No. _____

In The Supreme Court of the United States

MICHAEL VAN CLEVE,

Petitioner,

v.

OFFICE OF MANAGEMENT AND BUDGET, ET AL.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

APPENDIX

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[DO NOT PUBLISH]

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-13699
Non-Argument Calendar

MICHAEL EARL VAN CLEVE,
an individual,
Plaintiff-Appellant,
versus

U.S. SECRETARY OF COMMERCE,
DIRECTOR OF THE U.S. CENSUS BUREAU,
DIRECTOR OF THE OFFICE OF MANAGEMENT
AND BUDGET,U.S. DEPARTMENT OF
COMMERCE, U.S. CENSUS BUREAU, et al.,
Defendants-Appellees.

Opinion of the Court 21-13699

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:20-cv-23611-RNS

Before LUCK, LAGOA, and BLACK, Circuit Judges.
PER CURIAM:

Michael Van Cleve, an attorney proceeding *pro se*, filed an action against the U.S. Secretary of Commerce, Director of the U.S. Census Bureau, Director of the Office of Management and Budget (OMB), U.S. Department of Commerce, U.S. Census Bureau, and OMB (collectively, the agencies), alleging they violated, and will continue to violate, the Administrative Procedure Act by collecting and disseminating inaccurate race data. Van Cleve asserts the district court erred by concluding he lacks standing and dismissing his third amended complaint.[1] His three theories of standing are based on harm to his interests as an attorney, informational injury, and "census degradation." After review,[2] we affirm the district court.

I. DISCUSSION

A. Harm to Van Cleve's Interests as an Attorney

A plaintiff who invokes the jurisdiction of a federal court bears the burden to show the Constitutional limitations on standing: (1) an injury

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[1] In addition to the dismissal of the third amended complaint for lack of standing, Van Cleve also challenges the denial of his motion for a three-judge panel, pursuant to the 1998 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, § 209, Pub. L. No. 105-119, 111 Stat. 2440, 2481–82 (1997) (codified at 13 U.S.C. § 141 note), and the district court's conclusion his third count failed on the merits. However, because we hold Van Cleve lacks standing, we need not address these issues.

[2] "We review standing determinations de novo." Tanner Adver. Grp., L.L.C. v. Fayette Cnty., 451 F.3d 777, 784 (11th Cir. 2006) (en banc).

in fact, (2) a causal connection between the injury and the causal conduct, and (3) a likelihood the injury will be redressed by a favorable decision. *Tanner Adver. Grp., LLC v. Fayette Cnty.*, 451 F.3d 777, 791 (11th Cir. 2006) (*en banc*). At the pleading stage of a case, general factual allegations of injury can suffice, but these general factual allegations must plausibly and clearly allege an injury in fact. *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 924 (11th Cir. 2020) (*en banc*). "Mere conclusory statements do not suffice." *Id.* (quotation marks and alteration omitted).

"An injury in fact consists of an invasion of a legally protected interest that is both concrete and particularized and actual or imminent, not conjectural or hypothetical." *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 996 (11th Cir. 2020) (quotation marks omitted). "A concrete injury must be *de facto*; that is, it must actually exist." *Salcedo v. Hanna*, 936 F.3d 1162, 1167 (11th Cir. 2019) (quotation marks omitted). A particularized injury affects a plaintiff "in a personal and individual way," although "that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 n.7 (2016); *Trichell*, 964 F.3d at 996. "Each element of injury—a legally protected interest, concreteness, particularization, and imminence—must be satisfied." *Trichell*, 964 F.3d at 996-97.

Tangible injuries qualify as concrete. *Trichell*, 964 F.3d at 997. Intangible injuries sometimes qualify as concrete, but alleging a bare procedural violation, divorced from any concrete harm, is not enough to support standing. *Id.*; *Muransky*, 979 F.3d

at 924. Generally, courts look to history and the judgment of Congress to determine whether an intangible harm is sufficiently concrete. *Spokeo*, 578 U.S. at 340. For example, in *Trichell*, we concluded the plaintiffs' claims were not comparable to their closest historical analog, the common-law tort of negligent misrepresentation, because the plaintiffs did not establish reliance or damages, which cut against standing. *Trichell*, 964 F.3d at 998. Nonetheless, "if a statute protects against a lack of information, the denial of access to information is a concrete injury." *Muransky*, 979 F.3d at 930.

The harms Van Cleve alleged to his interests as an attorney were not particularized or concrete.[3] He alleged inaccurate census data (1) will make it more difficult to understand which communities most need legal assistance; (2) that he will not be able to rely on this data in cases he litigates; and (3) he has lost time and money pursuing this action that he could have devoted to other cases.

As to his first assertion, Van Cleve failed to explain why greater difficulty in identifying underprivileged communities that need legal assistance will harm him personally.[4] *Muransky*, 979

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[3] To the extent Van Cleve's claimed informational injury or injury based on "census degradation" relied on harm to his interests as an attorney to establish particularization, such reliance is misplaced for the reasons discussed.

[4] Even if Van Cleve were implying he could lose revenue, the third amended complaint noted the "Florida Bar encourages its members to service individuals who are indigent, in need [of] pro bono services, or otherwise encourages its members to assist communities that are subject to discrimination, segregation, or economic deprivation," implying he desires to help such communities pro bono.

F.3d at 925 (stating we "will not imagine or piece together an injury sufficient to give a plaintiff standing when [he] has demonstrated none, and we are powerless to create jurisdiction by embellishing a deficient allegation of injury" (quotation marks omitted)).

As to his second assertion, Van Cleve likewise failed to explain how not being able to rely on census data harms him specifically. It is unclear from his allegations how census data would be useful in discrimination or civil rights cases. Van Cleve simply states he "litigates cases where race data or race information may be necessary," such as Fair Housing Act cases. But this statement does not explain how the race data collected by the agencies, which would seem to only indicate where individuals of different races live, would show any discriminatory act has occurred. Moreover, if the census did not include "Middle Eastern and North African" or "Hispanic" as races in the past, and not including such races as options results in inaccurate or unreliable data, the implication is that civil rights practitioners like Van Cleve use some other data or evidence to show civil rights violations or instances of discrimination. It follows that his practice has not been, and will not be, harmed by a lack of reliable census race data. To the extent this theory relied on injury to the interests of Van Cleve's potential clients, whose cases cannot benefit from more accurate race data, this assertion of third-party standing is foreclosed. *Kowalski v. Tesmer*, 543 U.S. 125, 129, 134 (2004) (stating a party generally must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests

of third parties, such that lawyers cannot assert "the claims of future unascertained clients").

As to the third assertion, Van Cleve failed to allege he was required to inflict this form of harm on himself because the harm to his interests as an attorney was "certainly impending." *See Muransky*, 979 F.3d at 931 (explaining plaintiffs cannot manufacture a concrete harm by inflicting harm on themselves). His allegations stated that, in general, he cannot rely on census race data, but Van Cleve did not assert he has initiated or plans to initiate imminently any civil rights or discrimination actions that rely on race data collected and disseminated by the agencies. Thus, this injury is not concrete.

