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 MARI OVERBECK
 JORDAN D. SEGALL
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 KAREN A. LORANG
 CRAIG A. LAVOIE
 ELIA HERRERA
 JOSHUA S. MELTZER
 MARIA JHAI
 ADAM P. BARRY
 JENNIFER L. BRYANT
 ANDREW CATH RUBENSTEIN

1155 F STREET N.W.
 SEVENTH FLOOR
 WASHINGTON, D.C. 20004-1361
 TELEPHONE (202) 220-1100
 FACSIMILE (202) 220-2300

350 SOUTH GRAND AVENUE
 FIFTIETH FLOOR
 LOS ANGELES, CALIFORNIA 90071-3426
 TELEPHONE (213) 683-9100
 FACSIMILE (213) 683-3702

560 MISSION STREET
 TWENTY-SEVENTH FLOOR
 SAN FRANCISCO, CALIFORNIA 94105-3089
 TELEPHONE (415) 512-4000
 FACSIMILE (415) 512-4077

July 5, 2019

JEFFREY A. FAYNE
 HANNAH L. DUBINA
 NICHOLAS D. FRAM
 JOHN L. SCHWAB
 J'ME K. FORREST
 ASHLEY D. KAPLAN
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 TREVOR N. TEMPLETON
 SKYLAR D. BROOKS
 ELIZABETH R. DYER
 SARAH S. LEE
 ELIZABETH A. KIM
 SUSAN S. HARR
 NICHOLAS DUFAU
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 NAJEE K. THORNTON
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 SAMUEL H. ALLEN
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 JONATHAN S. MELTZER*
 SAMUEL JOSÉ DÍAZ
 LAUREN M. HARDING
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ALISON F. KAROL
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 GRAHAM B. COLE
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 SEGUN I. BABATUNDE II
 CARSON C. ZHENG
 LUCAS J. ARTAZ
 USHA CHILLUKURI VANCE
 BRIAN J. SPRINGER
 JENTRY LANZA
 CATHERINE N. GRECH
 TYLER HILTON
 VINCENT LING

OF COUNSEL

ROBERT K. JOHNSON
 ALAN V. FRIEDMAN
 PETER A. DETRE
 ALLISON B. STEIN
 BRAD SCHNEIDER
 ERIC P. TUTTLE
 PETER E. GRATZINGER
 JENNY H. HONG
 KIMBERLY A. CHI
 DAVID S. HONG
 ADAM R. LAWTON
 MATTHEW S. SCHONHOLZ
 MICHAEL E. GREANEY

E. LEROY TOLLES
 (1922-2008)

* ADMITTED IN DC.
 ALL OTHERS ADMITTED IN CA

Writer's Direct Contact
 (202) 220-1101
 (213) 683-4007 FAX
 Donald.Verrilli@mto.com

Lyle W. Cayce
 Clerk of Court
 United States Court of Appeals
 Fifth Circuit
 Office of the Clerk
 F. Edward Hebert Building
 600 S. Maestri Place
 New Orleans, LA 70130-3408

Re: *Texas v. United States*, No. 19-10011

Dear Mr. Cayce:

I write in response to the letter filed by Plaintiffs-Appellees Neill Hurley and John Nantz (“Individual Plaintiffs”) regarding *Department of Commerce v. New York*, No. 18-966, 2019 WL 2619473 (U.S. June 27, 2019).

The plaintiffs there—States, local governments, and non-governmental organizations—alleged that the inclusion of a citizenship question on the census would depress response rates, lead to an inaccurate count, and, in turn, cause them injuries, such as loss of federal funding. The district court found that “evidence at

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trial established a sufficient likelihood” of this chain of events, and the Supreme Court concluded that these factual findings were not clearly erroneous. Slip op. 9.

The decision in no way supports Individual Plaintiffs’ standing. *Department of Commerce* found standing where *third parties*’ “predictable” reaction to government action injured plaintiffs. *Id.* at 11. Here, by contrast, Individual Plaintiffs argue they are injured by *their own* reaction to government action—that is, their choice to obtain insurance rather than to pay \$0. Unlike the plaintiffs in *Department of Commerce*, Individual Plaintiffs’ supposed injury is entirely self-inflicted and, accordingly, insufficient for standing. *See Clapper v. Amnesty Int’l USA*, 568 U.S. 398 (2013).

Nor does *Department of Commerce* aid State Plaintiffs. There, the district court made factual findings following an eight-day bench trial that the citizenship question would depress response rates in noncitizen households by at least 5.8% and that this undercounting would lead to, *inter alia*, decreased federal funding for plaintiffs. *New York v. Dep’t of Commerce*, 351 F. Supp. 3d 502, 592, 596-99 (S.D.N.Y. 2019). Here, the district court made no findings regarding the effect of Section 5000A on State Plaintiffs—it did not even address State Plaintiffs’ standing. And, unlike in *Department of Commerce* where (often uncontradicted) written and oral testimony supported plaintiffs’ allegations, there is no record evidence supporting State Plaintiffs’ contention that Section 5000A increases Medicaid or CHIP enrollment in their States. That is unsurprising: it is hardly “predictable” that individuals sign up for inexpensive or free health insurance not because of the valuable benefit they receive, but instead only because of a toothless Section 5000A.

Respectfully submitted,

/s/ Donald B. Verrilli, Jr.

Donald B. Verrilli, Jr.

cc: Counsel of Record