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,	:	
Plaintiffs,	:	10 Civ. 3105 (FM)
v.	:	
PENNY PRITZKER, Secretary, United States Department of Commerce,	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Federal Rules

Defendant Penny Pritzker, in her official capacity as Secretary of the United States Department of Commerce, by her attorney, Preet Bharara, United States Attorney for the Southern District of New York ("defendant" or the "Government"), respectfully submits this memorandum of law in support of her motion to dismiss under Fed. R. Civ. P. 12(h)(3) and Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction[1] on the ground that each of the named plaintiffs, Evelyn Houser, Anthony Gonzalez, Ignacio Riesco, Precious Daniels, Felicia Rickett-Samuels, Chynell Scott, Vivian Kargbo, and Scotty Desphy (collectively, "plaintiffs"), lacks Article III standing to assert claims of disparate impact under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII").

PRELIMINARY STATEMENT

Plaintiffs allege, on behalf of themselves and a broad purported class of individuals who applied for temporary employment with the Census Bureau in connection with the 2010 Decennial Census, that Census' background check policies and practices had a disparate impact in violation of Title VII. Plaintiffs seek back pay, a declaratory judgment, and prospective equitable relief. Plaintiffs, however, lack standing to pursue any disparate impact employment discrimination claims against the Census Bureau because each was barred or otherwise effectively precluded from selection for reasons entirely independent of the challenged background check policies and procedures—meaning that none could have been selected for employment even if the challenged policies and procedures had not been in place. Thus, as a

[1] Because of the dispositive nature of this motion, and in the interest of efficient use of the Court's and the parties' resources, the Government respectfully requests that the Court consider this dispositive motion before turning its attention to the parties' briefing on plaintiffs' motion for class certification. If the Court believes necessary (which the Government believes it is not), the Government suggests a limited evidentiary hearing on the individual plaintiffs' particular lack of qualifications raised in the instant motion, if the Court would find it helpful and appropriate.

matter of law, none can show that the challenged policies and procedures caused any injury-in-fact or that a judgment invalidating such policies and procedures would redress any claimed injury-in-fact.

For a plaintiff to have Article III standing to bring a Title VII action, the plaintiff must show that he or she was personally injured by the defendant's alleged discrimination and that his or her injury will likely be redressed by the requested relief. *Breiner v. Nevada Dep't of Corr.*, 610 F.3d 1202, 1206 (9th Cir. 2010) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). In disparate impact cases, plaintiffs have standing only if they can establish that, absent the challenged employment practices, they were otherwise eligible for the position sought. *See, e.g., Bates v. United Parcel Serv., Inc.*, 465 F.3d 1069, 1078 (9th Cir. 2006); *Jones v. Mukasey*, 565 F. Supp. 2d 68, 81 (D.D.C. 2008); *King v. Stanislaus Consol. Fire Prot. Dist.*, 985 F. Supp. 1228, 1230 (E.D. Cal. 1997). As demonstrated below, *see infra* at 6-14, none of the named plaintiffs could have been selected for the temporary positions for which they applied for reasons entirely independent from the policies and procedures they seek to challenge here.

In addition, the named plaintiffs lack standing because they cannot obtain the monetary relief that would redress their injuries. Under the law of this Circuit, plaintiffs who would not have been hired even absent an allegedly discriminatory hiring practice are not entitled to receive back pay. For these reasons, the Court should grant defendant's motion to dismiss for lack of subject matter jurisdiction.

STATEMENT OF FACTS

A. Census Bureau Hiring Process and Employment Qualifications for the 2010 Decennial

The 2010 Decennial Census of Population and Housing (the "Census" or the "Decennial Census") required the Census Bureau to fill over 1.3 million temporary positions between October 2008 and September 2010. *See* Declaration of Viola Lewis Willis dated October 28,

2013 ("Willis Decl. I") [ECF No. 205], ¶ 2. Not all hiring was completed at one time. *Id.* Instead, the Census Bureau selected temporary employees for a particular operation, and then released the employees from employment after the operation was completed. *Id.*

The 2010 Decennial's field operations were conducted through twelve temporary Regional Census Centers located in cities around the country. *See id.* ¶ 7. Each Regional Census Center, in turn, oversaw a number of temporary Local Census Offices ("LCOs"). *Id.* Each LCO conducted its own recruiting and hiring for its geographic area. *Id.*

All applicants for the temporary positions for the Decennial Census were required to complete an application form and take a written test. Subsequently, to be selected, applicants also were required to pass a criminal background check, and satisfy requirements for language ability, hourly availability, and means of transportation, as needed. *See id.* ¶ 3; *see also* Administrative Manual (annexed as Exhibit A to the Declaration of Viola Lewis Willis dated December 16, 2013 ("Willis Decl. II")) at USA1737. The Census Bureau employed the written test to ascertain whether applicants could follow written instructions, do arithmetic, and perform in other areas related to Census work. *See* Willis Decl. II Ex. A at USA1758. Applicants could retake the test to improve their test scores. *See* Willis Decl. I ¶ 4.

After an applicant's test was scored, the LCO entered the applicant's data into the Decennial Applicant Personnel Pay System ("DAPPS"), an electronic system used by the Census Bureau to manage 2010 Decennial hiring. *Id.* Applicant data entered in DAPPS included the applicant's test score, address, contact information, willingness to work in the field or in an office, means of transportation, availability for work in terms of hours per week and weekends or nights, citizenship, language ability, veterans' preference eligibility, and other personal information self-reported by the applicant. *Id.* ¶ 10. 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. *Id.* ¶ 4. Applicants with veterans' preferences were granted either 5 or 10 "preference points" that were added to their test scores. *Id.* ¶ 11.[2]

Because the Census Bureau selected Decennial Census applicants within their own neighborhoods and communities, the Census employed geographic boundaries as selection criteria. *Id.* ¶ 8. An LCO could not select a new employee from another LCO's geographic area. *Id.* ¶ 29. To that end, the Census Bureau assigned a "geocode" —*i.e.,* a numerical value based on the Census tract and block of the applicant's residence—to all applicants based on their residential addresses. *Id.* ¶ 9. Each applicant's numerical geocode was either automatically generated by the computer system after the applicant's address was keyed in, or was manually entered if the system could not automatically generate a geocode. *Id.* ¶ 10.