B. Informational Injury

Van Cleve asserts he suffered, and will continue to suffer, an informational injury under both 44 U.S.C. § 3506(e) and 44 U.S.C. § 3563(a). Section 3506 is titled "Federal agency responsibilities." It is contained within subchapter I, "Federal Information Policy." This subchapter outlines its purposes, including improving government efficiency, organization, and decision-making. 44 U.S.C. § 3501. Sections 3506(e)(1) and 3506(e)(6) state that, "[w]ith respect to statistical policy and coordination, each agency shall--(1) ensure the relevance, accuracy, timeliness, integrity, and objectivity of information collected or created for statistical purposes . . . and (6) make data available to statistical agencies and readily accessible to the public." *Id.* §§ 3506(e)(1), (6).

Section 3563(a)(1) states that, "[i]n general[,] [e]ach statistical agency or unit shall--(A) produce and disseminate relevant and timely statistical

information; (B) conduct credible and accurate statistical activities; (C) conduct objective statistical activities; and (D) protect the trust of information providers by ensuring the confidentiality and exclusive statistical use of their responses." *Id.* § 3563(a)(1).

The two primary cases in which the Supreme Court has squarely addressed "informational injury" are *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440 (1989) and *Federal Election Commission v. Akins*, 524 U.S. 11 (1998). *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021) (noting these cases do not control in the absence of a "public-disclosure or sunshine laws that entitle all members of the public to certain information"). In *Public Citizen*, the Court held the plaintiffs alleged a sufficiently concrete injury based on violation of a statute that required advisory committees to make their minutes, records, and reports available to the public. 491 U.S. at 446-47. There, the plaintiffs asserted the American Bar Association (ABA), which had advised the Department of Justice regarding potential judicial nominees, had denied their request for the names of such nominees and for the ABA's reports and minutes of its meetings regarding these nominees in order to monitor its workings and participate more effectively in the judicial selection process. *Id.* at 447, 449. Similarly, in *Akins*, the Court held the plaintiffs' asserted injury was concrete because they alleged a political committee violated a statute's requirement that it make public information about members, contributions, and expenditures, which the plaintiffs needed to evaluate candidates for public office. 524 U.S. at 21.

In *Trichell*, we concluded the plaintiff could not show a concrete injury from a statute giving them a right to receive truthful communications from debt collectors. *Trichell*, 964 F.3d at 1003-04. We reasoned that, in contrast to the statutes at issue in *Public Citizen* and *Akins*, which made certain information subject to public disclosure, this statute, which only stated debt-collection letters may not be misleading or unfair, created no substantive entitlement to receive information from debt collectors. *Id.* at 1004. Similarly, in *Electronic Privacy Information Center v. U.S. Department of Commerce (EPIC)*, the D.C. Circuit held a violation of a statute that required federal agencies to, if practicable, publish a privacy impact assessment before initiating a new collection of personally identifiable information did not support an informational injury. 928 F.3d 95, 103 (D.C. Cir. 2019). It reasoned this statute was not meant to "vest a general right to information in the public" and, rather, "was designed to protect individual privacy by focusing agency analysis and improving internal agency decision-making." *Id.* In contrast, on remand from the Supreme Court, the Ninth Circuit concluded that, in enacting the Fair Credit Reporting Act (FCRA), Congress intended to protect consumers' interests in preventing the transmission of inaccurate information about them in consumer reports such that violations of the FCRA could constitute a concrete injury, noting the FCRA imposes a host of procedural requirements on consumer-reporting agencies and allows individuals to sue those who are non-compliant. *Robins v. Spokeo, Inc. (Spokeo II)*, 867 F.3d 1108, 1113-14, 1117 (9th Cir. 2017).

Van Cleve's alleged informational injury was not concrete because neither § 3506(e) nor § 3563(a) is a public-disclosure law that entitles all members of the public to certain information. The statutes focus on the intragovernmental sharing of information rather than the sharing of information between the government and the public. In the same way the statute in *EPIC* was not meant to "vest a general right to information in the public" and "was [instead] designed to protect individual privacy by focusing agency analysis and improving internal agency decision-making," § 3506(e) was primarily intended to improve government efficiency, organization and decision-making by "ensur[ing] the relevance, accuracy, timeliness, integrity, and objectivity of information collected or created for statistical purposes" and by "mak[ing] data available to statistical agencies and readily accessible to the public." 44 U.S.C. §§ 3506(e)(1), (6), *EPIC*, 928 F.3d at 103. Unlike the statutes in *Public Citizen* and *Akins*, which expressly required the disclosure of minutes, records, and reports of advisory committees and information about the members, contributions, and expenditures of political committees, respectively, neither statute here identifies any specific information, such as race data, to which all members of the public are entitled. *Public Citizen*, 491 U.S. at 446-47; *Akins*, 524 U.S. at 21. Instead, they refer to "data" and "information" in general. 44 U.S.C. §§ 3506(e)(1), (6); 44 U.S.C. § 3563(a). Both § 3506(e) and § 3563(a) only refer to the responsibilities of statistical agencies, and unlike the statute in *Spokeo II*, neither statute provides a mechanism for members of the public to seek disclosure of certain information or imposes a

specific procedural requirements on agencies. *Spokeo II*, 867 F.3d at 1113-14.

C. Census Degradation

In *Department of Commerce v. New York*, the Supreme Court held that several states had standing when they sued to prevent the reinstatement of a question about citizenship on the 2020 census questionnaire, which they claimed would depress the census response rate, lead to an inaccurate population count, and, consequently, result in a loss of federal funds that are distributed based on state population. 139 S. Ct. 2551, 2565 (2019). The Court reasoned that the loss of federal funds was a sufficiently concrete and imminent injury to satisfy Article III. *Id.*

Contrary to Van Cleve's argument the mere occurrence of "census degradation" creates standing, *Department of Commerce v. New York* held the state's loss of federal funds *resulting* from census degradation established a concrete injury. *See id.* Van Cleve's assertion that census race data is inaccurate or will be inaccurate in the future, without more, does not establish a concrete injury, nor does it show that any inaccuracies have affected Van Cleve personally.

II. CONCLUSION

The district court did not err by concluding Van Cleve lacks standing. None of his theories of standing, based on harm to his interests as an attorney, informational injury, and "census degradation," satisfied both the concreteness and

particularization elements required of a valid injury in fact. Accordingly, we affirm.[5]

AFFIRMED.

[5] Van Cleve's Motion to Expedite Appeal is DENIED as moot.

FILED DECEMBER 13, 2021

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 21-13425-D

In re: MICHAEL EARL VAN CLEVE,

Petitioner.

On Petition for Writ of Mandamus from the United States District Court for the Southern District of Florida

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Before: ROSENBAUM and GRANT, Circuit Judges.

BY THE COURT:

Michael Van Cleve, a licensed attorney proceeding *pro se*, petitions this Court for a writ of mandamus arising out of the district court's denial of his motion for a three-judge court in his Administrative Procedure Act ("APA") suit challenging the Office of Management and Budget's race categories used in the 2020 census. Van Cleve requests that this Court order the district court to assemble a three-judge court to preside in his APA suit.

Mandamus is available "only in drastic situations, when no other adequate means are available to remedy a clear usurpation of power or abuse of discretion." *Jackson v. Motel 6*

Multipurpose, Inc., 130 F.3d 999, 1004 (11th Cir. 1997) (quotation marks omitted). Mandamus may not be used as a substitute for appeal or to control decisions of the district court in discretionary matters. *Id.* The petitioner has the burden of showing that he has no other avenue of relief. *Mallard v. United States Dist. Court*, 490 U.S. 296, 309 (1989).

