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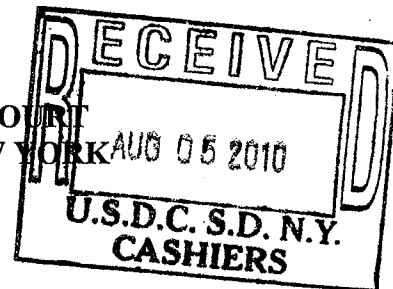
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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**



EUGENE JOHNSON, EVELYN  
HOUSER, SANDRA ANDERSON,  
ANTHONY GONZALEZ, IGNACIO  
RIESCO, PRECIOUS DANIELS, and  
FELICIA RICKETT-SAMUELS  
on behalf of themselves and all others  
similarly situated,

Plaintiffs,

v.

GARY LOCKE, Secretary, United States  
Department of Commerce,

Defendant.

10-cv-3105 (FM)

**FIRST AMENDED CLASS  
ACTION COMPLAINT**

Individual and Representative Plaintiffs Eugene Johnson, Evelyn Houser, Sandra Anderson, Anthony Gonzalez, Ignacio Riesco, Precious Daniels, and Felicia Rickett-Samuels (“Plaintiffs”), individually and on behalf of all others similarly situated, allege, upon personal knowledge as to themselves and upon information and belief as to other matters, as follows:

### **SUMMARY OF THE CLAIM**

1. Over the past two years, the United States Census Bureau (“Census”) has engaged in the temporary hiring of over one million temporary workers to conduct the 2010 census in a manner which has discriminated against over one hundred thousand African Americans, Latinos, and Native Americans. Near the outset of this hiring program, the United States Equal Employment Opportunity Commission (“EEOC”) informed Census officials that the method of screening out applicants could well have a racially discriminatory impact in violation of Title VII of the Civil Rights Act, but Census failed to revise its screening procedures to rectify the problem.

2. Approximately 3.8 million people have applied for temporary work with Census to help complete the 2010 decennial count. As a precondition of employment, Census has required nearly all job applicants who have ever been arrested to produce within 30 days the “official court documentation” for any and all of their arrests—regardless of whether a conviction resulted, the nature of the arrest, its relationship to the job, or when it took place. This requirement eliminated 93% of these applicants – roughly 700,000 people – from being considered for employment during the 2010 census. Of the small percentage who were able to find and deliver this documentation on time, Census next applied an arbitrary and irrational screen whereby even those who had never been convicted, those who had their records officially expunged, and those with very minor and old offenses were excluded from this civic undertaking.

Indeed, less than 5% of applicants required to submit official court documentation ultimately were deemed eligible for hire. Moreover, numerous applicants who satisfied both the 30-day letter requirement and eligibility screen nonetheless were denied employment because virtually all available positions had been filled during the attendant delay. Because each of these employment practices, individually and collectively, has significant adverse impact upon African Americans, Latinos, and Native Americans (who are arrested and incarcerated at rates substantially higher than whites), and because they are neither job-related nor consistent with business necessity, they are unlawful under Title VII of the Civil Rights Act.

### **BACKGROUND OF THE LITIGATION**

3. Plaintiffs Eugene Johnson and Evelyn Houser filed this class action on April 13, 2010. The Complaint challenged Census' requirement that applicants with any history of being arrested must produce their "official court documentation." At that time, Plaintiffs did not know the scale of exclusion caused by that requirement. Plaintiffs also did not know the actual test used by Census to analyze applicants' criminal background for the purpose of making final suitability determinations. Indeed, Census had kept that information a closely guarded secret for over a decade, refusing to tell applicants, the general public, or even Congress, which crimes in particular mandated exclusion or any other factors involved in the determination.

4. Through this litigation, Plaintiffs now know that the exclusionary effect of the "official court documentation" requirement is enormous, and that by excluding 93% of applicants with a record of almost any arrest, this single device, combined with the application of Census' criminal-history screen and processing-time delay, operated very nearly as a "no arrest or conviction history allowed" policy for the 2010 decennial census.

5. This process, and the consequent wide-scale exclusion of applicants with criminal background, including nothing more than a single arrest without prosecution, is not new.

Plaintiffs have learned that when Census hired temporary workers for the 2000 decennial census, it used the same background screening process, with the same massive exclusionary effect, as for the 2010 census. Following the 2000 census, and again this year, Census has failed to analyze the reasons for this exclusion and the racial and ethnic impact of its practices.

6. This litigation also has forced Census, for the first time ever, to divulge its criminal background screening criteria. As discussed further below, the records and testimony produced pursuant to court order reveal that the criteria are arbitrarily drawn and dramatically over-inclusive, automatically excluding many people who present no threat to the public or to the integrity of the process. In the limited areas where the criteria allow for discretion, Census officials inconsistently apply *ad hoc* standards, unguided by professional principles or social science, and based largely on gut instinct.

7. Plaintiffs also have learned that in a detailed letter on July 10, 2009, the EEOC criticized Census for the racially discriminatory impact of its criminal background policy, and notified Defendant that its practice may “run afoul” of Title VII of the Civil Rights Act. In addition, Plaintiffs have learned that other individuals filed formal Equal Employment Opportunity (“EEO”) complaints with the Department of Commerce, putting Defendant on notice of class-wide discrimination resulting from Census’ criminal background policy as early as October 2008.

### **FACTUAL BACKGROUND**

8. The United States Constitution requires the federal government to conduct a census of the entire population every ten years. The work conducted by Census – which has a \$14 billion budget for the 2010 count – forms a cornerstone of our democracy, serving as the basis for determining representation in the House of Representatives, informing the drawing of voting districts, and allocating substantial amounts of federal funding. It is imperative for all individuals

and communities that the work of the Census be done accurately and in a manner that is fair and free of discrimination.

9. This imperative must apply not only to the counting work at the core of Census' mission, but also to the way in which Census hires its workforce. Had its hiring been done appropriately, Census would have identified the most qualified workers and screened out those who posed a legitimate risk to public safety and the integrity of the census. Unfortunately, it did not do so.

**A. The Hiring Process**

10. Temporary employment for the 2010 decennial census involves two types of positions. Census Takers (also known as Enumerators), Census Crew Leaders, and Recruiting Assistants are responsible for conducting the door-to-door count, and interact directly with the public. Others, including Clerks, are engaged in office work, and have no personal interaction with the public. Despite the differences between these two types of positions with respect to public interaction, Census subjected all applicants to the same criminal background check process and standards.

11. Each applicant took a written test and completed an application, which included a question as to whether the individual had been convicted of a crime within the past 10 years. Census then ran each applicant's name and other personal identifiers through the Federal Bureau of Investigation ("FBI") Criminal Justice Information Services Division's Name Index (the "FBI database"), which searches for all arrests, regardless of whether a conviction resulted, and has no time limitation (including juvenile arrests). If an arrest record appeared, Census then sent a form letter to nearly all applicants for whom an arrest record appeared, requiring that the applicants produce the "official court documentation" of all arrests to remain eligible for employment, even where an individual's record showed no disqualifying criminal activity on its face. The form

letter gave applicants less than 30 days after receiving the notification (the “30-day letter”) to fully comply. To those few who managed to timely provide “official court documentation,” Census applied an “adjudication” screen to eliminate applicants it considered unsuitable for employment. The process of satisfying the requirements of the 30-day letter and then being subjected to the adjudication screen took months to complete, and many applicants simply never heard any response from Census whatsoever. For many otherwise qualified applicants, the attendant time delay was tantamount to a denial of employment.

12. There are five basic categories of applicants unfairly excluded from temporary employment in the 2010 census due to Census’s arbitrary screening process and criteria: (1) those deterred by or unable to comply with the 30-day letter; (2) those who were able to comply with the 30-day letter process, but have never received a response from Census; (3) those who proceeded to the “adjudication” phase, but were improperly rejected based on their criminal history; (4) those who passed the adjudication screen but were deemed eligible too late in the process to actually get hired; and (5) those who were hired but then terminated due to application of the “adjudication” criteria.