Whenever an LCO needed to select employees for a field operation, the LCO Assistant Manager would begin the process by entering desired criteria into a Form D-150, Requisition to Hire ("D-150"). *Id.* ¶ 12. The D-150 identified the number of employees desired, the position to be filled, availability requirements, language requirements, transportation requirements, whether the selection was for a field or office position, and the eligible geographic area. *Id.* ¶ 13. DAPPS used the particular criteria in the D-150 to search the database and to identify applicants whose application information fell within those parameters. *Id.* This DAPPS query generated a selection record, called a Form D-425(A), Selection Record ("selection record"), which listed

[2] There are five kinds of veterans' preference, ranging from 5 to 10 points. First, a 5-point preference is given to veterans after October 14 1982, who served during a qualifying war or campaign. *Id.* ¶ 11. Second, a 10-point disability preference is given to disabled veterans with a non-compensable disability of 10 percent or less. *Id.* Third, a 10-point compensable disability preference is given to disabled veterans with a compensable disability of more than 10 percent. *Id.* Fourth a 10-point preference is given to disabled veterans with a compensable service-connected disability of 30 percent or more. *Id.* Fifth, a 10-point preference is given to a deceased veteran's widow, widower, or mother, or to a disabled veteran's spouse or mother. *Id.* *See also* Willis Decl. II Ex. A at USA1718-1719.

qualified applicants according to veterans' preference principles and in numerical order from highest to lowest test scores. *Id.* ¶¶ 13-14. Applicants who did not clear the criminal background check process did not appear on the selection records. *See* Willis Dep. (annexed as Ex. A to the Declaration of Tomoko Onozawa ("Onozawa Decl.") at 183:16-18, Nov. 30, 2012.

Every selection record contained only the names of applicants whose data in DAPPS matched the selection parameters specified in the corresponding D-150. *See* Willis Decl. I ¶ 14. In other words, if the D-150 delineated a specific geographical area, a specific foreign language proficiency, availability requirements, transportation requirements, preferred job position, and transportation capability, only those applicants who lived in the same geographical area, listed the same foreign language proficiency on their applications, met the specified availability requirements (*i.e.,* hours per week they were willing to work and times of day they were available to work), interest in the type of position listed on the D-150, and access to the specified modes of transportation would appear on the selection record generated for that D-150. *Id.* ¶¶ 17-21. Additionally, the selection record for each D-150 listed a maximum of 50 candidates. *Id.* ¶ 26. Therefore, if an applicant's test score was not among the top 50 candidate scores in that selection record, the applicant was not listed on the record. *Id.*

The first applicants on a selection record included all 10-point compensable veterans with service-connected disabilities of either 30 percent or more, or at least 10 percent but less than 30 percent. *Id.* ¶ 15. The next group of qualified applicants on a selection record included applicants with a 10-point disability, 5-point preference eligibles,[3] and all applicants who did not claim veterans' preference. *Id.* ¶ 16. All applicants were ranked in descending test score order. *Id.* Under the selection process, LCOs could not pass over preference-eligible applicants and

[3] "Preference eligibles" include veterans and certain relatives of veterans as defined under

select non-preference-eligible applicants without a written justification explaining why the preference-eligible applicant was unqualified for the position. *Id.* ¶ 23. The selection process also required LCOs to offer positions to applicants with the highest scores on the selection record. *Id.* ¶ 24.

Furthermore, U.S. citizens received preference for employment at the Census Bureau. *See* Willis Decl. II Ex. A at USA1719. Non-citizens could only be considered for employment in situations where a specific bilingual ability was required in a geographic region and where no U.S. citizen applicant was available who spoke the specific language necessary for the geographic region. *Id.* Otherwise, non-citizens were not eligible to be selected for Decennial employment. *See* Willis Dep. (annexed as Onozawa Decl. Ex. A) at 144:13-22, 151:3-6, 183:16-18, Nov. 30, 2012.

Once the selection record of available candidates was generated, the selection clerks would begin the interview process by starting with the first person listed at the top of the selection record and continue interviewing applicants in descending test score order. *See* Willis Decl. II Ex. A at USA1737, 1739. The LCO contacted the applicant with the highest score, interviewed the applicant, and proceeded down the list as needed until the LCO had hired the required number of qualified applicants requisitioned on the D-150. Willis Decl. I ¶ 24.

B. Named Plaintiffs

1. Evelyn Houser

Plaintiff Evelyn Houser ("Houser") is an African-American resident of Philadelphia, Pennsylvania. *See* Houser Dep. (annexed as Onozawa Decl. Ex. B), 4:23-24, 8:9-11, Feb. 12, 2013. In January 2009, Houser applied for a temporary position with the 2010 Decennial. *See*

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federal law. *See* 5 U.S.C. § 2108(3).

id. at 65:3-7, 17-20. Houser received a score of 72 on her written test. *See* Willis Decl. I ¶ 43. Houser's application form noted that she did not speak any languages other than English. *See* Sandra Patterson Decl. ("Patterson Decl."), Ex. I at USA3882, Oct. 28, 2013, ECF No. 206.[4] A total of 84 selection records encompassing Houser's geocode were generated after the date she applied. *See* Willis Decl. I ¶ 44. Of the 84 records, 25 selection records were limited to applicants who spoke a language other than English, which meant Houser was not qualified for any of those selection records because her application did not note any foreign language ability. *Id.* ¶ 45. Moreover, none of the applicants in Houser's geographic tract who were selected on or after the date Houser applied had a score of 72 or lower and lacked the required foreign language ability. *See id.* ¶ 48.