A district court of three judges shall be convened when "otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284(a). Section 209 of Public Law 105-119 provides for a district court of three judges to hear an action challenging the use of any statistical method in violation of the Constitution or any provision of law, in connection with the Census, to determine the population for purposes of Congressional apportionment or redistricting. Pub. L. No. 105-119 § 209(b), (e)(1).

When a single district court judge refuses a request to convene a three-judge court but retains jurisdiction over the case, "review of his refusal may be had in the court of appeals either through petition for writ of mandamus or through a certified interlocutory appeal under 28 U.S.C. § 1292(b)." *Gonzalez v. Automatic Emp. Credit Union*, 419 U.S. 90, 100 n.19 (1974). When a single judge has issued a final order disposing of the complaint, however, "appeal lies to the court of appeals under 28 U.S.C. § 1291." *Id.*

Courts of appeals have jurisdiction over appeals from all final decisions of the district courts. 28

U.S.C. § 1291. An appeal from a final judgment brings up for review all preceding non-final orders. *Mickles on behalf of herself v. Country Club Inc.*, 887 F.3d 1270, 1278-79 (11th Cir. 2018).

Here, Van Cleve's petition for mandamus is due to be denied because he has, and is exercising, the adequate alternative remedy of challenging the district court's order denying his motion for a three-judge court as part of his appeal from the district court's final judgment dismissing his lawsuit for lack of standing. *See* 28 U.S.C. § 1291; *Gonzalez*, 419 U.S. at 100 n.19; *Jackson*, 130 F.3d at 1004.

Accordingly, Van Cleve's mandamus petition is **DENIED**.

United States District Court
for the
Southern District of Florida

Filed 10/13/2021
Civil Action No. 20-23611-Civ-Scola

Michael Van Cleve, Plaintiff,

v.

Wilbur L. Ross, U.S. Secretary of Commerce, and others, Defendants.

Order Granting in Part and Denying in Part Motion to Dismiss

This action arises from Plaintiff Michael Van Cleve's claim that "race is a myth based on pseudoscience" such that the Census, which requires respondents to report their race, perpetuates arbitrary data that results in discrimination against groups of people who are not accurately represented by the different race options from which the Census requires them to pick. (Third Am. Compl., ECF No. 32 at ¶¶ 178, 219, 303.) Defendants Wilber L. Ross, in his official capacity as United States Secretary of Commerce, Steven Dillingham, in his official capacity as Direct of United States Census Bureau, Russel Thurlow Vought, in his capacity as Director of the Office of Management and Budget, and three respective agencies, jointly move to dismiss with prejudice the amended complaint for lack of subject matter jurisdiction. (Mot. to Dismiss, ECF No. 76.) The Plaintiff opposes the motion (Resp. in Opp'n,

ECF No. 77) and the Defendants filed a reply. (Reply, ECF No. 78.) After careful review of the parties' submissions, the record, and applicable law, the Court **grants in part** the motion to dismiss and directs the Clerk of the Court to **close** this case.

1. Background

In this action, Van Cleve challenges the Defendants' adherence to and failure to update their standards for collecting racial data. Van Cleve is a Florida-licensed attorney who owns a law firm located in Miami-Dade County. (Third Am. Compl., ECF No. 72 at ¶ 21.) Van Cleve has litigated cases where race data or race information is necessary. (*Id.* at ¶ 228.) For example, Van Cleve has represented individuals alleging violations of the Fair Housing Act. (*Id.* at ¶ 229.) Van Cleve claims that his ability to adequately represent clients is diminished if he cannot access accurate race data. (*Id.* at ¶ 230.) Van Cleve alleges that inaccurate racial data "creates ethical concerns for Florida lawyers, since a Florida lawyer should not offer evidence the lawyer knows to be false." (*Id.* at ¶ 231.)

The Census Bureau is part of the U.S. Department of Commerce. The Office of Management and Budget (the "OBM") is part of the Executive Office of the President of the United States. https://www.whitehouse.gov/omb/ (last visited Oct. 12, 2021). The OMB creates the minimum standards for maintaining, collecting, and presenting federal data on race and ethnicity. *See Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58,782 (Oct. 30, 1997) (the "Standards"). The Census

Bureau and the remaining defendants are required to adhere to the standards on race and ethnicity set by OMB. (Third Am. Compl., ECF No. 72 at ¶¶ 22–61.)

The Standards provide for six "minimum" race and ethnicity categories: (i) American Indian or Alaska Native, (ii) Asian, (iii) Black or African American, (iv) Hispanic or Latino, (v) Native Hawaiian or Other Pacific Islander, and (vi) White. (*Id.* at ¶ 160.) The Standards also allow agencies to collect information on race and ethnicity using a "two-question format" whereby the "Hispanic or Latino" category is included in a separate question about the respondent's ethnicity. (*Id.* at ¶ 203 n.133.)

In 2016, to help make its decision on whether it include a Middle Eastern and North African ("MENA") category, the OMB requested commentary on its minimum race categories, which yielded support for inclusion of a distinct MENA race category. (Id. at ¶ 254.) Similarly, the Census Bureau conducted its own analysis regarding inclusion of a distinct MENA category in the 2020 Census. "The Census Bureau found through experimentation, [t]he inclusion of a MENA category significantly decreased the overall percentage of respondents reporting as White or SOR and significantly increased the percentage of respondents reporting as Black or Hispanic . . . When no MENA category was available, people who identified as MENA predominantly reported in the White category, but when a MENA category was included, people who identified as MENA predominantly reported in the MENA category." (*Id.* at ¶ 256.) Ultimately, OMB did not revise its standards, and on January 26, 2018, the Census Bureau announced

that the MENA category would not be added to the 2020 Census. (*Id.* at ¶ 80.)

Van Cleve initiated this action on August 30, 2020 and amended his complaint as a matter of course. (Compl., ECF No. 1.) Since then, the Court has granted Van Cleve's two requests to file amended complaints. In the operative third amended complaint, Van Cleve challenges the Standards as unlawful. (*See generally* Third Am. Compl., ECF No. 72.) Van Cleve claims that use of the Standards results in inaccurate racial data that affect his ability to represent clients and impede the judiciary from relying on accurate census data in various cases. (*Id.* at ¶¶ 230, 232, 234.) The inaccurate data also impacts the federal funding of certain federal programs such as Medicare, Medicaid, Head Start, Title VI, and the National School Lunch Program. (*Id.* at ¶ 196.) Lastly, Van Cleve "objects to being miseducated about race based on a clearly arbitrary and facially inconsistent agency decision which is fairly traceable to Defendants' agency rules." (*Id.* at ¶ 240.)

In count one, Van Cleve claims that the Defendants violated the Administrative Procedure Act ("APA") because in following the Standards, they have excluded Middle Eastern and North African populations from the 2020 Census. (Third Am. Compl., ECF No. 72 at ¶ 7.) Van Cleve seeks: "[a]n order directing revision of the race data prior to its dissemination to the public, where all persons that identified as MENA are tabulated as their own race, instead of being aggregated under White," "[a]n order directing Defendants to revise the race data from the 2020 U.S. Census through other administrative records at their disposal or

supplement the data with other surveys . . . prior to its release," and "[a] declaration that the Defendants['] refusal to use a form . . . [with] a separate race box for the MENA group[] was a violation of the APA, the PRA, the Evidence Act, or Policy Directive #1." (*Id.* ¶ 260.)