### **1. The FBI Background Check**

13. The FBI database from which Census drew its arrest and criminal records information is enormous. Law enforcement agencies across the United States arrest approximately 14 million people per year, transmitting fingerprint records for those charged with crimes to the FBI database. Over 70 million people in the country, well over 20% of the adult population, have a criminal record. Virtually all of these arrests remain in the FBI database forever.

14. As Census knows well, and as reported by the U.S. Department of Justice’s Bureau of Justice Statistics, the FBI database is *missing* final disposition information for roughly *half* of all of its arrest records. This has a clear negative effect for the millions of people whose entire

criminal history consists of having been arrested and fingerprinted, but never convicted.<sup>1</sup> These quick releases may occur when the police pick up the wrong person, lack evidence to prosecute, or determine that someone made a false crime report. In still other cases, upon review of the facts the district attorney declines to prosecute cases forwarded them by the police. Indeed, the total number of prosecutorial declinations on an annual basis is over half a million nationwide. Many people will have been over-charged, only to plead to or be found guilty of a lesser (sometimes non-criminal) offense. Others in the FBI database have actually gone to trial and been found not guilty by a jury of their peers, yet even these individuals may have no record of a disposition.

## 2. The 30-Day Letter

15. Nearly all applicants whose name matched a record in the FBI database were sent the “30-day letter”, whether or not they applied to work in a position with direct public contact. The letter states, in relevant part:

- A. If you do not dispute the identity of the arrest record in question, provide OFFICIAL COURT documentation on any and all arrest(s) and/or conviction(s) in your past;
- B. If you wish to dispute the identity of the arrest record in question, you may provide a set of original fingerprints... If you send a fingerprint card that shows a match with the criminal history record in question, and you did not provide the requested court documentation, you will be made ineligible for hire...

For your application to remain active, you must return all documents within 30 days of the date appearing above.

(A copy of the letter is attached as Exhibit A).

16. On its face, the 30-day letter has two critical flaws: (a) it screened applicants who may have had arrests but no convictions, and (b) it required documentation, at a significant cost of money and time to the applicant, of “any and all” *arrests*, even though Census’ stated policy

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<sup>1</sup> For example, in New York more than more than 200,000 people per year who are arrested are never convicted of any crime or offense.

was to consider only a conviction or pending charge “that affects hiring eligibility.”

17. The 30-day letter placed a substantial burden on applicants who have been arrested but never convicted. While their FBI records—even if assumed to be 100% true—would not exclude them under well-established legal precedent barring the use of arrest-only records, the difficulty, and often impossibility, of obtaining such proof, deterred and outright excluded many individuals class members from working for Census. Many of these arrests were for petty offenses and citations below the level of misdemeanors. The law is quite clear that Census cannot disqualify applicants based on arrest charges alone (unless the charge is pending, in which case a conviction may still result).<sup>2</sup> The federal government recognizes that restrictions on hiring individuals on the basis of arrest records are discriminatory and illegal. The 1990 EEOC Policy Guidance (“EEOC Arrest Guidance”) on the use of arrest records for employment decisions states: “[A]rrests alone are not reliable evidence that a person has actually committed a crime.” The Guidance relies upon the Supreme Court decision in *Schwabe v. Board of Bar Examiners*, 353 U.S. 232, 241 (1957), which held that “[t]he mere fact that a [person] has been arrested has very little, if any, probative value in showing that he has engaged in misconduct.” The EEOC Arrest Guidance goes on to address the precise situation presented in this case: “Even where there is no direct evidence that an employer used an arrest record in an employment decision, a pre-employment inquiry regarding arrest records may violate Title VII. It is generally presumed that an employer only asks questions which he/she deems relevant to the employment decision.” Additionally, the Department of Justice recognizes that it is improper to stigmatize arrestees as criminals, and considers any arrest without disposition, where one year or more has elapsed from

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<sup>2</sup> By contrast, according to the background check policy of the U.S. Postal Service: “No inquiries may be made, either orally or in writing, of the applicant or of any other person, concerning arrest records, except where the arrest resulted in a criminal conviction, or where the charges are still pending.” United States Postal Service, *Employment and Placement Handbook EL-312*, Sept. 2001, Updated with Postal Bulletin Revisions Through October 25, 2007, p. 108 (“Postal Handbook”).



the date of arrest with no active prosecution of the charge, to be a “nonconviction.” 28 C.F.R. Ch. I, sec. 20.3(q). The 30-day letter screen also violates the Department of Justice’s directive disapproving any employer policy that requests that applicants obtain official certification of no criminal record. 28 C.F.R. Ch. I, sec. 20.21(c)(2), pp. 414, 421.

18. In addition, the 30-day letter unfairly deterred or excluded many people with old and minor convictions for non-criminal offenses, misdemeanors, and other crimes that do not involve violence or dishonesty, and which bear no relationship to fieldwork or office clerical assignments. Thus, Census required applicants to provide official documentation even when the underlying conviction is irrelevant to the requirements of the job.

19. The 30-day letter also failed to identify for the applicant the purported criminal activity found in the FBI database search that was the basis for Census’ concern, thereby sending the applicant on an often futile exploration for records of any police interaction in their past. The older and less serious those records, the more difficult they generally are to find, placing a greater burden on those applicants – like some of the named plaintiffs in this suit – whose history least approximates actual risk. Indeed, some of the records that are impossible, or most difficult, to locate are of arrests that were never prosecuted. It is impossible for an individual who was merely arrested any number of years ago to provide “official court documentation” when the matter never went to court. In other words, Census demanded that applicants prove a non-event.

20. Census knew full well when it began planning for the 2010 count that the 30-day letter effectively would eliminate the vast majority of applicants with any arrest history from its ranks of temporary workers. Census used the same screening process for the 2000 decennial census count, and had approximately the same non-response rate of approximately 93%. Census planned for the 30-day letter to have the same exclusionary effect in 2010, and therefore provided scant staffing and resources for its CHEC (“Census Hiring and Employment Check”) office on

the expectation that there would be little to check.

21. The number of class members who have been effectively denied temporary employment by Census due to the use of the 30-day letter alone is staggering. Because over 35% of all arrests nationwide never lead to prosecution or conviction, the raw number of excluded individuals from the 2010 decennial census hiring process who have done nothing more than get arrested at some point in their life is in the hundreds of thousands. Adding those with minor and old convictions that are irrelevant to these jobs, it is reasonable to estimate that roughly half a million people who should have been made eligible were prevented from being considered for employment by this single practice.

### **3. Census' Suitability Policy**

22. For over a decade, the actual test used by Census to determine each applicant's suitability based on criminal history had been carefully concealed from public view. Census has refused to tell applicants, the general public, or even Congress, which crimes in particular mandate exclusion; whether there is any temporal limitation, including whether juvenile records can be considered; whether any distinction is made between non-criminal offenses, misdemeanors, and felonies; and any other factors it deems relevant to the determination.

23. The records and testimony in this litigation now reveal that the criteria are dramatically over-inclusive, so that Census excluded many people who presented no threat to the public or to the integrity of the process. Census documents identify its interest in conducting the criminal background screen as preventing "risk to public safety or data integrity." Yet Census applied an irrational, overbroad "adjudication" screen to the small percentage of applicants who were able to decipher and comply with the requirement to provide "official court documentation," failing to limit exclusion to those who presented a legitimate risk to the safety of the public or the integrity of the counting process.

24. Pursuant to the adjudication criteria, Census rejected applicants for nearly all felonies, even if decades old, even if committed as a juvenile, and even where the case was expunged or dismissed through deferred adjudication, probation, or similar diversion programs. Census also required exclusion for most misdemeanors, except the most minor offenses such as “abusive language” or “liquor possession by a minor.”

25. These adjudication guidelines and practices have changed in arbitrary fashion over the course of the hiring process, failing in each iteration to limit exclusion to those who present a legitimate risk to the safety of the public or the integrity of the counting process. For example, Census changed its screening policy in February 2010 to exclude applicants with pending charges for certain minor misdemeanors, even where an individual with a recent conviction for the exact same charge would be eligible for hire. When the criteria were changed to become less stringent, applicants who had been previously excluded but who would be eligible under the revised criteria were not notified or granted reconsideration.