The only applicant with a test score of 72 who was hired in Houser's geographic tract was chosen from selection record 306036, which was limited to applicants who spoke the Cantonese dialect of Chinese. *Id.* ¶ 46 & Ex. A at USA50196, 50200. Of those selection records that did not contain a foreign language requirement, the lowest score of 78 belonged to an applicant who was chosen from selection record 361468 on March 26, 2010. *Id.* ¶ 47 & Ex. A at USA50325. As a result, Houser could not have been selected for the Decennial Census because her test score was too low and she did not speak Chinese. *Id.* ¶ 49.

2. Anthony Gonzalez

Plaintiff Anthony Gonzalez ("Gonzalez") is a Latino resident of Riverview, Florida. *See* Gonzalez Dep. (annexed as Onozawa Decl. Ex. C), 7:16-18, Dec. 10, 2012. In February 2010, Gonzalez applied to the Decennial Census and received a score of 92 on his written test. *Id.* at

[4] True and correct copies of screenshots of each named plaintiff's job applications were annexed as exhibits to the Patterson Declaration, and authenticated by Viola Lewis Wills in her declaration dated October 28, 2013. *See* Lewis Decl. I ¶¶ 45, 52, 63, 70, 80, 85, 92, 96.

54:17-24, 88:9-89:19; Willis Decl. I ¶ 85 and Patterson Decl. Ex. N at USA3859. Gonzalez's application form noted that he spoke Spanish, and did not indicate any veterans' preference. *See* Patterson Decl. Ex. N at USA3852, 3855.

A total of 23 selection records encompassing Gonzalez's geocode were generated after he applied for the Decennial Census. *See* Willis Decl. I ¶ 86. Out of all the applicants selected from the 23 selection records, only two had test scores of 92 or lower. *Id.* ¶¶ 88-89. Although an applicant with a test score of 82 was hired from one of the selection records—selection record number 289811—that record was limited to applicants who spoke Haitian-Creole, which Gonzalez did not speak. *Id.* ¶ 88 & Ex. F at USA49755, 49757. Although an applicant with a test score of 88 was hired from another selection record—selection record number 389367—that applicant had a 10-point veterans' preference with greater than 30 percent disability, and could not have been passed over for the position in favor of a non-preference eligible applicant such as Gonzalez. *Id.* ¶ 89 & Ex. F at USA49821. Based on the selection records that were generated on or after the day 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. *Id.* ¶ 90. As a result, Gonzalez could not have been selected for temporary employment with the Decennial Census based on his qualifications. *Id.* ¶ 91.

3. Ignacio Riesco

Plaintiff Ignacio Riesco ("Riesco") is Latino and a resident of Orlando, Florida. *See* Riesco Dep. (annexed as Onozawa Decl. Ex. D), at 97:18-19, Nov. 16, 2012. On April 10, 2010, Riesco applied for a temporary position with the Decennial Census. *See* Patterson Decl. Ex. P at USA5597. That day, Riesco received a score of 93 on his Census test. *See* Willis Decl. I ¶ 97. Riesco affirmed on his application that he is not a United States citizen. *See* Patterson Decl. Ex N at USA5595; *see also* Onozawa Decl. Ex. D at 6:23-7:3.

The LCO ran only one selection record for Riesco's geocode after he applied. *See* Willis Decl. I ¶ 99 & Ex. H. All applicants who appeared on that selection record received test scores of 95 or above. *Id.* As a result, Riesco would not have been selected for the Decennial Census because his test score of 93 was lower than the scores of all of the other applicants listed in the selection record and because he was not an American citizen in a geocode where there were no eligible citizen applicants and there was a language requirement. *See id.* ¶ 100.

4. Precious Daniels

Plaintiff Precious Daniels ("Daniels") is an African-American resident of Detroit, Michigan. *See* Daniels Dep. (annexed as Onozawa Decl. Ex. E), at 6:9-12, 156:5-8, Oct. 18, 2012. In January 2010, Daniels applied for a temporary job with the Decennial Census and received a test score of 83. *Id.* at 29:20-24; Willis Decl. I ¶ 78. Daniels' application also indicated that she did not speak any foreign languages. *See* Patterson Decl. Ex. M at USA3796. Daniels' application also noted that she was available to work only 28 hours per week. *Id.*

A total of 34 selection records encompassing Daniels' geocode were generated after she applied. *See* Willis Decl. I ¶ 79. Of those, 11 selection records were limited to applicants who spoke a foreign language. *Id.* ¶ 80 & Ex. E. Because Daniels spoke only English, she would not have been eligible for any of those 11 selection records. *Id.*

Although certain selected applicants received test scores lower than Daniels' score of 83, all were chosen because they fulfilled other specifications of the D-150s that generated those selection records. One applicant with a test score of 75 was chosen on selection record 493271, but that selection record was limited to Spanish-speaking applicants. *See id.* ¶ 81 & Ex. E, USA48309. Another applicant with a test score of 78 was chosen on selection record 546788, but that selection record was limited to applicants who stated they were available to work for 40 hours per week. *See id.* ¶ 82 & Ex. E, USA48407. Because no applicants with a test score of 83,

lack of qualifying language ability, and only 28 hours of availability per week could have been selected on or after the day Daniels applied, Daniels would not have been selected to work for the Decennial Census. *Id.* ¶¶ 83-84.

5. Felicia Rickett-Samuels

Plaintiff Felicia Rickett-Samuels ("Rickett-Samuels") is an African-American resident of Stamford, Connecticut. *See* Rickett-Samuels Dep. (annexed as Onozawa Decl. Ex. F), at 6:8-12, 7:3-4, Feb. 25, 2013. On January 13, 2009, Rickett-Samuels applied for a temporary position with the 2010 Decennial. *See* Willis Decl. I ¶ 50. On the same day, Rickett-Samuels received a score of 88 on her written test. *See id.* Rickett-Samuels' application noted that she did not speak a language other than English, and did not indicate any veterans' preference. *See* Patterson Decl. Ex. J at USA44224, 44227.