In count two, Van Cleve also alleges that the Standards unlawfully allow a "two-part race and ethnicity question" as opposed to requiring a "combin[ed] race and ethnicity question" that would "treat Hispanics as a race." (*Id.* at ¶ 8.) These deficiencies, Van Cleve alleges, constitute violation of the APA. (*Id.* at ¶ 275.) Van Cleve seeks a declaratory judgment and orders directing the Defendants to revise race data collected using the Standards so that "all persons that identified as Hispanic are tabulated as their own race, instead of being aggregated under the five main races." (*Id.* ¶ 279.)

Lastly, in count three, Van Cleve alleges that the Defendants have violated the Paperwork Reduction Act by "failing to promulgate a new rule revising or updating the race categories from the [Standards.]" (*Id.* ¶ 290.) Van Cleve seeks an order directing the Defendants to update the Standards and enjoining them from using the Standards for any future statistical surveys.

The Defendants have filed a motion to dismiss the third amended complaint with prejudice for lack of Article III standing, as time-barred and unreviewable because the Standards do not constitute a final agency action.

2. Legal Standard

Because the question of Article III standing implicates subject matter jurisdiction, it must be addressed as a threshold matter prior to the merits of any underlying claims. *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1250 (11th Cir. 2015).

Indeed, standing generally must be present at the inception of the lawsuit. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 n.5 (1992). Article III of the U.S. Constitution grants federal courts judicial power to decide only actual "Cases" and "Controversies." U.S. Const. art. III § 2. The doctrine of standing is a "core component" of this fundamental limitation that "determin[es] the power of the court to entertain the suit." *Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1264–65 (11th Cir. 2011) (quoting *Lujan*, 504 U.S. at 560; *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

"[A] dismissal for lack of standing has the same effect as a dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1)." *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008) (citing *Cone Corp. v. Fla. Dep't of Transp.*, 921 F.2d 1190, 1203 n.42 (11th Cir. 1991)). Motions to dismiss a complaint for lack of subject matter jurisdiction can consist of either a facial or factual attack on the complaint. *Id.* A facial attack requires the court to "merely look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction," whereas a factual attack "challenges the existence of subject matter jurisdiction using material extrinsic from the pleadings, such as affidavits or testimony." *Id.* at

1233–34. "A dismissal for lack of subject matter jurisdiction is not a judgment on the merits and is entered without prejudice." *Id.* at 1232.

3. Analysis

The Defendants move to dismiss the operative complaint in its entirety. They offer four bases of dismissal: First, the Defendants argue that Van Cleve lacks Article III standing to bring this action. The Defendants contend that Van Cleve's injury is not particularized or concrete. Second, the Defendants argue that Van Cleve's challenges are barred by the APA's six-year statute of limitations. Third, the Defendants contend that Van Cleve's challenge is unreviewable because the Standards are discretionary. Fourth, the Defendants argue that dismissal is warranted because Van Cleve's challenge does not constitute a "final agency action" within the meaning of the APA.

Van Cleve opposes the motion on all grounds. Van Cleve offers four different theories of standing or harms he has suffered. Van Cleve also disputes that his claims are time-barred or unreviewable.

Because the Court finds that Van Cleve has failed to allege sufficient facts to establish Article III standing, the Court **grants in part** the Defendants' motion to dismiss (ECF No. 76), **dismisses** the complaint, and directs the Clerk of the Court to **close** this case. The Court **denies** the Defendants' request to dismiss this case with prejudice. *See Stalley ex rel. U.S.*, 524 F.3d at 1232.

A. Standing

The Court must first begin with the threshold question of whether plaintiffs have constitutional standing to assert their claims at all. Article III of the United States Constitution grants the Judiciary authority to adjudicate only "Cases" and "Controversies." U.S. Const. art. III. To satisfy Article III's well-established "case or controversy" requirement, plaintiffs must demonstrate that they have "standing" to sue; that is, they must show that they (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of defendants, and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016); *Lujan*, 504 U.S. at 560; *Flat Creek Transp., LLC v. Fed. Motor Carrier Safety Admin.*, 923 F.3d 1295, 1300 (11th Cir. 2019).

Here, the parties hotly dispute whether Van Cleve has alleged sufficient facts to show he has suffered an injury in fact. The complaint alleges four different theories of standing: (1) informational injury, (2) injury as an attorney relying on racial data and economic harm to his practice, (3) miseducation in his military training; and (4) census degradation. The Court turns to each theory below.

1) Informational Injury

Van Cleve's first argument for Article III standing is that he has suffered an informational injury. (Resp. in Opp'n, ECF No. 81 at 12.) To show an informational injury, Van Cleve must show: (1) he "has been deprived of information that, on its

interpretation, a statute requires the government or a third party to disclose" to him, and (2) he "suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure." *Elec. Priv. Info. Ctr. v. United States Dep't of Com.*, 928 F.3d 95, 103 (D.C. Cir. 2019), *cert. denied sub nom. Elec. Priv. Info. Ctr. v. Dep't of Com.*, 140 S. Ct. 2718, 206 L. Ed. 2d 854 (2020).

Van Cleve alleges that the Defendants have deprived him of accurate census data by using the 1977 Standards that exclude MENA and Hispanics as distinct race options (as opposed to not offering MENA and having a two-part race and identity question for persons who identify as Hispanics). Van Cleve further claims that the Defendants are required to produce accurate census information under the PRA, 44 U.S.C. § 3506(e).[1] Section 3506(e) provides:

"With respect to statistical policy and coordination, each agency shall— . . . (6) make data available to statistical agencies and readily accessible to the public." The agencies do not dispute that they are subject to the requirements; however, they challenge Van Cleve's reliance on this particular section because on its face it does not entitled him to the information he seeks. The Court agrees. On its face, Section 3506(e) does not require dissemination of census data that includes MENA as a distinct race option. Nor does Van Cleve cite to any case law

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[1] The Court notes that the PRA does not provide a private cause of action. *United to Protect Democracy v. Presidential Advisory Comm'n on Election Integrity*, 288 F. Supp. 3d 99, 103 (D.D.C. 2017). Thus, to the extent count three constitutes a private claim under the PRA, the claim is dismissed.

supporting his standing argument under Section 3506(e).

Van Cleve cites to *United to Protect Democracy v. Presidential Advisory Comm'n on Election Integrity*, 288 F. Supp. 3d 99 (D.D.C. 2017), in support of his argument. However, that case is inapposite. There the court found that the plaintiff had organizational standing pursuant to the PRA, under 44 U.S.C. § 3507(a)(1)(D). Section 3507(a)(1)(D) requires that federal agencies abide by certain procedures, including providing specific disclosures before collecting information. The complaint alleged that the defendant agencies had failed to follow those specific procedures, and it was undisputed that the necessary disclosures were not made. Such is not the case here. Unlike Section 3507(a)(1)(D), Section 3506(e) does not require the dissemination of any specific data or disclosures, and Van Cleve makes no allegations that the Defendants failed to follow the procedures set forth in Section 2506(e). Rather, Van Cleve only argues that the Defendants failed to include his preferred information, which is not a cognizable harm under the PRA.

2) Harm of Interests as Attorney

Van Cleve attempts to show Article III injuries by arguing that the Defendants' statutory violations resulted in a harm to his interests as an attorney who relies on racial data, including Census information. (Resp. in Opp'n, ECF No. 81 at 13–15.)