26. Additionally, where the criteria allow for discretion, Census officials employed *ad hoc* and inconsistent standards, unguided by professional principles or social science, and based largely on gut instinct, which inherently includes the bias of the decision-maker.<sup>3</sup> The sophomoric nature of this enterprise is exhibited in a training document for CHEC analysts with the following “Reminders:” “Defer anything you feel strongly about and/or can’t make an unbiased decision” and “Don’t be afraid to ask for help – ask your roommates, colleagues or the CHEC Staff.”

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<sup>3</sup> By contrast, over the past two and a half years, the Transportation Security Administration (“TSA”) has screened the FBI records of about 1.6 million port workers pursuant to the Maritime Transportation Security Act of 2002. During that time, at least 60% of the employee petitions to “waive” their disqualifying felony offense based on evidence of rehabilitation were granted by TSA, resulting in nearly 5,000 workers getting hired who otherwise would have lost their opportunity for this federal government work. Department of Homeland Security, TWIC Dashboard.

27. Even those who passed through the adjudication process and were told to report for work were subject to further screening, as Census required all new hires to be fingerprinted. Census then conducted a second FBI background check using those fingerprints, and again applied its “adjudication” screen, sometimes even after the individual had begun work.

28. No one who was excluded from hire is offered the right to appeal the decision to the CHEC office. For those applicants who nonetheless took it upon themselves to challenge the decision, Census applied a standardless *ad hoc* review process. In fact, the Chief of the CHEC office is not aware of a single job denial being reversed through appeal.

#### **4. Denial by Delay**

29. Even among those who passed the “adjudication” screen and were ultimately deemed “eligible for hire,” many now have no real chance of being hired because of the months of delay created by the unnecessary 30-day letter process. Many such applicants (including Plaintiff Eugene Johnson) who applied well before the bulk of hiring took place in the spring and summer of 2010, who, on the face of their records, do not pose a threat to public safety or the integrity of the count, were found “eligible” *after* virtually all hiring had been completed. Since at least early June 2010, Census has been explicit in telling these applicants: “Please be aware that most temporary Census jobs are now filled and major census operations are nearing completion or are already completed.”

#### **B. Discriminatory Impact**

30. Census’ use of these arbitrary pre-employment screens is not only unfair, it also has the result of discriminating on the basis of race, ethnicity, color, and national origin. Because the arrest and conviction rates of African Americans, Latinos, and Native Americans far exceed those of whites nationwide, the arbitrary use of criminal history in employee selection imports these

racial and ethnic disparities into the employment process.<sup>4</sup> Thus, Plaintiffs bring this class action suit pursuant to Title VII of the Civil Rights Act of 1964, which provides: “All personnel actions affecting ... applicants for employment ... in executive agencies [of the federal government] shall be made free from any discrimination based on race, color ... or national origin.” 42 U.S.C. § 2000e-16(a).

31. Since at least the 2000 decennial census, the Secretary of Commerce and other government officials have known, or should have known, that Census’ criminal background screening devices exclude from consideration hundreds of thousands of applicants, and that this exclusion disproportionately affects African Americans, Latinos, and Native Americans.

32. Unfortunately, Census’ hiring process not only has discriminated against hundreds of thousands of individuals seeking to serve the public interest, but also has undermined its own stated goal of reducing the historic under-count in communities of color. Through this lawsuit, Plaintiffs seek to both end Census’ discriminatory hiring practices and improve its ability to achieve its constitutionally mandated goal of counting all who live in the United States.

#### **CLASS DEFINITION**

33. Plaintiffs bring this case as a class action under Federal Rules of Civil Procedure 23(a) and (b)(2), on behalf of the following class:

All African American, Latino, and Native American persons who applied for temporary employment with the United States Census Bureau for positions including but not limited to Census Takers (also known as Enumerators), Census Crew Leaders, Recruiting

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<sup>4</sup> The President of the National District Attorneys Association has told prosecutors that they “must comprehend this full range of consequences that flow from a crucial conviction” and asked: “[h]ow can we ignore a consequence of our prosecution that we know will surely be imposed by the operation of law? These collateral consequences are simply a new form of mandated sentences.” R. Johnson, *Message from the President, Collateral Consequences*, The Prosecutor (May/June 2001).

Assistants, and/or Clerks, who were sent a 30-day notice to produce official court documentation or fingerprints, for whom there was no record of conviction, or who were otherwise suitable for employment because they do not present a legitimate threat to the public safety or integrity of the counting process, and who were not hired or were terminated by the Census Bureau, between the commencement of temporary hiring for the 2010 decennial census and the date of judgment in this action (“the Class”).

### **JURISDICTION AND VENUE**

34. The court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(4) as this claim arose under the Constitution and laws of the United States, and under § 717 of Title VII, 42 U.S.C. § 2000e *et seq.*

35. Venue is proper in this Court pursuant to 42 U.S.C. § 2000e-5(f)(3), because Defendant’s unlawful employment practice was committed in Manhattan, employment records relevant to Defendant’s illegal actions are maintained and administered in New York City, and Plaintiff Eugene Johnson would have worked in New York City but for Defendant’s unlawful employment practice. Additionally, venue is proper pursuant to 42 U.S.C. § 1391(e)(3) because Mr. Johnson resides within this judicial District.

### **EXHAUSTION OF ADMINISTRATIVE REQUIREMENTS**

36. On August 10, 2009, Plaintiff Evelyn Houser filed an Informal EEO Complaint based on her denial of temporary employment with Census. Ms. Houser explicitly challenged the policy employed by Census of excluding applicants with criminal history as having a racially disparate impact in violation of Title VII, and included in her complaint references to the three EEOC Guidance statements bearing on the use of arrest and criminal conviction records in employment. On August 28, 2009, Ms. Houser filed a timely written Charge of Discrimination with the Equal Employment Opportunity Office of the Department of Commerce (“EEO

Office”). On September 29, 2009, the EEO Office rejected that charge by issuing a Final Agency Decision dismissing Ms. Houser’s complaint. Plaintiff appealed that decision to the Board of Review of the EEOC. The EEOC issued a decision on January 29, 2010, which Plaintiff received on or about February 1, 2010. The EEOC’s decision explicitly provided that Plaintiff had the right to file a civil action in federal District Court within ninety calendar days from the receipt of the decision.

37. In addition, Defendant has been on notice for over a year, both from the EEOC and from other deterred and excluded applicants, of the class-wide discriminatory impact of Census’ criminal background screening policy.

38. On July 10, 2009, one month prior to Ms. Houser’s formal complaint, the Acting Chairman of the EEOC wrote a detailed four-page letter to the Secretary of the Department of Commerce and the Acting Director of the U.S. Census Bureau.

39. Under Section 717 of Title VII, the EEOC has “authority to issue ... such orders and instructions as it deems necessary and appropriate” to fulfill its statutory obligation to ensure non-discrimination in all federal agencies. Further, “[t]he head of each such department, agency, or unit *shall comply* with such ... orders, and instructions.” 42 U.S.C. § 2000e-16 (emphasis added).

40. The July 10 letter was sent explicitly under the EEOC’s authority pursuant to section 717, and stated that the EEOC was aware of reports of “numerous instances nationwide” in which Census told applicants that their record of an arrest or conviction would disqualify them unless shown to be incorrect, that the Census application states that adult convictions other than a minor traffic violation could be the basis for nonselection, and that “this information suggests that the Census Bureau’s approach is overbroad and may run afoul of Title VII.” The letter further informed the Secretary and Acting Director: “Unless there is a record that an arrest resulted in a

conviction, an arrest in itself is not evidence that the person engaged in the conduct alleged. Therefore, without confirmation, the Census Bureau should not disqualify people based on an arrest record.”

41. Regarding individuals with convictions, the EEOC went on to state that “[p]ursuant to longstanding EEOC policy guidance, when there is evidence of criminal conduct, objective evidence concerning three factors should be considered: The nature and gravity of the offense or conduct (including the circumstances surrounding the offense or conduct, and the number of offenses for which the individual was convicted); [t]he amount of time that has passed since the arrest or conviction and/or completion of the sentence; and [t]he nature of the job held or sought.”