A total of 22 selection records encompassing Rickett-Samuels's geocode were generated after the date of her application. *See* Willis Decl. I ¶ 51. Of the 22 selection records, 11 were limited to applicants proficient in a language other than English, which meant that Rickett-Samuels was not qualified for any of those selection records. *Id.* ¶¶ 52-53 & Ex. B.

Although certain selected applicants received test scores lower than Rickett-Samuels' score of 88, all were chosen because they met foreign language specifications in the D-150s that generated those selection records. One applicant with a test score of 80 was chosen from selection record 14814, which was limited to Spanish-speaking applicants. *See* Willis Decl. I ¶ 53 & Ex. B at USA50715. Another applicant with a test score of 77 was chosen from selection record 117008, which was limited to Russian-speaking applicants. *See id.* ¶ 54 & Ex. B at USA50731. A third applicant who also had a test score of 77 was chosen from selection record 117013, but that record was limited to Portuguese-speaking applicants. *See id.* ¶ 55 & Ex. B at USA50733. A fourth applicant who also had a test score of 75 was chosen from selection record

117480, but that record was limited to applicants who spoke Cambodian. *See id.* ¶ 56 & Ex. B at USA50735. Furthermore, one applicant with a test score of 85 was chosen from selection record 172683, and another applicant with a test score of 75 was chosen from selection record 183996, but those selection records were limited to applicants who spoke Haitian-Creole. *See id.* ¶ 57 & Ex. B at USA50813, 50815, 50848. Finally, of the remaining selection records that did not have a language requirement, the lowest test score of a selected applicant was 97. *Id.* ¶ 58 & Ex. B at USA50742.

Because no applicant with a test score of 88 who lacked any foreign language ability could have been selected on or after the day Rickett-Samuels applied, she would not have been selected to work for the Decennial Census. *Id.* ¶¶ 59-60.

6. Chynell Scott

Plaintiff Chynell Scott ("Scott") is an African-American resident of Philadelphia, Pennsylvania. *See* Scott Dep. (annexed as Onozawa Decl. Ex. G), 4:15-19, 14:23-24, Jan. 14, 2013. On December 11, 2009, Scott applied for a temporary position with the Decennial Census, and took the written test. *See id.* 76:9-13; Willis Decl. I ¶ 61. Question 28 on the Census application form asked applicants whether, during the last 10 years, they had ever been "convicted." *See id.* ¶ 62; Patterson Decl. Ex. H at USA43462 & Ex. K at USA43550. Scott responded to question 28 by answering "no." *See* Willis Decl. ¶ 63; Patterson Decl. Ex. H at USA43462 & Ex. K at USA43550.

In fact, according to court disposition information that Scott submitted to the Census Bureau, Scott had pleaded guilty to disorderly conduct on or about September 8, 2009, about two months before she completed her Census application form. *See* Patterson Decl. ¶ 17 & Ex. H at USA43460. Applicants who provided false information in their employment application were deemed not eligible for hire, *see* Willis Decl. I ¶ 65; Patterson Decl ¶ 17, and therefore would not

have appeared on any selection records. *See* Willis Decl. I ¶ 66. Accordingly, Scott would not have appeared on any selection records because she had provided false information in her application, and consequently would not have been chosen for a temporary position. *Id.* ¶ 67.

7. Vivian Kargbo

Plaintiff Vivian Kargbo ("Kargbo") is an African-American resident of Boston, Massachusetts. *See* Kargbo Dep. (annexed as Onozawa Decl. Ex. H) at 12:17-17, Dec. 17, 2012. On or about March 10, 2010, Kargbo applied for a temporary position with the Decennial Census, took the written exam, and received a test score of 80. *See* Willis Decl. I ¶ 93. On her application, Kargbo indicated that she was not a U.S. citizen and did not report any foreign language ability. *See id.* ¶ 92; Patterson Decl. Ex. O at USA43530, 43533.

Only two selection records encompassing Kargbo's geocode were generated after the date of her application. *See* Willis Decl. I ¶ 94. The lowest-scoring applicant who was selected from selection record number 392291 received a 100, *see id.* Ex. G at USA50694, and the lowest-scoring applicant who was chosen from selection record number 399022 received a 97. *Id.* & Ex. G at USA50698. Furthermore, because Kargbo was not a U.S. citizen, she would have been considered for employment only if a D-150 requested a specific language skill for her geographic tract and there were no U.S. citizen applicants available who could satisfy the foreign language requirement. *See* Onozawa Decl. Ex. A at 144:13-22, 150:21-151:6; *see also* Willis Decl. II Ex. A at USA1719. Accordingly, Kargbo was not qualified for any of those selection records because she was not a U.S. citizen, did not have any foreign language ability, and her score of 80 was too low. *See* Willis Decl. I ¶¶ 94-95; Onozawa Decl. Ex. A at 144:13-22, 150:21-151:6; Willis Decl. II Ex. A at USA1719.

8. Scotty Desphy

Plaintiff Scotty Desphy ("Desphy") is an African-American resident of Philadelphia,

Pennsylvania. *See* Desphy Dep. (annexed as Onozawa Decl. Ex. H), at 7:3-6, 7:19-23, Apr. 5, 2013. In December 2009, Desphy applied for a temporary position with the Decennial Census. *See id.* at 65:13-67:19. Desphy took the written test twice, and received a score of 75 on December 21, 2009, and a score of 83 on February 8, 2010. *See* Willis Decl. I ¶ 68. Desphy's application indicated that she did not have any foreign language ability, and did not have any veterans' preference. *See* Patterson Decl. Ex. L at USA44236.

A total of 123 selection records encompassing Desphy's geocode were generated after December 21, 2009. *See* Willis Decl. I ¶ 69. Of the 123 selection records, 51 records were limited to applicants proficient in a language other than English, which meant that Desphy was not qualified for any of those selections. *Id.* ¶ 70 & Ex. D.