Courts consider two things when evaluating whether concrete harm flows from an alleged statutory violation: The Court asks "if the violation itself caused harm, whether tangible or intangible,

to the plaintiff. If so, that's enough. If not, we ask whether the violation posed a material risk of harm to the plaintiff. If the answer to both questions is no, the plaintiff has failed to meet his burden of establishing standing." *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 928 (11th Cir. 2020) ("The point is that for standing purposes, no matter what label you hang on a statutory violation, it must be accompanied by a concrete injury."). The Court finds Van Cleve has failed to satisfy his standing burden.

Van Cleve alleges that he is an attorney who "has the desire to help underprivileged communities through legal assistance." (Third Am. Compl, ECF No. 72 at ¶ 215.) In his capacity as an attorney, Van Cleve has represented individuals that would be included within the MENA race or the Hispanic race in cases "where their cultural identities were an issue." (*Id.* at ¶ 216.) These cases include Fair Housing cases. (*Id.* at ¶ 230.) Van Cleve claims that inaccurate racial data affects his role as an attorney because he cannot reasonably rely on inaccurate data. (*Id.*) Van Cleve alleges that inaccurate racial data "creates ethical concerns for Florida lawyers, since a Florida lawyer should not offer evidence the lawyer knows to be false." (*Id.* at ¶ 231.) Lastly, Van Cleve alleges that as a busines owner he has "diverted a considerable amount of his resources, incurred financial costs, exhausted time, manpower, and declined other cases . . . to get Defendants to engage in corrective action or counteract action for their outdated race questions and outdated race systems." (*Id.* at ¶ 218.) In his own declaration, Van Cleve claims that more accurate racial data would allow him to better identify who needs pro bono

assistance or allow him to more readily identify civil rights violations. (Van Cleve Decl., ECF No. 22–1.)

To begin with, Van Cleve's injuries related to his diminished ability to represent individuals in civil cases like Fair Housing cases or readily identify civil rights violations are conclusory and vague. It is unclear from the complaint and Van Cleve's response in opposition how census data or racial information is necessary in those types of cases or how the current information, which Van Cleve asserts is inaccurate, hinders him from representing underprivileged communities. Relatedly, Van Cleve's alleged harm as an attorney (that he cannot submit false information to the courts) is insufficient because the complaint fails to connect what information he would be submitting to the court in those cases and why.

Van Cleve relies on the declaration of Mark Sobocienski, an attorney who knows Van Cleve personally, in support of his standing argument. Sobocienski declares that he is an attorney who practices commercial litigation, criminal defense, foreclosure defense, collections, and real estate transactions. (Sobocienski Decl., ECF No. 22–1.) Sobocienski affirms that it is his subjective belief that "it is important for lawyers like me or Michael Van Cleve to have accurate statistical information from the government. Statistical data is heavily utilized in the legal profession, and often necessary to prove facts in litigation." (*Id.* at 2.) This declaration is perhaps vaguer than Van Cleve's complaint as it fails to state whether Sobocienski relies on the specific data at issue in this case, how it is utilized in any of his practice fields, how the current inaccurate data has affected his practice, or

how it has affected Van Cleve's practice. Van Cleve also relies on the declaration of another lawyer Jianyin Liu, who stated that "our current categorization of races is not only confusing, but also causes loss of trust in the government," and "as civil attorneys, we are facilitating the implementation of administrative and legal actions." (Liu Decl., ECF No. 28–1). This declaration similarly fails to connect Van Cleve's practice in civil cases to accurate racial information. By Liu's definition of standing, any attorney who challenged a law or procedure as unconstitutional would have standing simply because he or she is in the business of "facilitating" the implementation and/or enforcement of laws. Nor is Van Cleve's reliance on his former clients' declarations persuasive as they do not clarify how Van Cleve used the racial data at issue in those cases. (Bargul Decl., ECF No. 23–1; Suleiman Decl., ECF No. 23–2.)[2]

Van Cleve cites to *Nat'l Women's L. Ctr. v. Off. of Mgmt. & Budget*, 358 F. Supp. 3d 66, 71 (D.D.C. 2019), in support of his argument that "[a] party can also satisfy Article III injuries through a harm to their interests, even if the information is not statutorily required to be disclosed." (Resp. in Opp'n, ECF No. 81 at 13.) In *Nat'l Women's*, the court explained that in deciding whether the organization had suffered a concrete injury, the court looks first to whether the defendant agency's actions injured the organization's interest. *Id.* at 79. Ultimately, the court held the organization had shown its own concrete injury through evidence of its specific

[2] It appears from the declarations that whatever racial data used, if any, was sufficient or unnecessary to succeed in those cases.

mission, its purported use of the sought-after gender pay gap data that was not provided, how the data would have been used to represent individuals, and how the data would reduce the organization's cost in representing its clients. As discussed above, Van Cleve has failed to allege or submit any facts showing his specific injury in representing his clients in cases that touch upon the issue of race or cultural identity.

Van Cleve's purported injury of wasted time, diversion of monies into this action, and rejection of other cases to pursue this action also fails to establish standing. Although the Eleventh Circuit has previously held that allegations of wasted time may state a concrete injury for standing purposes, the court has also declined to find standing when the complaint lacked specific allegations of same or where the wasted time constituted a hypothetical future harm. *Muransky*, 379 F.3d at 930–31. It is unclear what Van Cleve considers to be wasted time. However, the Court assumes he means the time spent working on this matter. This choice was Van Cleve's alone and unrelated to the Defendants' alleged misconduct. *See Colceriu v. Barbary*, No. 8:20-CV-1425-MSS-AAS, 2021 WL 2471211, at *2 (M.D. Fla. June 14, 2021) (Scriven, J.) ("Moreover, it is not clear that a mere waste of time, voluntarily expended, could suffice to establish injury-in-fact.") (citing *Muransky*, 979 F.3d at 926 (recognizing that a claim of wasted time is not always an injury-in-fact)). Further, Van Cleve does not cite any authority supporting his argument that wasted time pursuing the underlying action confers standing. The Court notes that Van Cleve's position would therefore confer standing on every plaintiff that spent time

researching issues before filing a complaint or spent time litigating the action for which the plaintiff claims he has standing. Relatedly, Van Cleve's choice to turn down work to focus on this case and ensure he has better data to rely on in future cases is also a voluntary decision that the Court finds insufficient to confer standing. *See Crowder v. Andreu, Palma, Lavin & Solis, PLLC*, No. 2:19-CV-820-SPC-NPM, 2021 WL 1338767, at *6 (M.D. Fla. Apr. 9, 2021) ("So any time [the plaintiff] spent researching APLS about a hypothetical future harm does not confer standing.") (citing *Muransky*, 979 F.3d at 931 ("Where a 'hypothetical future harm' is not 'certainly impending,' plaintiffs cannot manufacture standing merely by inflicting harm on themselves.")).

3) Forced Miseducation Upon Van Cleve as a Service Member

Van Cleve also alleges that as an Army Reserve service member he has been forced to complete annual diversity training, which is inaccurate because it excludes MENA and traches inaccurate racial categories. (Third Am. Compl, ECF No. 72 at ¶¶ 236–240.) He argues that his objection to being miseducated confers standing in this case. (Resp. in Opp'n, ECF No. 81 at 18–19.)

