were denied employment. *Robinson v. Blank*, No. 11 Civ. 2480 (PAC) (DF), 2013 WL 2156040 at *5–6 (S.D.N.Y. May 20,

2013). Immediately in the wake of losing a similar Rule 12(b)(1) motion to dismiss in *Robinson*, Census served and Robinson accepted a full offer of judgment that included just such relief: "The Government shall adjust Plaintiff's employment record to show that Plaintiff was not terminated from employment by the U.S. Census Bureau on May 7, 2010, but instead remained employ[ed] by the U.S. Census Bureau until June 27, 2010." (*Robinson v. Blank*, No. 11 Civ. 2480(PAC) (DF), ECF No. 65). Such relief would be possible for the Plaintiffs in this case who were also denied employment and for whom Census maintains a record of rejection based on its criminal background check. This could be changed in each Plaintiff's file, as for Robinson.

Such relief would also be meaningful to the Plaintiffs and class in the future. Applicants with prior Census experience have a leg-up in the re-application process, as revealed by the current application on-line that asks, at No. 18, "Have you ever worked on previous census operations?" Ex. 155 (*Census Jobs!*, United States Census Bureau (Form BC-170B (11-27-2012))), *available at* http://www.census.gov/regions/specialcensus/pdf/BC-170B.pdf (last visited on Feb. 6, 2014). Plaintiffs are all disadvantaged by the unvalidated, discriminatory criminal background check process that blocked them from the opportunity to work for Census in 2010, and equitably correcting those records would help them in any future Census hiring process.

III. Census Fails to Show That Plaintiffs Would Not Have Been Hired.

Even if it mattered for standing purposes whether Plaintiffs would have eventually been hired, this cannot be resolved in Census's favor on the current record. Plaintiffs have furnished a person-by-person account (Statement of Facts, § II, *supra*) presenting a genuine dispute of fact about this question. In stark contrast, Census makes broad statements about whether the Plaintiffs would have been hired based on hearsay statements and a woefully incomplete record.

A. Plaintiffs Were Deprived the Opportunity to Retake the Qualifying Test.

In its effort to repack the egg, by hypothetically recasting the 2010 hiring events, Census shortcuts other possibilities that would have *benefitted* Plaintiffs. For one, one cannot know what would have happened to any Plaintiff's score if they had eventually been allowed to advance. As plaintiff Maurice Robinson alleged in his individual case challenging the same Census policy, "in February 2010, Plaintiff took a qualifying test to be hired by the Census Bureau as an 'Enumerator,' and, although he passed the test, he took it again in March 2010 to try to improve his score, and, the second time, he did 'very well.'" *Robinson v. Locke*, No. 11 Civ. 02480 (PAC) (DF), 2012 WL 1029112, at *1 (S.D.N.Y. Feb. 1, 2012). Plaintiffs in this case, too, might have improved their rank as Mr. Robinson alleged in his case. (Indeed, Plaintiff Scotty Desphy did take the exam again before she was kicked from the process, in February 2010, and increased her score to 83. Ex. 128 (Desphy DAPPS record) at USA44239.) Once cut from the applicant pool, Plaintiffs had no reason or opportunity to retake the test. *Cf. Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365–66 (1977) ("When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.").

B. In Any Event, Use of Rank-Order Scores Is Itself a Suspect Practice.

Also, Census should not be permitted to exploit *another* unvalidated and likewise racially discriminatory practice—the use of rank-order for hiring based on test scores—to deprive Plaintiffs of a remedy. Census's own expert Dr. Bernard Siskin testified that he believed Census only used test scores as a minimum qualification and conceded that "you can have an adverse impact from a test based on the nominal pass/fail . . . [and] an adverse impact on a test based on its rank ordering effective pass cut score." *Id.* at 184:7–15. Census hangs its argument on the

way in which it implemented the selection process in 2010, dependent on rank-ordering test scores. Courts, though, have been uniform in their searching disapproval of rank-ordering, as lacking job-relatedness and validity. Our Circuit recognizes there is often no valid reason why an applicant who scored, for example, an "85" will be better qualified than one netting an "84," which represents a mere statistical hiccup in the measurement of job fitness.