42. The EEOC further noted that it had become aware of Census’ use of the 30-day letter, and stated: “this practice is inconsistent with Census Bureau’s obligation under Title VII, to objectively assess whether the applicant or employee in fact engaged in the conduct alleged.” Additionally, the EEOC stated that “the Census Bureau should not exclude people from employment for offenses that do not predict an unacceptable risk.”

43. Defendant also has been on notice of the class-wide discriminatory impact of Census’ criminal background screening policy since the very outset of the 2010 decennial hiring process through the EEO complaints of deterred and excluded applicants other than Ms. Houser. As early as October 2008, an African American applicant filed a formal charge of race discrimination, challenging Census’ rejection of his application for temporary employment. His complaint states that his challenge was based on the “disparate and adverse impact” of Census’ criminal background policy on him as a minority worker, noting his understanding that the policy has a “discriminatory impact on the protected class.”

44. In August 2009, another African American applicant filed a formal complaint of class-wide discrimination, alleging that the “Census Bureau’s policy or practice of using criminal



conviction information to screen out candidates for hire is discriminatory in that it has a disparate impact on African Americans...” The complaint specifically sought “class and individual injunctive, declaratory and monetary relief (back and front pay) and all other relief provided for under Title VII.” The complaint also alleged intentional discrimination.

45. Additionally, between July 2009 and April 2010, at least five other applicants of color filed formal charges of race discrimination based on Census’ criminal background process.

46. Any and all other prerequisites to the filing of this suit have been met.

### **PARTIES**

47. Plaintiff **Eugene Johnson** applied to the Census local office in Manhattan, New York on or about January 13, 2010. Mr. Johnson, who is 48 years old, is an African American resident of the Bronx who has lived in New York City all his life.

48. Mr. Johnson has an extensive work history in positions involving direct contact and interaction with the public, making him well-qualified to take on a Census Taker position. His many years of contract work in the field of market research, for firms including Harris Interactive (helping to conduct various Harris Polls) and CMR Market Research, and his work performing research with the Coalition for the Homeless, have given him invaluable experience in communicating with the public and gaining people’s trust so that they answer questionnaires accurately. In addition, he has developed sales and marketing experience in his positions as an office supply salesperson for Standard Technology and as an independent sales contractor for Click Bank. For the past four years, to supplement his income from his contract positions, Mr. Johnson has worked part-time for Newman & Leventhal Caterers, a company that caters upscale events at locations including the Waldorf Astoria Hotel and the Park Avenue Synagogue.

49. Mr. Johnson would be equally suited to an office position with Census. Having earned a GED in 1980, he has taken college courses through the State University of New York’s

Manhattan and Brooklyn Educational Opportunity Centers, where he is currently enrolled in a finance course. He is trained and skilled at data entry, and worked in this field for the Coalition for the Homeless. He also has training, interest and experience in radio broadcasting, and through this work and market research positions has developed skills at conducting telephone interviews and explaining complex concepts in simple terms.

50. Mr. Johnson was arrested on misdemeanor assault charges in 1995, stemming from a dispute with his landlord concerning the rent due on his apartment. Mr. Johnson was convicted of the charges after a very brief bench trial in 1996, but was sentenced to perform community service and pay restitution rather than serve any time in jail. He complied with this sentence.

51. Census sent Mr. Johnson the 30-day letter on January 25, 2010; he received it several days thereafter. He went to the New York City Criminal Court and obtained an official disposition slip for his conviction. Mr. Johnson sent the document to Census on February 22, 2010—the same day he received it—together with a letter discussing the conviction and explaining his interest in and qualifications for Census work.

52. On or around June 8, 2010, several months after submitting his documentation, and well after this litigation commenced, Mr. Johnson received a letter from Census stating that he was being placed on an “eligibility list.” The letter informed him that “most temporary census jobs are now filled and major census operations are nearing completion or are already completed.” After receiving this letter, Mr. Johnson visited the 2010 Census website, which confirmed that most of the hiring was complete and that it was very unlikely that anyone else would be hired. To this date, Mr. Johnson has not been hired by the Census Bureau. He currently works part-time, and has been available to work for Census from the time of his application throughout the time in which Census has been hiring temporary workers.

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53. Plaintiff **Evelyn Houser** is a 69 year old African American resident of Philadelphia, Pennsylvania. Ms. Houser has lived in Philadelphia for decades, and has contributed to her community as a block captain, committee person, and poll worker. Ms. Houser is presently retired, but has a life-long history of work in housekeeping, security and office positions, counseling, home health aide positions, data entry, and retail. She has also raised four children on her own.

54. Ms. Houser worked for Census in 1990. She started as a Census Taker, and then was given an office job, where she was involved in hiring, including helping to perform background checks, interviewing candidates, and speaking with job applicants on the telephone. She performed both jobs well.

55. After applying for a temporary position for the 2010 census, Ms. Houser received the 30-day letter in March 2009. Census did not provide Ms. Houser with a copy of the arrest record about which it was requesting information. As a result, Ms. Houser did not know with certainty what was on the record to which she was expected to respond. On March 31, 2009, Ms. Houser obtained a set of her fingerprints. She mailed them to Census on or about the same day, which was within the 30-day period in which Census requested a response to its letter. Ms. Houser believed that providing the fingerprints was a satisfactory response to the 30-day letter. She did not understand that she might have to provide court documentation to comply with Census' requests.

56. Census denied Ms. Houser's application. By letter dated May 21, 2009, Census informed Ms. Houser that she had not provided the requested information within 30 days. It also stated that as a result of her failure to act as requested, she was no longer being considered for employment. Ms. Houser then appealed to the EEO office of the Department of Commerce, and

then to the EEOC, as discussed above. Ms. Houser remains available to work for Census if she were to be hired.

57. Ms. Houser has a 1981 case for theft and forgery, where she tried to cash a check she had found. Ms. Houser was placed in a diversionary program known in Pennsylvania as “accelerated rehabilitative disposition” (ARD). She was never formally convicted. Ms. Houser has not been arrested since the 1981 case, almost 30 years ago.

58. Because of her clean criminal record over the last 30 years, her prior satisfactory employment by the Census Bureau (which was *after* her criminal case), her extensive work history, and her civic activities in her neighborhood, Ms. Houser is a strong job applicant to be a Census employee. Since the time of her application, Ms. Houser has remained ready, willing and able to work for Census if she were to be hired.

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59. Plaintiff **Sandra Anderson** is a Native American resident of Albuquerque, New Mexico. Ms. Anderson applied for a temporary job for the 2010 census in December 2009 and was subsequently rejected.

60. Ms. Anderson spent the first ten years of her life on a Navajo reservation, the next five years on a Cherokee reservation, and has since resided in and among the Native American community of Albuquerque.

61. Ms. Anderson is very well qualified to work for Census, and particularly well-suited to be a census worker within the Native American communities of Albuquerque. She has two Associate’s degrees from Southwestern Indian Polytechnic Institute, received her Bachelor’s degree from the University of New Mexico with a double major in Native American studies and anthropology, and has begun studies toward a Master’s degree in community and regional planning. Her education has been entirely funded by scholarships, including grants that were

based upon maintaining a grade point average above 3.5. Once she receives her Master's degree, Ms. Anderson hopes to be involved in planning and development with the Navajo Nation.

62. Ms. Anderson has some ability to speak and write in Navajo. In her current job with an organization that develops testing vehicles for non-native English speakers, she reviews tests to make sure that neither the factual scenarios nor the language would be offensive or alienating to Native Americans.

63. Ms. Anderson applied for a job with Census to utilize her knowledge of Native American cultural practices and social expectations to assist the U.S. government in gaining access to and the cooperation of Native Americans. She recognized that many in her community are suspicious of government, and that some are resistant to comply with Census because of its lack of specificity in counting separate tribes and mixed tribe Native Americans. She is confident that as a Census worker she could have helped transcend Native American fears and frustrations about the census.

64. Ms. Anderson submitted her application on-site at the National Indian Youth Council and took Census's written examination in December 2009. She was informed that her score was 96%.