Although certain selected applicants received test scores lower than Desphy's score of 83, all were chosen because they met foreign language specifications on the D-150s that generated those selection records. *See id.* ¶ 71. One applicant with a test score of 72 was chosen from selection record 390838, which was limited to Arabic-speaking applicants. *See id.* ¶ 72 & Ex. D at USA49304, 49307. Another applicant with a test score of 83 was chosen from selection record 422498, which was limited to Chinese-speaking applicants. *See id.* ¶ 73 & Ex. D at USA49339, 49341. A third applicant who also had a test score of 82 was chosen from selection record 298721, but that applicant had a 10-point veterans' preference with greater than 30 percent, and therefore could not have been passed over for the position in favor of a non-preference eligible applicant. *See id.* ¶ 74 & Ex. D at USA48752. Of the remaining selection records, other than 298721, which did not have a foreign language requirement, the lowest score of a selected applicant was 88. *See id.* ¶ 75 & Ex. D at USA49081, 49724-25, 49734. Because no applicant with a test score of 83, without any qualifying language ability or any veterans' preference could have been selected after the day Desphy applied, she would not have been

selected to work for the Decennial Census. *Id.* ¶¶ 76-77.

ARGUMENT

ALL NAMED PLAINTIFFS LACK STANDING TO ASSERT A DISPARATE IMPACT CLAIM

A. The Court Must Decide Whether the Named Plaintiffs Have Standing Before Deciding Class Certification Because Standing Defects Warrant Dismissal

As the Second Circuit has instructed, "[i]f a court perceives at any stage of the proceedings that it lacks subject matter jurisdiction, then it must take proper notice of the defect by dismissing the action." *Cave v. East Meadow Union Free Sch. Dist.*, 514 F.3d 240, 250 (2d Cir. 2008) (citing Fed. R. Civ. P. 12(h)(3)). Under Article III of the Constitution, federal courts have jurisdiction only over "cases and controversies," and "standing 'is an essential and unchanging part of the case-or-controversy requirement of Article III.'" *Field Day, LLC v. Cnty. of Suffolk*, 463 F.3d 167, 175 (2d Cir. 2006) (quoting *Lujan*, 504 U.S. at 560); *see also Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.").

Therefore, as also noted in the Government's opposition to plaintiffs' class certification motion [ECF No. 203, at 15-16], before determining whether a class can be certified, this Court must first consider whether any of the named plaintiffs have established standing to challenge the Census Bureau's criminal background check screening policies and practices.[5] "When the

[5] On July 2, 2013, the Government sought leave to file a Rule 12(b)(1) motion to dismiss plaintiffs' claims for lack of standing [ECF No. 220], only a few days after plaintiffs moved for class certification on June 28, 2013 [ECF No. 166]. However, on August 9, 2013, the Court initially denied the Government's request on the ground that "a dispositive motion at this juncture—while the class certification motion is being briefed—would be pointless." *See* Order dated August 9, 2013, at 2 [ECF No. 183]. Following the Government's request for reconsideration dated August 20, 2013 [ECF No. 222], the Court granted the Government leave to file the instant motion by order dated September 11, 2013 [ECF No. 188].

plaintiff is a class, the class must establish that at least one named plaintiff has standing in order for the entire class to have standing." *Bates v. United Parcel Serv. Inc.*, 465 F.3d 1069, 1078 (9th Cir. 2006) (citing *Casey v. Lewis*, 4 F.3d 1516, 1519, 1524 (9th Cir. 1993)); *see also Lee v. Oregon*, 107 F.3d 1382, 1390 (9th Cir. 1997) (holding that standing is a jurisdictional element "that must be satisfied prior to class certification."); *Fort Worth Employees' Ret. Fund v. J.P. Morgan Chase & Co.*, 862 F. Supp. 2d 322, 331 (S.D.N.Y. 2012) (for each claim asserted in a class action, there must be at least one class representative with standing to assert that claim). Accordingly, "no class may be certified that contains members lacking Article III standing." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 1006)). Moreover, each named plaintiff must also establish standing for each claim and for each form of relief that he or she seeks in this action. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (noting that "our standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press" and "for each form of relief sought") (citations omitted).

If none of the proposed class representatives can "establish[] the requisite case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *see also Tabor and Gray v. Hilti, Inc.*, 703 F.3d 1206, 1227 (10th Cir. 2013) ("It is not sufficient for an individual plaintiff to show that the employer followed a discriminatory policy without also showing that plaintiff [herself] was injured."). The eight proposed class representatives must therefore show that they have personally suffered injury-in-fact caused by the challenged policies and practices, and that the relief sought would redress such injury-in-fact. As set forth below, plaintiffs cannot possibly carry their burden.

B. Standard of Review

"[A] district court may properly dismiss a case for lack of subject matter jurisdiction under Rule 12(b)(1) if it lacks the statutory or constitutional power to adjudicate it." *Aurecchione v. Schoolman Transp. Sys., Inc.*, 426 F.3d 635, 638 (2d Cir. 2005). Indeed, "[d]efects in subject matter jurisdiction . . . may be raised at any time during the proceedings." *Fuller v. Bd. of Imm. Appeals*, 702 F.3d 83, 88 (2d Cir. 2012) (quoting *Fox v. Bd. of Trustees of State Univ.*, 42 F.3d 135, 140 (2d Cir. 1994)) (citing Fed. R. Civ. P. 12(h)(3)).

On a motion to dismiss pursuant to Rule 12(b)(1), a plaintiff carries the burden of establishing that subject matter jurisdiction exists over his complaint. *See Robinson v. Overseas Military Sales Corp*., 21 F.3d 502, 507 (2d Cir. 1994); Because standing is "an indispensable part of the plaintiff's case," each element of standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the same manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561 (citing cases). In considering challenges to subject matter jurisdiction under Rule 12(b)(1), the Court may consider evidence extrinsic to the pleadings. *See Phifer v. City of New York*, 289 F.3d 49, 55 (2d Cir. 2002) (noting that in challenges to subject-matter jurisdiction, a court "may consider materials extrinsic to the complaint"). *See also Luckett v. Bure*, 290 F.3d 493, 496-97 (2d Cir. 2002) ("In resolving the question of jurisdiction [on a motion made pursuant to Rule 12(b)(1)], the district court can refer to evidence outside the pleadings and the plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists.").