The Eleventh Circuit has reviewed military judgments and decisions under the lens of the political question doctrine. *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1280 (11th Cir. 2009). "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value

determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Id.* (quoting *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986)). Political questions "have been held to be nonjusticiable and therefore not a 'case or controversy' as defined by Article III." *Id.* (quoting *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard Tanker Dauntless Colocotronis,* 577 F.2d 1196, 1203 (5th Cir.1978)). The political question doctrine has been deemed applicable to military training policies. *Id.* at 1287 (citing *Gilligan v. Morgan*, 413 U.S. 1, 5–6, 93 S. Ct. 2440, 37 L. Ed. 2d 407 (1973) (suit was barred by political question doctrine because it entailed judicial review of "training, weaponry and orders" of the Ohio National Guard)). Because Van Cleve is challenging military diversity training, the Court finds that his challenge is nonjusticiable.

Van Cleve does not distinguish *Carmichael*, but rather argues "not everything involving the military is a nonjusticiable political question unreviewable by the courts." (Resp. in Opp'n, ECF No. 81 at 18.) He cites to *Albino v. US*, 78 F. Supp. 3d 148 (D.D.C. 2015), where the court reviewed a challenge to the Army Board for Correction of Military Records's denial of the plaintiff's request to remove a negative officer evaluation report. The Court declines to apply *Albino* to this case in light of controlling Eleventh Circuit case law. Moreover, Van Cleve has not cited to any authority supporting his argument that miseducation alone constitutes a concrete injury for standing purposes.

4) Census Degradation

Van Cleve's last theory for Article III standing is that he has suffered harm from degradation of census data. (Resp. in Opp'n, ECF No. 81 at 16.)

The United States Supreme Court has recognized that census degradation may constitute a concrete injury for purposes of Article III standing. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565, 204 L. Ed. 2d 978 (2019). Even so, plaintiffs must do more than just allege census degradation has occurred. They must allege sufficient facts showing "present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Id.* Because the Court has already found that Van Cleve has failed to show that he has suffered a concrete injury, Van Cleve's argument is unavailing.

Van Cleve relies on *Kravitz v. United States Dep't of Com.*, 336 F. Supp. 3d 545, 557 (D. Md. 2018), to show that he has satisfied his burden. There, the court found that the plaintiffs, individual residents from various states, had shown that they had suffered concrete injuries stemming from a Census citizenship question. *Id.* at 557. The plaintiffs showed that they lived in states that have a higher percentage of undercounted groups that would be injured by a citizenship question because it would decrease the undercounted group's participation in the 2020 Census in their respective states. *Id.* ("Specifically, they argue that the undercount will result in a loss of representation in the House of Representatives, as well as a loss of

federal funding for their [respective states'] communities' schools and roads.")

Kraviz is inapposite from the allegations and data in this case because Van Cleve has not alleged in what manner Van Cleve or any protected group is particularly affected by the current version of the Standards or that the current Standards would reduce or impact Van Cleve's or any protected group's representation in the House of Representatives. On the contrary, Van Cleve alleges in a conclusory manner that the current version of the Standards, without more precise categories, "would reduce or negatively affect the enumeration count for the 2020 U.S. Census/2020 ACS by leading to nonresponse, whereas more precise race categories act as a motivator for Americans to answer the 2020 U.S. Census/2020 ACS questions." (Third Am. Compl, ECF No. 72 at ¶ 12.) Further, although the Supreme Court has recognized that a reduction of federal funding could constitute a concrete injury, *New York*, 139 S. Ct. 2565, Van Cleve has not plausibly alleged that the exclusion of MENA and Hispanic as distinct racial groups will likely cause the injuries he claims. *See Parks v. United States Dep't of Com.*, 456 F. Supp. 3d 691, 697 (D. Md. 2020) (distinguishing *Kravitz* and finding that the plaintiff failed to allege a concrete injury). Indeed, the complaint later alleges that the Census Bureau found that individuals in the MENA population will continue participating in the Census regardless of the existence of a distinct MENA race and that if given the option to identify as MENA, White, or Black, they will select MENA. (Third Am. Compl., ECF No. 72 at ¶ 256.) Thus, it appears from the complaint that for purposes of being counted in a

state's population, the Standards do not serve to exclude MENA or Hispanic persons from the Census. *See Parks*, 456 F. Supp. 3d at 697.

Because the Court finds that Van Cleve has failed to allege sufficient facts to establish Article III standing, the Court need not address the Defendants' remaining arguments.

4. Conclusion

For the foregoing reasons, the Court **grants in part** the Defendants' motion to dismiss the complaint. (**ECF No. 76.**) The Court **denies** the Defendants' request that this action be dismissed with prejudice. The Clerk of the Court is directed to **close** this case and **deny** all pending motions as moot.

Done and Ordered in chambers, at Miami, Florida, on October 13, 2021.

/s/
Robert N. Scola, Jr.
United States District Judge

United States District Court
for the
Southern District of Florida

Filed 10/10/2021
Civil Action No. 20-23611-Civ-Scola

Michael Van Cleve, Plaintiff,

v.

Wilbur L. Ross, U.S. Secretary of Commerce, and others, Defendants.

Order Denying Renewed Motion for Three Judge Panel

This matter is before the Court upon the Plaintiff Michael Van Cleve's renewed motion for assembly of a three–judge panel pursuant to 28 U.S.C. § 2284. (ECF No. 79.) The Defendants Wilber L. Ross, in his official capacity as United States Secretary of Commerce, Steven Dillingham, in his official capacity as Direct of United States Census Bureau, Russel Thurlow Vought, in his capacity as Director of the Office of Management and Budget, and the three respective agencies have responded to the motion. (ECF No. 81). Van Cleve has submitted a reply. (ECF No. 83). Upon review of the motion, the record, and the relevant legal authorities, the Court **denies** the motion (**ECF No. 79**).

1. Background

This action arises from Michael Van Cleve's claim that "race is a myth based on pseudoscience" such that the Census, which requires respondents to report their race, perpetuates arbitrary data that results in discrimination against groups of people who are not accurately represented by the different race options from which the Census requires them to pick. (Third Am. Compl., ECF No. 32 at ¶¶ 178, 219, 303.)

Van Cleve previously requested an assembly of a three–judge panel pursuant to 28 U.S.C. § 2284. On December 21, 2020, the Court denied Van Cleve's motion, noting that Van Cleve's interpretation of case law was misplaced and that 28 U.S.C. § 2284 did not require a panel because this case does not involve a challenge to the constitutionality of the apportionment of congressional districts. (ECF No. 48.) The Court also entered an order to show cause why the Plaintiff should not be sanctioned with an order to pay the Defendants' costs and fees incurred in responding to a baseless motion.

On February 22, 2021, Van Cleve filed the operative third amended complaint alleging virtually unchanged claims. (Third Am. Compl., ECF No. 72.) In the operative complaint, Van Cleve challenges a set of standards set forth by the Office of Management and Budget adopted in 1977 that regulate how federal agencies collect information on race and ethnicity. He claims that the standards are unlawful because they do not account for the Middle Eastern and North African population and thus discriminate against these groups. (*Id.* at ¶¶ 7, 146, 209.) He alleges that a failure to include other races

in surveys and questionnaires will lead to the dissemination of inaccurate race data. He further claims that such inaccuracies "will make it more difficult to understand which communities need the most help," and affect his ability to effectively represent those persons in his capacity as an attorney. (*Id.* at ¶¶ 219, 257.)