65. Ms. Anderson received a 30-day letter dated December 29, 2009. Her only criminal case occurred when she was arrested in October 2006 for driving while intoxicated. She was held in jail for 48 hours until a friend could post bail.

66. So as to not interfere with her education, Ms. Anderson pled guilty to "first offense" DUI, which is a misdemeanor under New Mexico law. Her sentence consisted of payment of fines and costs, a mandatory counseling program, installing an ignition interlock device on her car, and performing 24 hours of community service. She also reported to a probation officer once a month for six months. Ms. Anderson successfully completed this sentence, and has never had

any other criminal charge lodged against her.

67. Ms. Anderson complied with the 30-day letter demand that she provide official court documentation of her criminal case by mailing a “court summary” about the case to the Census Bureau in early January 2010. The court summary makes clear that she was convicted for driving while intoxicated and that her sentence was satisfied and completed successfully. Nevertheless, she received a rejection letter dated February 2, 2010 stating that “based on the nature of the facts disclosed,” she would not be eligible for a job with Census.

68. Since the time of her application, Ms. Anderson has remained ready, willing and able to work for Census if she were to be hired.

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69. Plaintiff **Felicia Rickett-Samuels** is an African American resident of Stamford, Connecticut. Ms. Samuels is a paralegal at a law firm in Manhattan, where she has worked for the past nine years. Her work involves handling sensitive documents and daily face-to-face interaction with the firm’s clients. Ms. Samuels has a B.A. and Masters Degree in human resources. Ms. Samuels holds a Notary Public commission issued by the State of New York, which requires that she be of good moral character.

70. Ms. Samuels also is a Waiver Service Provider for the Jewish Child Care Association, which provides mentorship to children in the foster care system. She also serves on the Board of Directors of the College and Community Fellowship at the City University of New York (“CUNY”) Graduate Center, and she volunteers with Upwardly Global, an organization in which she works as a mentor and career coach for immigrant job-seekers.

71. Ms. Samuels saw the Census temporary position as an opportunity to make some extra money to pay back her student loans, and she applied for the position in January 2009 in Stamford. Ms. Samuels answered the question on the application about criminal background,

stating that she had been convicted of three felonies. She also submitted a copy of the Certificate of Good Conduct issued to her by the State of New York Division of Parole. A Certificate of Good Conduct is issued to individuals convicted of more than one felony who have demonstrated rehabilitation to the satisfaction of the Division of Parole, after a waiting period and the submission of documentary evidence. A Certificate of Good Conduct creates a presumption of rehabilitation according to New York's Correction Law section 753(2).

72. At the end of March 2009, Ms. Samuels received a 30-day letter from Census. In response, she sent Census another copy of her Certificate of Good Conduct, which lists her convictions for attempted assault in 1989, attempted sale of a controlled substance in 1993, and possession of marijuana in 1998.

73. Roughly a week later, she received a letter from Census denying her application. She then called Census in Washington, D.C., but the person she spoke with would not tell her why she had been denied. The Census official also did not tell Ms. Samuels that she could appeal the decision. Since the time of her application, Ms. Samuels has remained ready, willing and able to work for Census if she were to be hired.

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74. Plaintiff **Anthony Gonzalez** is a Latino resident of Riverview, Florida. Mr. Gonzalez has been an Alcohol and Substance Abuse Treatment ("ASAT") Counselor for the New York State Department of Correctional Services ("DOCS") for the past sixteen years, having retired in November 2009.

75. Mr. Gonzalez applied to work for Census in February 2010, seeking the position as part of his public service, and recognizing the importance of an accurate count in terms of political representation and the receipt of federal funds. He also desired part-time work to

supplement his fixed income. He received a 92 on the test, speaks Spanish, and is skilled in communicating with diverse populations.

76. Prior to working for the prison system, DOCS conducted a full investigation of Mr. Gonzelez' background, which includes three felonies for burglary and one for weapons possession in the 1980's, during a time in which he experienced a serious drug abuse problem. After completing a substance abuse treatment program in Albany, New York following his last conviction, Mr. Gonzalez wanted to prevent others from following the same path, and then became trained in substance abuse counseling. In 1992, he received his Certified Alcohol and Substance Abuse Counselor credential from the New York State Office of Alcoholism and Substance Abuse Services. Mr. Gonzelez has been sober and has had no criminal activity for the past 24 years, and he is now 51 years old.

77. In response to his application to Census, Mr. Gonzalez received a 30-day letter in March 2010. He knew he would not be able to get official court documentation in 30 days of such old convictions, so he downloaded his listing on the DOCS Inmate Lookup website, which described his 1986 burglary conviction, and submitted that print-out. He also submitted copies of his retirement certificate and a letter from the Commissioner of DOCS thanking Mr. Gonzalez for his outstanding service.

78. To this date, Mr. Gonzalez has not heard a response from Census, though he has remained ready, willing and able to work for Census if he were to be hired.

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79. Plaintiff **Precious Daniels** is an African-American resident of Detroit, Michigan. Ms. Daniels applied for a temporary job with the 2010 census in January of 2010 and was sent a 30-day letter. She tried to comply with Census' request but was met with only obstacles, and was unable to obtain and produce the requested documentation.



80. Ms. Daniels is well qualified to work for Census. She has lived in the largely African-American community on the west side of Detroit her whole life, knows the people there well, and would be comfortable in any part of West Detroit where she might have been assigned.

81. Ms. Daniels went to high school at Redford High School in Detroit. For two years she attended Marygrove College in Detroit and studied psychology. She received a certification in phlebotomy from Crocker Adult Center in 2000.

82. For ten years, Ms. Daniels has been a phlebotomist at various Detroit-area hospitals and medical centers. She works with the public all day long, and it is her job to gain the trust of strangers so that she can make them comfortable enough to draw their blood.

83. Ms. Daniels applied for a job with Census out of a desire to utilize her skills to assist the U.S. government in gaining access to and in quickly establishing a rapport with her community. She recognizes the importance of getting an accurate count, and wanted to help Detroit receive its fair share of federal funding. If hired, she anticipated meeting some reluctance or refusal to participate, and was prepared to explain what is at stake for the community.

84. Ms. Daniels was arrested once, in November of 2009, for participating in a peaceful protest against Blue Cross Blue Shield of Michigan to pressure them to stop paying lobbyists to weaken health care coverage. She and others were arrested for blocking the doorway. She was taken to jail, was released on \$50 bail, and subsequently appeared in court for a hearing, at which the charge of disorderly conduct was dropped. Ms. Daniels has no other criminal history.

85. Since criminal charges against her had been dropped, Ms. Daniels assumed that Census must have been confusing her record with someone else. She went to the Central District police precinct and paid to get fingerprinted. She then mailed her fingerprint card to Census to dispute the identity of the arrest record. She was subsequently informed by Census that the fingerprints matched the ones they had on file. Census directed her to provide official

documentation on her criminal history.

86. Ms. Daniels called the 36<sup>th</sup> District Court to try to obtain her criminal record. The court officer told her that there was no record for her. At that point, she did not see what else she could do to provide “official” documentation that she had never been prosecuted. To date, Ms. Daniels has not been hired by Census, though she has remained available to work since the time of her application.

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87. Plaintiff **Ignacio Riesco** is a Latino resident of Massachusetts. Mr. Riesco is a student at Harvard University in the Faculty of Arts and Sciences, where he is finishing his undergraduate degree, while also preparing for law school. He also is starting a charity, where he takes students and professors to volunteer at a local women’s shelter.

88. In 2006, while working in ticket sales at Disney World in Orlando, Florida, Mr. Riesco was wrongly arrested for taking money from his employer. Subsequently, it was determined that he was not responsible for the financial loss, and the charges against him were dismissed.

89. Mr. Riesco applied for temporary work with Census in March 2010, and he received the 30 day letter in April. Within a few days, he submitted a disposition document of the wrongful arrest case showing that all the charges had been dropped. He then called Census and was told that it would take up to five weeks for his file to clear, but not to worry because Census was still hiring. Mr. Riesco made repeated subsequent calls to check on the status of his application, but he never received further correspondence, and to this date has not received a decision on his application.