C. The Named Plaintiffs Lack Standing to Assert a Disparate Impact Claim Because They Can Neither Establish an Injury in Fact Nor Relief That Will Redress Their Claimed Injuries

To meet constitutional standing requirements, a plaintiff is required to prove: "(1) injury in fact, which must be (a) concrete and particularized, and (b) actual or imminent; (2) a causal connection between the injury and the defendant's conduct; and (3) that the injury is likely to be redressed by a favorable decision." *Kreisler v. Second Ave. Diner Corp.*, 731 F.3d 184, 187 (2d Cir. 2013) (citing cases). In particular, to establish constitutional standing to pursue a Title VII claim, a plaintiff must show that he was "personally injured by the defendant's alleged discrimination and that his injury will likely be redressed by the requested relief." *Melendez v. Illinois Bell Tell. Co.*, 79 F.3d 661, 668 (7th Cir. 1996)). It is plaintiff's burden to establish that all three prongs—injury-in-fact, causation, and redressability—have been met in order to show that there is, in fact, an Article III case or controversy. *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 103-04 (1998). As shown below, the eight named plaintiffs cannot show that they have personally suffered injury-in-fact caused by the challenged policies and practices, or that the relief sought would redress their alleged injuries-in-fact. Consequently, this action must be dismissed.

1. The Named Plaintiffs Suffered No Injury-In-Fact From the Practices and Procedures They Challenge

Here, none of the named plaintiffs meets the first "injury in fact" prong of the standing requirement, which asks the Court to consider whether these plaintiffs suffered an injury caused by the Census Bureau's criminal background check requirements that is sufficiently "concrete and particularized" and "actual or imminent." *Bates*, 465 F.3d at 1078 (citing *Lujan*, 504 U.S. at 560-61). Any plaintiff who fails to establish his or her eligibility for the position sought lacks standing to sue under Title VII on a disparate impact claim. *See King*, 985 F. Supp. at 1234. On the other hand, if a plaintiff can show that he or she was not hired "as the direct result of a

discriminatory hiring practice," that plaintiff has been "personally injured" within the meaning of Title VII. *Melendez*, 79 F.3d at 668. "To hold otherwise would unfairly narrow the language of Title VII, which makes it unlawful for an employer 'to limit . . . applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race . . . ." *Id.* (quoting 42 U.S.C. §2000e-2(a)(2)).

To determine whether a named plaintiff was "injured" requires this Court to examine whether any of the named plaintiffs were "qualified" for the temporary positions they applied for, "in the sense that, aside from the [allegedly discriminatory] standard he is challenging and all prerequisites connected to that standard, he meets the basic job requirements for the desired position." *Bates*, 465 F.3d at 1078; *see also Coe v. Yellow Freight Sys. Inc.*, 646 F.2d 444, 451 (10th Cir. 1981) (for Title VII plaintiffs to prevail on disparate impact claim, plaintiffs must show that "they were qualified for the positions that they sought . . . [t]o hold otherwise would be to allow the plaintiff to avoid the fundamental requirements for constitutional standing in addition to failing to establish the fundamentals of disparate impact")(citing *Rich v. Martin-Marietta*, 522 F.2d 333, 347-48 (10th Cir. 1975)).

As explained by the Seventh Circuit, the reason for the "qualification requirement" is clear:

> Absent direct evidence showing that a plaintiff was not hired or promoted because of a discriminatory employment practice, we assume that an unqualified plaintiff was not hired or promoted for the obvious reason—that he was unqualified. Such a plaintiff would have no standing to sue under Title VII, for he could not claim that he was injured, much less affected, by the defendant's use of an employment practice with an allegedly disparate impact.

Melendez, 79 F.3d at 668. Applying this rationale, substantial Circuit authority has held that plaintiffs asserting disparate impact challenges to discrete elements of a hiring process cannot establish Article III standing, where they would have failed to qualify for the position for

independent reasons. In particular, the Seventh Circuit has repeatedly applied standing principles to assess disparate impact challenges to employment practices, concluding that plaintiffs must establish that they were otherwise qualified for the position sought to have standing to assert those challenges. *Gilty v. Vill. of Oak Park*, 919 F.2d 1247, 1248-49 (7th Cir. 1990) (evidence of overall disparate impact immaterial where plaintiff failed to establish that he was qualified for promotion); *Carpenter v. Bd. of Regents of Univ. of Wisconsin Sys.*, 728 F.2d 911, 915 (7th Cir. 1984) ("[A] plaintiff denied a promotion could not challenge a promotion test as discriminatory, if promotion was denied for a reason completely unrelated to the test, such as lack of experience."); *see also Melendez*, 79 F.3d at 667-78 (plaintiff possessed standing to assert disparate impact challenge only after proving he was otherwise qualified for the position sought).

The Ninth and Tenth Circuits and other district courts have similarly held that, in employment discrimination cases, plaintiffs must establish their eligibility for the positions sought, despite the existence of an allegedly discriminatory employment practice. *See, e.g., Coe*, 646 F.2d at 451 (holding that, to permit plaintiffs to challenge allegedly discriminatory employment practice without showing "they were qualified for the positions that they sought … would be to allow [such plaintiffs] to avoid the fundamental requirements for constitutional standing in addition to failing to establish the fundamental[] requirements of disparate impact.") (citing *Rich*, 522 F.2d at 347-48); *Santana v. City and County of Denver*, 488 F.3d 860, 866 (10th Cir. 2007) (holding that plaintiff satisfied minimum qualifications for position sought and "therefore meets the standing requirements" for disparate impact claim); *Bates*, 465 F.3d at 1078 (holding that plaintiff had standing to challenge employment standard that allegedly violated Americans With Disabilities Act, where plaintiff showed that, aside from the allegedly discriminatory standard he was challenging, he was qualified for the position sought) (citing *Coe*, 646 F.2d at 451 and *Melendez*, 79 F.3d at 668); *Jones v. Mukasey*, 565 F. Supp. 2d 68, 81

(D.D.C. 2008) (applying *Melendez* to determine whether plaintiff had produced sufficient evidence to support claim that he was as qualified as other white applicants who were hired notwithstanding issues as to their suitability).