As the Second Circuit held in its foundational case on this topic:

> The inevitable error of measurement for a test consisting of 100 items . . . has significance in assessing the use of rank-ordering. At the passing score of 94, one standard deviation is equivalent to a range between 2.4 points above and below 94. The range narrows as actual scores approach 100. At 97, for example, the range is plus or minus 1.7. Thus, to have 95% confidence that an applicant's grade has statistical reliability, grades within two standard deviations of his grade should theoretically be treated as equivalent to his grade, for in fact there is a 95% likelihood that each applicant at each grade would score within such a range on successive takings of equivalent tests. This means that the range in which a satisfactory confidence level is achieved for an applicant who scores 94 lies between 89 and 99, and even for one who scored 97, the range extends from 94 to 100. Care must be taken not to over-emphasize the significance of the error of measurement. Though grounded on sound principles of statistics, it remains an estimate, and it need not prevent the usual use of test scores that do not have a disparate racial impact. At a minimum, however, it should serve to illustrate the risks of making hiring decisions turn on one-point increments at scores where even a single standard deviation covers a raw score range greater than one point.

Guardians Ass'n of New York City Police Dep't, Inc. v. Civil Service Comm'n, 630 F.2d 79, 102-03 (2d Cir.1980); *see also United States v. City of New York*, 637 F. Supp. 2d 77, 128-32 (E.D.N.Y. 2009) (exams and rank-ordering of results disproportionately impacted black and Hispanic applicants, and that the City had not satisfied its burden of demonstrating that the employment procedures were job-related or consistent with business necessity).

Census should not be allowed to skirt adjudication (let alone liability) on this claim by asserting that it would have reached the "same decision" because of another suspect criterion already being challenged under Title VII, before that practice is itself administratively exhausted

and litigated. Indeed, the Department of Justice itself is affirmatively challenging the use of a rank-order test hiring process because of its race impact in the *Vulcan Society* case in the Eastern District of New York. *See* Ex. 125 (DOJ Mot. for Partial Summ. J. in *Vulcan Society*) at 16 (relying on Dr. Bernard R. Siskin's analysis of the examination score each candidate would have had to receive in order to rank high enough to "be reached for appointment," the DOJ argued that this type of rank scoring was sufficient to establish a prima facie case of disparate impact).

IV. Census's Argument Is Also Barred by Reasoning of *Nassar* and *McKennon*.

Census's arguments in support of its motion to dismiss are simply misplaced affirmative defenses, applicable (if at all) only at the remedial phase of a Title VII case: "same decision" and "after-acquired evidence." At the threshold, the Court should foreclose Census from asserting these defenses at all, because neither is alleged in its answer, Ex. 156 (Def.'s Answer to Second Amended Class Action Complaint), ECF No. 129, and their belated assertion poses prejudicial delay to plaintiffs, coming after the close of deposition discovery and on the eve of the deadline for all fact discovery. *See, e.g., Evans v. Syracuse City Sch. Dist.*, 704 F.2d 44, 47 (2d Cir. 1983) (denying motion to amend answer with new defense nearly three years after answer was served).

The same-decision defense runs headlong into the reasoning in the Supreme Court's recent decision in *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013). This defense, that the employee would not have been hired anyway, arose originally from the plurality decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The ensuing Civil Rights Act of 1991 codified this defense, but notably limited its scope to status-based claims of disparate treatment. Congress added the defense by way of 42 U.S.C. § 2000e–5(g), which provides that "[o]n a claim in which an individual proves a violation under section 2000e–2(m)" an employer may avoid monetary relief and reinstatement if it "demonstrates that the respondent would have taken

the same action in the absence of the impermissible motivating factor." 42 U.S.C. § 2000e-5(g)(2)(B). The *Nassar* Court found this reference to claims under subsection 2000e–2(m) significant. "When Congress wrote the motivating factor provision in 1991, it chose to insert it as a subsection within § 2000e–2, which contains Title VII's ban on status-based discrimination, § 2000e–2(a) to (d), (l), and says nothing about retaliation." *Nassar*, 133 S. Ct. at 2529. This claim, though, is brought under 42 U.S.C. § 2000e–2(*k*), the disparate impact section. As with retaliation under Title VII, the codified defense nowhere cross-references disparate impact.[9]