90. At all times relevant to this complaint, Plaintiffs have been applicants for employment to, or employees of, an executive agency of the United States government within the

meaning of Title VII, 42 U.S.C. § 2000e-16(a).

91. Defendant Gary Locke is the Secretary of the United States Department of Commerce, and has full authority over the United States Census Bureau. 42 U.S.C. § 2000e-16(c).

### **STATEMENT OF THE CLAIM**

#### **A. The Census Hiring Process has a Discriminatory Racial and Ethnic Impact**

92. Census' screening practice effectively imports acute racial and ethnic disparities in the criminal justice system into the employment process, thereby multiplying the negative impact on African American, Latino, and Native American job applicants with arrest and minor or old conviction histories. Indeed, the Department of Justice recognizes that a practice of using the FBI criminal records database in a widespread manner for criminal screening, without further refinement, undermines employment anti-discrimination policies. Attorney General's Report on Criminal History Background Checks, June 2006, p. 20.

93. Racial disparities in the U.S. criminal justice system are severe. African Americans, Latinos, and Native Americans are far more likely to have arrest records and convictions than whites. While African Americans make up approximately 12.3% of the population, they account for approximately 28.3% of arrests and an even greater percentage of felony convictions nationwide.<sup>5</sup> Similarly, Latinos are arrested and incarcerated at rates significantly higher than their proportion of the population. Native Americans make up approximately 0.8% of the U.S. population, but they account for approximately 1.3% of arrests

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<sup>5</sup> The statistics cited in this Complaint are derived from publicly available sources and are subject to that limitation.

nationwide.<sup>6</sup>

94. The FBI estimates that well over 14 million people were arrested nationwide in 2007 alone. Most arrests are for minor crimes and non-criminal offenses such as curfew and loitering violations, vagrancy, and disorderly conduct.<sup>7</sup> African Americans are as much as 15 times more likely than whites to be arrested for low-level offenses.<sup>8</sup> Yet less than 20% of the arrests of African Americans for these offenses result in convictions. The racial disparities are exacerbated by the fact that more than 80 percent of those charged with crimes nationwide are indigent and absorb the collateral consequences of these incidents in numerous aspects of their lives.<sup>9</sup>

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<sup>6</sup> The National Council on Crime and Delinquency recently released an analysis of data on disproportionate minority contact (“DMC”) in arrests, court processing and sentencing, new admissions, and ongoing populations in prison and jails, probation and parole, capital punishment, and recidivism. The Council concluded that “[a]t each of these stages, persons of color, particularly African Americans, are more likely to receive less favorable results than their White counterparts,” and that Latinos also are over-represented relative to whites. C. Hartney & L. Vuong, *Created Equal: Racial and Ethnic Disparities in the U.S. Criminal Justice System* (National Council on Crime and Delinquency, March 2009).

<sup>7</sup> In 2008 in New York State, more than 87 percent of adult convictions were for misdemeanors or petty offenses. (N.Y. Division of Criminal Justice Services (DCJS), *Dispositions of Adult Arrests by County and Region* (6/18/2009). Nationwide, only 4.2 percent of the 14 million annual adult arrests resulted in charges for violent crimes. *Crime in the United States 2007* (FBI, Sept. 2008).

<sup>8</sup> For example, from 1997 to 2006, the New York City Police Department arrested, charged with misdemeanors, and jailed more than 353,000 people for possessing small amounts of marijuana. U.S. Government surveys have consistently found that Whites use marijuana at higher rates than African Americans. Yet, African Americans constituted 52% of the arrests (while accounting for only 26% of the city’s population). Relative to white arrest rates for marijuana, the arrest rate of African Americans is five times greater and the arrest rate of Latinos is nearly three times greater. H. Levine & P. Small, *MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY, 1997 – 2007* (New York Civil Liberties Union, April 2008).

<sup>9</sup> Denial of employment and other collateral consequences (such as eviction from public housing and denial of public benefits) trap many low-income individuals -- especially African Americans, Latinos, and Native Americans -- in recurring encounters with the criminal justice system. Studies consistently have shown that recidivism is directly linked to lack of economic opportunity. Individuals and their families begin to suffer collateral consequences from the moment of arrest, and these punishments create significant barriers to successful reentry from the criminal justice system. See M. Smyth, *From Arrest to Reintegration*, 24 *Criminal Justice* 3 (Fall 2009, ABA).

**B. The 30-Day Letter Created a Barrier to Employment that is Neither Job-Related nor Consistent with Business Necessity**

95. The 30-day letter screened out individuals who would be eligible for employment according to any rational and fair system of determining who does not present a legitimate threat to the public safety or the integrity of the counting process, i.e. those with arrests but no convictions, and those with convictions that are old or do not relate to violence or dishonesty. The 30-day letter does not identify the criminal history information that prompted Defendant to send the letter. By requiring applicants to provide official court documentation of *all* arrests, Census created a hurdle that often was insurmountable, and in many cases is literally impossible to overcome. Many of the “official court documents” that Census requires simply do not exist.

96. Even where compliance was not a literal impossibility, the difficulty, time, and expense of attempting to obtain and submit official records within 30 days presented a significant impediment to many applicants. Where the individual was not able to comply within 30 days, their application, like Ms. Houser’s, was automatically denied with no opportunity to re-apply.

97. Ironically, the directive in the 30-day letter to produce documentation of “any and all arrest(s) and/or conviction(s)” deterred or excluded many of the best-qualified applicants with arrest records of non-criminal or insignificant charges that are decades old. Generally speaking, the older and less serious one’s record, the harder it is to find, and the more likely one is to fail to obtain and submit it, especially when limited to less than a month to do so. Census thus unnecessarily excluded qualified potential workers, and undermined its own publicized goal of “indigenous hiring,” i.e. hiring people to work in the communities in which they live. This not only violated Title VII because of the racial impact of relying on arrest records as a screen, but also increases the risk that Census will end up with a substantial undercount in communities of color. Due to the historically low mail-in response rate in many such communities, there was a

heightened need to hire putative class members.

### **1. Compliance with the 30-Day Letter was Impossible for Many Applicants**

98. Many people with criminal histories have had their records expunged or sealed, and have been returned to the legal position of having never been arrested or convicted. As of the latest report in 2006, sixteen states and the District of Columbia have statutes providing for expungement of felony convictions; twenty states have statutes that provide for setting aside felony convictions; and fifteen states have statutes that provide for the sealing of conviction records. However, often these expungements and sealings are not reported to the FBI from the states in which they originated, so the records of convictions are never removed from the FBI database. Yet, many of these records are not accessible to members of the general public, and some expunged or sealed records are actually destroyed (e.g. Pennsylvania) or made unavailable for release (e.g. New Jersey and Arkansas). In a number of states and localities, regardless of expungement or sealing, criminal records have been destroyed pursuant to official record retention policies or by inadvertence. Thus, many Census applicants were caught in a Catch-22: they would not be hired unless they provided an official document that no longer exists, but failure to respond with official documentation led to automatic rejection.<sup>10</sup>

### **2. Compliance with the 30-Day Letter was Unduly Burdensome**

99. Even where records have not been destroyed, a vast number of applicants were faced with insurmountable hurdles in determining where their records were kept and how to obtain them. The process by which official court records are obtained is unknown to many people, especially those with only fleeting interaction with the criminal justice system. The 30-day letter

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<sup>10</sup> By contrast, the criminal background check policy of the U.S. Postal Service provides: "In instances where a criminal conviction is set aside, vacated, or annulled, expunged, or sealed pursuant to state or court order, the conviction may not serve as a basis for the disqualification of the applicant. Further, no inquiry may be made, either oral or written, directly or indirectly, into that conviction." Postal Handbook, p. 109.

failed to provide even the simplest advice on which records to obtain and how to obtain them. Finding and securing copies of such records often requires sophistication about states and individual court systems' record-keeping mechanisms, which vary widely from state to state and locality to locality.