On March 79, 2021, Van Cleve filed the subject renewed motion asking the Court to reconsider its prior denial of his request to convene a three–judge panel. (ECF No. 79.) Although the allegations of the operative complaint are essentially unchanged, Van Cleve argues that a different result is warranted now.

2. Legal Standard

"[I]n the interests of finality and conservation of scarce judicial resources, reconsideration of an order is an extraordinary remedy that is employed sparingly." *Gipson v. Mattox*, 511 F. Supp. 2d 1182, 1185 (S.D. Ala. 2007). A motion to reconsider is "appropriate where, for example, the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension." *Z.K. Marine Inc. v. M/V Archigetis*, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992) (Hoeveler, J.) (citation omitted). "Simply put, a party may move for reconsideration only when one of the following has occurred: an intervening change in controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice." *Longcrier v. HL-A Co.*, 595 F. Supp. 2d 1218, 1247 (S.D. Ala. 2008) (quoting *Vidinliev v.*

Carey Int'l, Inc., No. CIV.A. 107CV762-TWT, 2008 WL 5459335, at *1 (N.D. Ga. Dec. 15, 2008)). However, "[s]uch problems rarely arise and the motion to reconsider should be equally rare." *Z.K. Marine Inc.*, 808 F. Supp. at 1563 (citation omitted). Certainly, if any of these situations arise, a court has broad discretion to reconsider a previously issued order. Absent any of these conditions, however, a motion to reconsider is not ordinarily warranted.

3. Analysis

In his motion, Van Cleve argues that reconsideration is appropriate because the Court failed to review whether convening of a three–judge panel was required by Section 209 of Public Law No. 105–119. (Mot., ECF No. 79 at 2–3.) Confusingly, in the operative complaint filed after the Court denied Van Cleve's first motion for a three-judge panel, Van Cleve recognizes that the Court had denied his argument under Section 209. Notwithstanding, the Court addresses the merits of Van Cleve's motion for reconsideration.

Under 28 U.S.C. § 2284(a), "a district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." (emphasis added) Moreover, and relevant to the proceedings before the Court, "[a]ny person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law ... in connection with the 2000 census or any later decennial census, to determine the population for

purposes of the apportionment or redistricting of Members in Congress, may in a civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method." § 209(b).(emphasis added) Further, under § 209(e)(1), "[a]ny action brought under this section shall be heard and determined by a district court of three judges in accordance with section 2284."

Section 2284 and Section 209 require a challenge to an action or a statistical method, respectively, affecting the constitutionality of the apportionment ore redistricting of congressional districts. As explained in the Court's earlier order, this case does not challenge the constitutionality of the apportionment of congressional districts or the appointment of a legislative body. On the contrary, the third amended complaint challenges the standards for collecting racial data by federal agencies that may indirectly impact representation of specific populations sometime in the future. At best, his challenge is that inaccurate population data will make it harder for him to represent the Middle Eastern and North African populations in a variety of civil cases. These allegations are insufficient to convene a three–judge panel under either Section 2284 and Section 209 and thus, Van Cleve's motion must be denied. *Compare Alabama v. United States Dep't of Com.*, 493 F. Supp. 3d 1123, 1128 (N.D. Ala. 2020) (Proctor, J.) (denying motion for appointment of three–judge panel because the plaintiff challenge was "not a challenge to the actual division of congressional districts but rather a challenge to a practice that might affect a future division of districts."); *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 577–78 (D.D.C. 1980)

(explaining that § 2284 does not apply where the "challenge is to census practices which will produce data on which the apportionment of House of Representative members to states will be based [as opposed] to any state action reapportioning congressional districts."); *Tyree v. Massachusetts*, No. C.A.06-10232-MLW, 2008 WL 427293, at *4 (D. Mass. Feb. 17, 2008) (denying request for three–judge panel because "[a]lthough the plaintiff's claims regarding the Fourteenth Amendment, the census, and the one-person, one-vote standard may relate to apportionment, the gravamen of plaintiff's complaint is not a challenge to apportionment.") *with Adams v. Clinton*, 26 F. Supp. 2d 156, 161 (D.D.C. 1998) (convening three–judge panel where the plaintiffs "challenge their existing allocation of zero representatives" and contrasting cases "concerned about census practices that might affect a future allocation.") and *Alabama v. United States Dep't of Com.*, No. 3:21-CV-211-RAH-KFP, 2021 WL 1171873, at *2 (M.D. Ala. Mar. 26, 2021) (granting motion to convene three–judge panel where the plaintiffs challenged a "differential privacy method" applied by the Bureau of the Census after collecting population data and alleged that this method was used to add or subtract to or from the population within Alabama for apportionment purposes).

Moreover, the Court has reviewed Van Cleve's various notices filed after the subject motion and finds the information therein nondeterminative for the disposition of this motion. Lastly, to the extent the parties dispute the merits of the Defendants' motion to dismiss, those disputes will be resolved in a forthcoming order.

For these reasons explained above and in the Court's earlier order, Van Cleve's motion for reconsideration is **denied. (ECF No. 79.)**

Done and Ordered in chambers, at Miami, Florida, on October 10, 2021.

/s/
Robert N. Scola, Jr.
United States District Judge

United States District Court
for the
Southern District of Florida

Filed 12/28/2020
Civil Action No. 20-23611-Civ-Scola

Michael Van Cleve, Plaintiff,

v.

Wilbur L. Ross, U.S. Secretary of Commerce, and others, Defendants.

Order Granting Motion to Amend Complaint

This matter is before the Court on the Plaintiff's revised motion for leave to file a second amended complaint. (Pl.'s Mot., ECF No. 38.) This lawsuit arises from the Plaintiff's claim that "race is a myth based on pseudoscience" such that the Census, which requires respondents to report their race, perpetuates arbitrary data that results in discrimination against groups of people who are not accurately represented by the different race options from which the Census requires them to pick. (*See, e.g.*, ECF No. 38-1 at ¶306.) The Plaintiff previously filed a first amended complaint prior to the Defendants' filing a response. (First Am. Compl., ECF No. 16.) The Plaintiff seeks to amend the complaint in order to add allegations challenging the Census on the basis that it does not include "Middle Eastern or North African" as a race or ethnicity option. (ECF No. 38-1 at ¶50.) Having reviewed the record, the parties' briefs, and the relevant legal

authorities, the Court **grants** the motion (**ECF No. 38**).