Second, as to all Plaintiffs (particularly Chynell Scott, who supposedly supplied false information in the application),[10] *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995), is dispositive on the materiality of after-acquired evidence. Because no Plaintiff was actually turned down for the reasons asserted in Census's fact section, the argument reduces to the suggestion that *had these facts been known at the time*, the applicants would not have been hired. Yet "[t]he employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason." *Id.* at 360. An

[9] To the extent that *Ass'n Against Discrimination in Emp't, Inc. v. City of Bridgeport*, 647 F.2d 256, 289 (2d Cir. 1981), or *Cohen v. West Haven Bd. of Police Comm'rs*, 638 F.2d 496, 502 (2d Cir. 1980), suggest—as Census argues (Def.'s Br. at 25-26)—that same-decision may be a defense against back pay, both cases predate *Price Waterhouse*, the 1991 Act and *Nassar*, and concern only the award of a remedy, not whether the employee has standing.

[10] Also, whether Chynell Scott provided false information in her application should be weighed in her favor at this stage. As noted above, the judge who sentenced Ms. Scott explained to her that all charges had been reduced to a fine and the judge told Scott that it was equivalent to putting the trash out on the wrong side of the street. Accordingly, her application was not false, as Census contends, but a reasonable, good-faith interpretation of what the application was soliciting. *See, e.g., Kanhoye v. Altana Inc.*, 686 F. Supp. 2d 199, 212-13 (E.D.N.Y. 2009) (finding question of whether incorrect information in job application would have disqualified applicant was a factual question not fit for resolution at summary judgment stage).

after-acquired evidence defense, by its very definition, cannot be based on facts that were known at the time. *Weber v. FujiFilm Med. Sys. U.S.A., Inc*., 933 F. Supp. 2d 285, 297 (D. Conn. 2013).

The most that Census could argue, had the defense been timely raised, is that this evidence might limit the back pay from the monetary remedy from the date of the adverse action from the date the new information was discovered. *Altana Inc.*, 686 F. Supp. 2d at 212.[11] It would not bar the claim altogether. *Blake-McIntosh v. Cadbury Beverages, Inc*., No. 96 Civ. 2554, 1999 WL 643661, at *16 (D. Conn. Aug. 10, 1999) ("The doctrine does not function as a bar to the assertion of an employment discrimination claim."). While Census does not disclose when it discovered the facts it cites in its motion, it was certainly during proceedings in this case after temporary hiring had ended; it would not affect the back pay period and is, therefore, irrelevant.

CONCLUSION

Plaintiffs were injured when they failed a criminal-background check screen which they have shown (in their motion for class certification) had a statistically discriminatory impact on the basis of race, and that foreclosed them from further consideration for the temporary jobs for which they applied. In the words of the Supreme Court in *Teal*, "Title VII guarantees these individual black respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria." *Teal*, 457 U.S. at 441 (emphasis in original). Once failing to pass through the discriminatory test eliminated them from an opportunity to compete further, these Plaintiffs

[11] After-acquired evidence is an affirmative defense. *See Kanhoye*, 686 F.Supp.2d at 212; *see also Quinby v. WestLB AG*, No. 04 Civ. 7406, 2007 WL 1153994, at * 16 (S.D.N.Y. Apr. 19, 2007). "An affirmative defense should be pled 'at the earliest possible moment' after it becomes available, even if its availability was unclear." *Hamilton v. City of New York*, No. 06 Civ. 15405, 2011 WL 1842990, at *2 (S.D.N.Y. May 10, 2011). Census did not produce the selection records underlying much of its motion until June 21, 2013, after non-expert deposition discovery had closed, only a week before the due date for Plaintiffs' class motion, and years after the hiring for the positions in question was completed.

incurred a cognizable injury and thereby had standing to sue in order to be compensated for that injury when they filed this case. Thus, the Court should deny Census's motion to dismiss.

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