100. Additionally, because Census directed them to provide "all" official records, many applicants faced the nearly impossible burden of finding records that are decades old, possibly located in a different state, in four weeks or less (depending on mailing time of 30-day letter). Even where conceivably possible, the cost and delay involved in such a search are cumulative and prohibitive. This had a particular impact on retirees living on limited incomes, who Census actively encouraged to apply. To make matters worse, the directive to supply "all" official records of "any arrest" literally includes juvenile infractions.

### **3. The 30-Day Letter was Ambiguous and Created Confusion**

101. Many applicants were rightly confused as to what constitutes an arrest, and thus were confused as to how to comply with the 30-day letter. There is no universal definition of when a person is arrested. For example, the Department of Justice distinguishes between an "arrest" and "detention," without clearly defining either. (28 C.F.R. § 20.3(d)). If people are not sure whether an encounter with the police has been reported as an arrest, they will not know which incidents to investigate. In many African American and Latino neighborhoods, where stop-and-frisk and other encounters with police frequently occur, it is hard to know which interactions resulted in a record and which did not.<sup>11</sup>

102. Plaintiffs recently learned that the 30-day letter is intended to solicit

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<sup>11</sup> For example, in 2009, African Americans and Latinos collectively represented 84% of all individuals subjected to "stop and frisk" by the police in New York City, while they comprise only 53 percent of the city's population.

documentation only where the arrest led to police booking and fingerprinting. Yet, when applicants were confused and sent documentation on arrests for citations or other minor offenses where they were released without being booked, Census went ahead and processed those arrests and sent 30-day letters accordingly.

103. There also is significant ambiguity in the term “official court documentation” used in the 30-day letter. There is a wide spectrum of possibilities, from mere disposition statements to full court transcripts. In some states, such as Pennsylvania, individuals can obtain computer-generated summary dispositions that identify the criminal history, but are not original documents. As another example, while the New York State Office of Court Administration provides criminal background reports (for a fee exceeding \$50), they are not certified and thus may not be considered “official.” To comply with the 30-day letter mandate, an individual thus could be relegated to obtaining official certificates of disposition from each court.

104. Additionally, each state maintains its own repository of criminal records. For many people seeking their criminal records, this is the most obvious source of retrieval, especially since many repositories have automated features and can be accessed on-line. However, many criminal records that appear in the FBI database are not accessible to applicants through their state repositories. Indeed, well over 10% of criminal records nationwide are in what the Department of Justice classifies as “Closed Record States,” where criminal records are unavailable to individuals due to strict limitations on production. In some other states where records are not completely closed, disposition information will not be disclosed even upon request by the subject of the record.

#### **4. The 30-Day Letter Caused Unnecessary Delay Resulting in Denial of Employment**

105. Additionally, the delay created by the 30-day letter—and the series of events that



it triggers, including follow-up letters with further directives—is itself a significant barrier to employment, as experienced by Plaintiff Eugene Johnson. The delay imposed by this process harms class members who should have been hired – and paid – months earlier, which has a significant impact on the many applicants struggling with financial hardship in the current economic climate of high unemployment.

**C. The “Adjudication” Criteria Created a Barrier to Employment that is Neither Job-Related nor Consistent with Business Necessity**

106. The few applicants who made it past the 30-day letter faced a criminal background screen that was arbitrary and unfair, and which failed to distinguish those individuals who present a legitimate threat to the public safety or the integrity of the counting process.

107. Nearly all felonies, even if decades old, even if committed as a juvenile, and even where expunged or dismissed through deferred adjudication, probation, or similar diversion programs, led to exclusion from hiring by Census. Many misdemeanors also led to exclusion. Even the most petty offenses – such as “abusive language,” “unlawful assembly,” or “liquor possession by a minor” – could lead to exclusion if the applicant was unable to document the event, or if more than one such violation is on the person’s record. In the limited places where the criteria allowed for discretion, Census officials applied *ad hoc* standards, unguided by professional principles, and based largely on gut instinct.

108. Census’ adjudication policy is far too over-inclusive to meet the standards of job-relatedness and consistency with business necessity. For example, screening out applicants with any felony, regardless of the nature of the crime, where the person was on parole or probation, or in prison, within the past ten years, simply cannot be justified as being necessary to protect the public or the process. This is especially true for those applicants whose charges were dismissed through an adjournment or diversionary program.

109. Census does not have any legitimate process or policy to determine whether individuals convicted of crimes decades ago had made positive changes in their lives such that they no longer posed a risk to others. Its employment screening process provided no real opportunity for applicants to provide proof of rehabilitation, such as documentation of successful participation in drug treatment programs, educational achievements or relevant employment, or to submit certificates of relief from disabilities.

110. Further, Census applied the same screening factors to office clerks as enumerators, even though clerks have no interaction with the public. Screening clerks for danger to the public is, on its face, not job-related.

**D. There are Less Discriminatory Alternatives that Would Better Achieve Census' Legitimate Hiring Interests**

111. As discussed above, the 30-day letter and adjudication criteria created significant barriers to employment that deterred or excluded many properly qualified persons, including disproportionate numbers of African American, Latino, and Native American applicants. There are less discriminatory alternatives that would better achieve Census' legitimate hiring interests in protecting the public and the integrity of the counting process. Among the less discriminatory alternatives, a simple resolution to this problem would be for Census to cease using the 30-day letter, and grant eligibility to all qualified applicants with arrests only, and to those with convictions who do not present a legitimate threat to the public safety or the integrity of the counting process. Such a process would include the following steps:

(1) All applicants with a record of an arrest over one year old at the time of application and no record of criminal conviction, as well as those applicants with juvenile adjudications or adult convictions that have been expunged or sealed, should be given the same consideration as applicants whose names do not appear in the FBI database, unless Census

provides the applicant with documented evidence that the individual has been convicted of a crime of violence or dishonesty that is a valid basis for excluding them from consideration;

(2) All applicants with an FBI record of conviction for a crime who do not pose a legitimate threat to the public safety or the integrity of the counting process should be given the same consideration as applicants whose names do not appear in the FBI database;

(3) Consistent with (1) and (2) above, all applicants whose criminal history may pose a legitimate threat to the public safety or the integrity of the counting process should be given a written description of the conviction(s) (or pending charge) that form the basis for presumptive exclusion; and

(4) Census should ask each presumptively excludable applicant in (3) if they contest the identified conviction(s), and, for pending charges, whether a disposition has occurred. Each such individual should be given a meaningful opportunity to demonstrate that they do not present a current threat, including being given the chance to submit evidence of rehabilitation, an explanation of events leading to the conviction, or information regarding other mitigating factors. Census should then promptly evaluate such evidence.

### **CLASS ACTION ALLEGATIONS**

112. Plaintiffs are all members of the Class, which includes applicants for whom there is no record of conviction (excluding those with charges pending at the time of application), or who were convicted but do not pose a legitimate threat to the public safety or the integrity of the counting process, and who (1) were deterred by or unable to comply with the 30-day letter; (2) were able to comply with the 30-day letter process, but have never received a response from Census; (3) proceeded to the “adjudication” phase, but were improperly rejected based on their criminal history; (4) passed the adjudication screen but were deemed eligible too late in the process to actually get hired; or (5) were hired and then terminated based on application of the

“adjudication” criteria.

113. The members of the Class are so numerous that joinder of all of them is impracticable. Census recruits for decennial positions throughout the United States and screens all of the approximately 3.8 million applicants using the FBI database to hire around 1.4 million temporary employees. Approximately 700,000 applicants have been excluded from consideration by use of the 30-day letter, and approximately 20,000 applicants have been rejected through application of the “adjudication” criteria. An additional unknown number of applicants who were ultimately deemed “eligible” have been effectively denied employment through the unnecessary delay caused by the 30-day letter process. Others were actually hired, but then terminated based on application of the “adjudication” criteria.