The named plaintiffs have not suffered an "injury in fact" as the direct result of the procedures they challenge because they could not have obtained positions with Census for reasons entirely unrelated to those procedures. The record clearly establishes that all named plaintiffs have failed to meet independent hiring criteria irrespective of the outcome of the criminal background check process, which included the obligation to provide truthful and correct information on an application, possessing requisite citizenship and/or language requirements, and/or ranking sufficiently high on selection registers. *See supra* at 6-14.

Plaintiffs' letter to the Court dated July 9, 2013, which was submitted in opposition to defendant's July 2, 2013 letter request to file a Rule 12(b)(1) motion to dismiss plaintiffs' claims for lack of standing, erroneously asserted that the Government's proposed motion was "baseless" because the Supreme Court's decision in *Connecticut v. Teal*, 457 U.S. 440, 449 (1982). Plaintiffs wrongly asserted that *Teal* "flatly rejected" the government's standing argument, because Title VII, as plaintiffs characterize it, purportedly speaks of "limitations and classifications that would deprive any individual of employment *opportunities*." *See* Letter from Adam Klein, Esq. to Hon. Frank Maas (July 9, 2013), at 2 (hereinafter "Klein Ltr.") (not docketed on ECF). However, as set forth below, any reliance on *Teal* to oppose Government's motion to dismiss on standing grounds is misplaced.

In *Teal*, the Supreme Court considered whether a so-called "bottom line" defense could defeat a disparate impact challenge to a discrete aspect of an employer's selection process even where the challenged aspect was shown to have had a disparate impact. 457 U.S. at 442. As the Court described the issue before it, under the "bottom line" theory advanced by the defendant,

"an employer's acts of racial discrimination in promotions—effected by an examination having disparate impact—would not render the employer liable for the racial discrimination suffered by employees barred from promotion if the 'bottom-line' result of the promotional process was an appropriate racial balance." *Id.* On the facts before the Supreme Court, the plaintiffs had each failed a written test required by their employer for promotion to a specific position, the results of which were also shown to have had a disparate impact on African-American test-takers. *Id.* at 443-44. However, the record also established that, "although the comparative passing rates for the examination indicated a prima facie case of adverse impact upon minorities, the result of the entire hiring process reflected no such adverse impact." *Id.* at 445. On that basis, the employer argued that plaintiffs could not establish disparate impact on the merits, notwithstanding their disqualification at the written-test stage of the process.

The Supreme Court disagreed, holding that "the 'bottom line' does not preclude [the] employees from establishing a prima facie case, nor does it provide [the] employer with a defense to such a case." *Id.* at 442. On the merits, the Supreme Court explained, the disparate impact provision of Title VII "guarantees … the *opportunity* to compete equally … on the basis of job-related criteria." *Id.* at 451 (emphasis in original). Thus, because plaintiffs were eliminated from further consideration for promotion by an employment test shown to have had a disparate impact, the fact that the racial breakdown of those candidates ultimately selected for promotion at the end of the full process was "balanced" did not defeat their challenge to the discriminatory test on the merits. *Id.*

The facts here, however, make *Teal* inapposite. The plaintiffs in *Teal* were eliminated from consideration for promotion by an employment test that they showed had a disparate impact, and the employer-defendant made no showing that the plaintiffs were ineligible for promotion on the basis of any criteria independent of the discriminatory test. By contrast, the

named plaintiffs in the instant case have indisputably failed to meet independent hiring criteria, including citizenship, language, and/or hourly availability requirements, and/or would have ranked too low on selection registers to have been selected in any event, irrespective of the outcome of the criminal-background-check process. Thus, unlike the defendant in *Teal*, the Government is not asserting a "bottom line" argument—*i.e.,* that the alleged disparate impact of a discrete stage or element of the selection process was somehow "balanced out" by the outcome of the full process. Instead, the named plaintiffs in this case cannot satisfy the elements of Article III standing to challenge Census's background-check procedures because they could not have obtained positions with Census for reasons entirely unrelated to those procedures.

Indeed, unlike this case, the Supreme Court in *Teal* never even had reason to address Article III standing. *See* 457 U.S. 440, *passim*. There was no basis for the employer to challenge standing in *Teal*, because it was apparent that the plaintiffs suffered injury from their failure to pass a discriminatory employment test and their subsequent non-selection for promotion, that such injury was traceable to the discriminatory test, and that an injunction against the use of the test might redress such injury. *Id.* at 443-44. Here, by contrast, the named plaintiffs have suffered no injury-in-fact as a result of the background-check procedures, because they could not have been hired for reasons independent of the challenged procedures. Accordingly, *Teal* in no way overcomes the Government's showing that the named plaintiffs lack standing.