In accordance with Federal Rule of Civil Procedure 15(a)(2), a party seeking to amend its complaint may do so only with the opposing party's written consent or the court's leave. According to the rule, leave should be freely given when justice so requires. Rule 15(a) reflects a policy of "liberally permitting amendments" and absent a "substantial reason to deny leave to amend" a plaintiff's request should be granted. *Espey v. Wainwright,* 734 F.2d 748, 750 (11th Cir. 1984). "Although leave to amend shall be freely given when justice so requires, a motion to amend may be denied on numerous grounds such as undue delay, undue prejudice to the defendants, and futility of the amendment." *Maynard v. Bd. of Regents of Div. of Universities of Florida Dep't of Educ. ex rel. Univ. of S. Florida,* 342 F.3d 1281, 1287 (11th Cir. 2003) (quotations omitted). "[L]eave to amend should not be denied on the ground of futility unless the proposed amendment is clearly insufficient or frivolous on its face." *Montes v. M & M Mgmt. Co.*, No. 15-80142-CIV, 2015 WL 11254703, at *1 (S.D. Fla. May 12, 2015) (Marra, J.) (citing *Davis v. Piper Aircraft Corp.,* 615 F.2d 606, 613 (4th Cir.1980)). In order to deny leave to amend, the Court must identify a "justifying reason." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

After the Defendants moved to dismiss the original complaint on the grounds that it failed to allege a harm or redressability, the Plaintiff filed the instant motion to further develop the ways in which the Census purportedly harms respondents by failing to use reliable or comprehensive race-based

data and response options. Without passing judgment on any future motion to dismiss, the Court finds that the Plaintiff's counterarguments just barely squeak by the low futility standard and warrant leave to amend at this early stage of the proceedings. The standard for futility requires "clear insufficiency" or "frivolity" on the face of the pleading, and that standard is not met here. *See Montes*, 2015 WL 11254703, at *1. Specifically, the second amended complaint points to data showing that if the "Middle Eastern or North African" category had been included in the Census, it would have been chosen by respondents; relatedly, purportedly overbroad categories such as White, Black, or Hispanic would have been chosen less frequently. (ECF No. 42 at 2.) This is consistent with the crux of the Plaintiff's lawsuit, which claims that the current race data collected by the Census is unreliable because it does not allow respondents to identify as Middle Eastern or North African. Again, at this stage, the Court cannot find that the allegations and issues raised by the Plaintiffs are futile as a matter of law. Rather, a motion to dismiss, with its attendant briefing, would be the best way to fully resolve the issues presented by the motion—including the question of standing.

Accordingly, the Court finds no "substantial reason" at this early stage of the litigation why the Plaintiff should be denied leave to amend. The Court emphasizes that its decision to grant leave to amend has been made in accordance with the applicable futility standard only and not the standard that would apply to a fully briefed motion to dismiss. The Court therefore **grants** the Plaintiffs' motion for leave to amend (**ECF No. 38**) and orders the

Plaintiff to file his second amended complaint (without any yellow or other highlighting) by **December 30, 2020**. Additionally, the Court **denies as moot** the Defendants' motion to dismiss the prior pleading (**ECF No. 30**) and **denies as moot** the Plaintiff's original motion for leave to amend the complaint (**ECF No. 32**). *See Taylor v. Alabama*, 275 F. App'x 836, 838 (11th Cir. 2008) (noting that when the plaintiffs amended their complaint the defendants' motion to dismiss became moot).

The parties are also advised that the instant Order has no bearing on the outcome of the Court's December 21, 2020 Order to Show Cause. Failure to timely file the amended complaint may result in sanctions, including dismissal.

Done and Ordered at Miami, Florida, on December 28, 2020.

/s/
Robert N. Scola, Jr.
United States District Judge

United States District Court
for the
Southern District of Florida

Filed 12/21/2020
Civil Action No. 20-23611-Civ-Scola

Michael Van Cleve, Plaintiff,

v.

Wilbur L. Ross, U.S. Secretary of Commerce, and others, Defendants.

Order Denying Motion for Three Judge Panel and Order to Show Cause

This matter is before the Court upon the Plaintiff's motion for assembly of a three-judge panel pursuant to 28 U.S.C. § 2284. (ECF No. 39.) The Defendant has responded to the motion (ECF No. 43) and the Plaintiff has submitted a reply (ECF No. 44). Upon review of the motion, the record, and the relevant legal authorities, the Court **denies** the motion (**ECF No. 39**) and **orders the Plaintiff to show cause** as set forth below.

28 U.S.C. § 2284 is a constitutionally important statute that applies to cases "challenging the constitutionality of the apportionment of congressional districts." *Id.* Given the importance of apportionment cases, that statute allows a party in such cases to request that the case be heard by a panel of three judges. However, this case involves no challenge to the constitutionality of the apportionment of congressional districts, which the

Plaintiff does not dispute in his reply. Rather, the Plaintiff claims that he was authorized to file the motion because, in *Shapiro v. McManus*, the Supreme Court commented that "a party may—whether in good faith or bad, through ignorance or hope or malice—file a *request* for a three-judge court even if the case does not merit one under § 2284(a)." 136 S. Ct. 450 (2015) (emphasis in original). The Plaintiff's reading of that excerpt of *Shapiro* as if it were *endorsing* the filing of motions made in "good faith or bad, through ignorance or hope or malice" is as surprising as it is frivolous.

While the Plaintiff's reply extols the importance of his case—challenging race data incorporated into the Census—the briefs simply do not show any case law or interpretation showing that the Plaintiff had grounds to seek a three judge panel under 28 U.S.C. § 2284. In an apparent concession of this defect, the Plaintiff's reply concludes that he "faithfully puts his trust in this court on this issue." (ECF No. 44 at 2.) The Plaintiff appears to ignore that his duty to ensure that every motion has valid grounds cannot be delegated to the Court. Consistent with his delegation of his own duty to this tribunal, the reply concludes that if the Court (without any grounds) convenes a three judge panel, then "any error can be remedied by a single district judge certifying the panel's decision" at the end of the case. (*Id.* at 3.) The Court declines the invitation to commit legal error on the basis that it can be remedied by a colleague after the fact.

Finally, the Court hereby **Orders the Plaintiff to Show Cause** by **December 28, 2020** why the Plaintiff should not be sanctioned with an order to pay the Defendants' costs and fees incurred in

responding to this motion. Rule 11 provides that attorneys, such as the Plaintiff, must make a reasonable inquiry into the facts and law of a case or face potential sanctions for their failure to do so. Fed. R. Civ. P. 11; *Worldwide Primates, Inc. v. McGreal*, 87 F.3d 1252, 1254 (11th Cir. 1996). Under Rule 11, a court must determine whether a party's claims are objectively frivolous in view of the facts or law and if the person who signed the pleadings would have been aware of that fact had they made a reasonable inquiry into the claims they have advanced. *Worldwide Primates*, 87 F.3d at 1254. A legal claim is frivolous if no reasonably competent attorney could conclude that it has any reasonable chance of success or is a reasonable argument to change existing law. *Id.* A factual claim is frivolous if no reasonably competent attorney could conclude that it has a reasonable evidentiary basis. *Davis v. Carl*, 906 F.2d 533, 537 (11th Cir. 1990).

This is not the first time that the Plaintiff has run afoul of the applicable rules in the short history of this case. For example, he moved "to compel a response [to the complaint] or compel an appearance from defendants" before several of them were even served. (ECF No. 17.) In denying that meritless motion, the Court reminded the Plaintiff "of his obligation to adhere to the applicable rules of procedure." (ECF No. 18.) The Court further stated that "[a]lthough plaintiff[] [is] proceeding pro se, [Van Cleve] is a licensed attorney; therefore, plaintiff[] will not receive the leniency customarily reserved for other pro se litigants." (*Id.* (citing *Smith v. Bank of Am. Home Loans*, Case No. 2:11-cv-676-FtM-29DNF, 4 n.1 (M.D. Fla. Jan. 15, 2014)).) Nevertheless, the Plaintiff proceeded to file the

instant, baseless motion. Such motions drain scarce judicial resources, deprive the Court's attention from legitimate matters, and, in this case, harmed the Defendants by requiring them to waste resources on responding to the motion.

The Plaintiff's response to this Order to Show Cause shall not exceed four pages.

Done and Ordered in chambers, at Miami, Florida, on December 21, 2020.

/s/
Robert N. Scola, Jr.
United States District Judge