114. There are questions of law and fact common to the Class, and these questions predominate over any questions affecting only individual members. Common questions include, but are not limited to: (1) Whether it is Defendant’s policy or practice to deter or exclude temporary job applicants with criminal histories who have never been convicted or who should be eligible for employment based on valid factors assessing legitimate threat to public safety or the integrity of the process; (2) Whether Defendant’s policy or practice to deter or exclude job applicants based on criminal history had a discriminatory disparate impact on African American, Latino, and Native American applicants; (3) Whether Defendant’s policy or practice to deter or exclude job applicants based on their criminal history records is job-related and consistent with business necessity; (4) Whether Defendant’s policy or practice to exclude job applicants based on its “adjudication” criteria is job-related and consistent with business necessity; (5) Whether a less discriminatory policy or practice exists that would meet Defendant’s legitimate needs; and (6) What equitable and injunctive relief for the Class is warranted. It is notable for commonality that Defendant acknowledges that Census has a *single, uniform* background check procedure that is

used for *all* decennial applicants.

115. Plaintiffs' claims are typical of the claims of the Class: (1) Each of the Plaintiffs applied for a temporary position in the 2010 census; (2) Each was processed through the same application procedure; (3) Each was subjected to the same pre-screening device; (4) Each was constructively or actually denied the position; and (5) Each has the same discrimination claim based on disparate impact. All of these claims are shared by each and every class member.

116. Plaintiffs will fairly and adequately represent and protect the interests of the members of the Class. Plaintiffs have no conflict with one another or any class member. Plaintiffs are committed to the goal of having Census revise its hiring policy and practice to reduce or eliminate its discriminatory impact on African American, Latino, and Native American applicants.

117. Plaintiffs have retained counsel competent and experienced in complex class actions, employment discrimination litigation, and the intersection thereof.

118. Class certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(2) because Defendant has acted and/or refused to act on grounds generally applicable to the Class, making appropriate declaratory and injunctive relief with respect to Plaintiffs and the Class as a whole. The Class members are entitled to injunctive relief to end Defendant's common, uniform, unfair, and discriminatory policies and/or practices.

**CLAIM FOR RELIEF**  
**(Title VII of the Civil Rights Act of 1964,**  
**42 U.S.C §§ 2000e et seq.)**

119. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

120. Plaintiffs bring this claim on their own behalf and on behalf of the Class.

121. Defendant's policy and practice of using employment screens that deter or exclude applicants with arrest or irrelevant conviction records from obtaining employment opportunities,

has harmed, and continues to harm, Plaintiffs and the Class, and constitutes unlawful discrimination on the basis of race, ethnicity, color, and/or national origin in violation of 42 U.S.C. §§ 2000e *et seq.*

122. Defendant's policy and practice of using employment screens that deter or exclude applicants with arrest or irrelevant conviction records from obtaining employment opportunities has a disparate impact on African Americans, Latinos, and Native Americans, and is neither job related nor consistent with business necessity. Even if Defendant's policy and practice of denying employment opportunities based on applicants' criminal history records could be justified by business necessity, a less discriminatory alternative exists that would equally serve any legitimate purpose.

123. Plaintiffs and the Class have no plain, adequate, or complete remedy at law to redress the wrongs alleged herein, and the injunctive relief sought in this action is the only means of securing complete and adequate relief. The practices identified above have been in place since at least the initiation of hiring for the 2000 decennial census, and Census maintains a permanent staff of approximately 50 full-time CHEC employees yearly to conduct background checks on its applicants for employment. Plaintiffs and the Class they seek to represent are now suffering, and will continue to suffer, irreparable injury from Defendants' discriminatory acts and omissions.

124. Defendant's conduct has caused, and continues to cause, Plaintiffs and the members of the Class substantial losses in earnings and other employment benefits.

#### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs and the Class pray for relief as follows:

125. Certification of the case as a class action on behalf of the proposed Class;

126. Designation of Representative Plaintiffs Eugene Johnson, Evelyn Houser, Sandra Anderson, Anthony Gonzalez, Ignacio Riesco, Precious Daniels, and Felicia Rickett-Samuels as

representatives on behalf of the Class;

127. Designation of Representative Plaintiffs' counsel of record as Class counsel;

128. A declaratory judgment that the practices complained of herein are unlawful and violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*;

129. A preliminary and permanent injunction against Defendant and all officers, agents, successors, employees, representatives, and any and all persons acting in concert with them, from engaging in each of the unlawful policies, practices, customs and usages set forth herein, consistent with the less discriminatory alternative described above;

130. An order that Defendant institute and carry out policies, practices, and programs that provide equal employment opportunities for all Class members who would be eligible under application of the Uniform Guidelines for Employee Selection Procedures and related EEOC Guidance, and that Defendant eradicate the effects of past and present unlawful employment practices;

131. Because it is no longer possible to restore Plaintiffs and Class members to their rightful positions at Census as applicants or employees, an order for payment of lost wages and benefits;

132. Back pay accruing as a result of a delay in hiring Plaintiffs and Class members caused by the illegal policies and practices alleged herein;

133. Costs incurred herein, including reasonable attorneys' fees to the extent allowable by law, including but not limited to 42 U.S.C. §§ 2000e-5(k) & 2000e-16;

134. Pre-judgment and post-judgment interest, as provided by law; and

135. Such other and further legal and equitable relief as this Court deems necessary, just, and proper.

Dated: New York, NY  
August 5, 2010

Respectfully submitted,

By: Samuel R. Miller

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**Attorneys for Plaintiffs and the Putative Class**



# **Exhibit A**

REDACTED

BC-189Z  
(11-2008)



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

February 16, 2010

Precious A. Daniels  
REDACTED

Detroit, MI 48206

Dear Applicant,

The Census Bureau processes all applicants for temporary census jobs through a pre-appointment name check against the Federal Bureau of Investigation (FBI) Criminal Justice Information Services Division's criminal file and reviews the forms you completed at the time of application. Your application was potentially flagged as disclosing information pertaining to a conviction, court martial, or pending charges. If you disclosed such information, Census requests a detailed explanation of the self-disclosure, as well as any and all court documents related to the arrest or conviction. However, if you did not disclose any adverse information on your application, your name check most likely resulted in a tentative match between you and an arrest record in the FBI criminal history index. Because this identification is based on descriptors only, there is a chance that this record does not concern you. Therefore, you may do one of the following:

- A. If you do not dispute the identity of the arrest record in question, provide OFFICIAL COURT documentation on any and all arrest(s) and/or conviction(s) in your past;
- B. If you wish to dispute the identity of the arrest record in question, you may provide a set of original fingerprints. Call 1-888-360-5561 to obtain a fingerprint card and return envelope from the office in which you applied. If you send a fingerprint card that shows a match with the criminal history record in question, and you did not provide the requested court documentation, you will be made ineligible for hire.

Please affix an address label provided below to the return envelope of any correspondence. Use the second address label for any additional information that needs to be sent in a separate envelope. For your application to remain active, you must return all documents within 30 days of the date appearing above. The Census Bureau will not reimburse you for costs associated with obtaining your fingerprints or court documentation. Also, providing any of the above information does not guarantee that you will be hired by the Census Bureau.

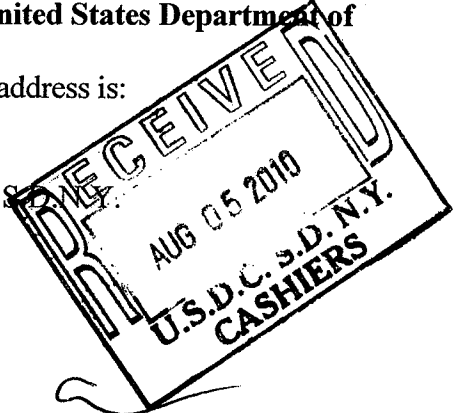
Sincerely,  
Census Hiring and Employment Check Staff  
Administrative and Management Systems Division  
U.S. Census Bureau

**CERTIFICATE OF SERVICE**

I, **Rosemary Almonte**, under penalties of perjury, certify the following as true and correct: I am not a party to this action; and I am over 18 years of age. On this **5th** day of **August 2010**, I served a true and correct copy of the foregoing: **"First Amended Class Action Complaint"** herewith by causing same to be served by **U.S. Certified Mail** to the following attorney of record for **Gary Locke, Secretary, United States Department of Commerce**, the defendant in this action, whose last known address is:

Allison D. Penn, Esq.  
Office of the U.S. Attorney, S  
86 Chambers Street  
New York, NY 10007

Dated: August 5, 2010  
New York, New York



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