2. The Named Plaintiffs Cannot Show That the Requested Relief Will Redress Their Alleged Injuries

Plaintiffs' Second Amended Complaint seeks (1) declaratory judgment that the criminal background check process violates Title VII; (2) preliminary and permanent injunctive relief precluding Defendant from employing the criminal background check process; (3) an order directing Defendant to utilize employment policies, practices and programs set forth under

alternate guidelines and to "eradicate the effects of past and present unlawful employment practices"; (4) back pay in the form of lost wages and lost benefits, "because it is no longer possible to restore Plaintiffs . . . to their rightful positions at Census as applicants or employees for the 2010 decennial count"; and (5) plaintiffs' costs, including attorneys' fees, and interest. *See* Second Am. Compl. ¶¶ 135-140. Even assuming *arguendo* that the criminal background check was unlawful, however, the named plaintiffs have not met the third element of Article III standing, redressability, because they did not score high enough on the written test and/or did not meet other non-discriminatory qualifications for employment and therefore are not entitled to any back pay, which is the only relief that would provide the named plaintiffs with redress for their alleged injuries.[6]

The Supreme Court has defined redressability as "a likelihood that the requested relief will redress the alleged injury," and failure to establish redressability alone is grounds for dismissing a complaint for lack of standing. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103, 105 (1998) (citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45-46 (1976)). In *Steel Co.*, the Supreme Court dismissed a private enforcement action brought by an environmental protection organization against a manufacturer under the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"). *Steel Co.*, 523 U.S. at 86. Plaintiff's complaint asserted that defendant had failed to file timely toxic- and hazardous-chemical storage and emission reports for previous years that were required under EPCRA, *id.* at 87-88, and sought: (1) declaratory judgment that the defendant had violated EPCRA; (2) forward-looking

[6] To the extent plaintiffs claim they seek prospective relief as to not-yet-designed hiring and background processes for the 2020 Decennial Census, the Government respectfully continues to assert that there is no sufficiently imminent and non-speculative harm to give rise to an actionable case or controversy, notwithstanding this Court's ruling to the contrary. [ECF No. 101]. Moreover, even if such a harm did exist, it is not redressable as is required to support

injunctive relief, including authorization to periodically inspect the defendant's facility and records, and the requirement that defendant provide plaintiff with reports; (3) an order requiring the defendant to pay civil penalties for the statutory violations; (4) an award of plaintiff's litigation costs, including attorneys' and expert witness fees; and (5) any further relief as the court deemed appropriate. *Id.* at 105.

The Supreme Court held that the complaint did not satisfy the redressability prong of Article III standing. *Id.* In so doing, the Court held that the declaratory judgment sought was "worthless" to plaintiff. *Id.* at 106. The Court further held that the injunctive relief sought—*i.e.,* plaintiff's rights to inspect the manufacturer's facility and records and to receive copies of reports—could not "conceivably remedy any past wrong but is aimed at deterring [defendant] from violating EPCRA in the future," and that the plaintiff's "generalized interest in deterrence," was "insufficient for purposes of Article III." *Id.* at 108-09. The Court also held that the plaintiff's request for litigation costs and attorneys' fees were not enough to satisfy redressability because "a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit." *Id.* at 107. Finally, the Court held that the statutory civil penalties sought by plaintiff did not confer standing because those penalties were payable to the United States Treasury, not to plaintiff. *Id.* at 106. In sum, the Court noted that "[b]y the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Id.* at 107 (emphasis in original).

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plaintiffs' standing.

Under the *Steel Co.* analysis, most of the requested relief in the Second Amended Complaint—*i.e.,* declaratory judgment, injunctive relief, litigation costs, and attorneys' fees—are insufficient to confer Article III standing on the named plaintiffs. Even if this Court were to grant declaratory judgment against the Government and order injunctive relief precluding the Government from employing some or all of the challenged practices or procedures in the future, the fact remains that none of this relief will redress plaintiffs' claimed injuries-in-fact, because plaintiffs were precluded from selection for reasons entirely independent of the challenged policies and procedures.

Although the Supreme Court observed that the statutory civil penalties sought by plaintiff in *Steel Co.* "might be viewed as a sort of compensation or redress to [plaintiff] if they were payable to [plaintiff]," the Court held that the penalty request could not confer standing because plaintiff was not entitled to any of those penalty amounts. *Id.* at 106. Similarly, in this case, the named plaintiffs' request for back pay does not confer standing because none of them can justify a back pay award without first establishing that they would have filled available positions in their geocode without the alleged discriminatory practices. *See* Second Am. Compl. ¶ 138 (alleging that award of back pay will redress the named plaintiffs' injuries because "it is no longer possible to restore Plaintiffs . . . to their rightful positions at Census as applicants or employees for the 2010 decennial count").

Under the law of this Circuit, in Title VII class actions, if the court has determined that an employment practice is discriminatory, the class members subject to the discriminatory practice are presumptively entitled to back pay. *Cohen v. West Haven Bd. of Police Comm'rs*, 638 F.2d 496, 502 (2d Cir. 1980) (citing cases). In cases where the employer unlawfully refused to hire, plaintiffs can establish a *prima facie* entitlement to back pay by showing that they applied for the job and did not get hired. *Ass'n Against Discrimination in Employment, Inc. v. City of*

Bridgeport, 647 F.2d 256, 289 (2d Cir. 1981) (citing *Cohen*, 638 F.2d at 502)). The defendant may rebut this *prima facie* showing by "proving that the class member would not have been hired even absent discrimination for example, because no vacancies existed or because the claimant failed to meet nondiscriminatory prerequisites for employment." *Id. See, e.g., Ass'n Against Discrimination*, 647 F.2d at 289 (holding that district court order awarding back pay to plaintiffs "should be modified to end the backpay period as of the time the nonofferee ceased or failed to meet any of the City's requirements other than the written exam . . . ."); *Cohen*, 638 F.2d at 502-03 (holding that named plaintiffs had shown entitlement to back pay because both applied for positions, met all employment-related criteria except for the allegedly discriminatory agility test, and were denied placement on an appointment list solely because they failed the agility test). Plaintiffs who would not have been hired absent the allegedly discriminatory hiring practice are not ultimately entitled to monetary damages. *See, e.g., Ass'n Against Discrimination*, 647 F.2d at 289*; Cohen*, 638 F.2d at 502. As demonstrated above, *see supra* at 6-14, the Government has rebutted the named plaintiffs' *prima facie* showing of entitlement to back pay, because the record shows that, even if the named plaintiffs had passed the criminal background check, none would have been hired for reasons independent of the challenged procedures. As a result, because none of the plaintiffs would be entitled to back pay, they cannot satisfy the redressability element of standing, and their case should be dismissed for lack of subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, the Court should grant defendant's motion for lack of subject matter jurisdiction.

Dated: New York, New York
December 16, 2013

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