IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LA UNIÓN DEL PUEBLO ENTERO, *et al.*, Plaintiffs, v. WILBUR L. ROSS, in his official capacity as U.S. Secretary of Commerce, *et al.*, Defendants.	No. 8:19-cv-02710-GJH

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Secretaries of Commerce have long exercised their statutory authority to gather administrative records—files from other federal and state agencies—in aid of their mission to provide vital statistics to the nation. After the Secretary's unsuccessful attempt to obtain citizenship data using a citizenship question on the 2020 Census, the President issued Executive Order 13880 in July 2019 with the "goal of making available to the [Commerce] Department administrative records showing citizenship data for 100 percent of the population." Exec. Order No. 13880, 84 Fed. Reg. 33821 (July 11, 2019). While the Secretary had collected enough administrative records for the Census Bureau (the primary statistical agency in the Department of Commerce) to "determine citizenship status for approximately 90 percent of the population," he "remain[ed] in negotiations to" access "several additional important sets of [administrative] records with critical information on citizenship." *Id.* The President therefore directed "all executive departments and agencies" to "provide the [Commerce] Department the maximum assistance permissible" in order "to eliminate delays and uncertainty, and to resolve any doubt about the duty of agencies to share data promptly with the Department." *Id.*

Plaintiffs—individuals and organizations concerned about their *States and localities'* potential use of citizenship data—now take issue with a process decades in the making: the Secretary's collection of administrative records, facilitated by the President's

internal guidance to federal agencies, to obtain comprehensive citizenship data on the U.S. population. In seeking to "[e]njoin Defendants and their agents from collecting data as dictated by EO 13380," Plaintiffs' First Amended Complaint (FAC) alleges violations of the Administrative Procedure Act (APA), the Fifth Amendment's equal protection component, and 42 U.S.C. § 1985(3) (civil conspiracy). FAC ¶¶ 88–117, ECF No. 41; *Id.* at 31. But the FAC is fatally flawed from beginning to end.

The Secretary's administrative-record collection does not affect any private parties, let alone Plaintiffs. It is only when Plaintiffs' *States and localities* "discriminatorily" choose to use citizenship data that Plaintiffs could possibly be injured. *See* FAC ¶ 87. So they lack standing, and their suit is unripe, because their injuries can only result from a highly attenuated chain of possibilities, including the independent decisions of States and localities to use (or not use) citizenship data. This also torpedoes Plaintiffs' APA and equal protection claims, as the Secretary's administrative-record collection is neither "agency action" for APA purposes, nor does it cause a "disparate impact" for equal protection purposes.

If that were not enough, Plaintiffs' § 1985(3) is barred on several threshold grounds, including sovereign immunity and a lack of statutory authorization for injunctive relief. And Plaintiffs do not plausibly allege any facts supporting their equal protection and § 1985(3) claims, instead relying almost exclusively on the events leading

up to *a citizenship question*, not the collection of administrative records. Plaintiffs' FAC is meritless and should be dismissed.

BACKGROUND

I. The Secretary's Collection of Administrative Records and Citizenship Data

The use of administrative records is not new. In the 1890 Census, for example, "special enumerators visited real estate recorders' office[s] [ ] to obtain data on individual and corporate debt."[1] And after the Department of Commerce was formed, Congress specifically empowered the Secretary of Commerce, "whenever he considers it advisable," to "call upon any other department, agency, or establishment of the Federal Government . . . for information pertinent to the work" of the Census Bureau. 13 U.S.C. § 6(a).[2] Secretaries have routinely exercised this power to collect and use administrative records. As just two of many examples, administrative records have been used since the 1940s to help produce population estimates between censuses,[3] and in 1954 the Census

[1] U.S. Census Bureau, *History of the 1997 Economic Census* (July 2000), at 63, https://www.census.gov/history/pdf/1997econhistory.pdf.

[2] The Secretary may also acquire similar information from "States, counties, cities, or other units of government," or "from private persons and agencies." 13 U.S.C. § 6(b).

[3] U.S. Census Bureau, *Current Population Reports, Population Estimates* (Aug. 13, 1948), at 2, https://www2.census.gov/library/publications/1948/demographics/P25-13.pdf.

Bureau implemented "large-scale use of administrative records" from the Internal Revenue Service as part of the Economic Census.[4]

The Secretary has collected administrative records containing citizenship data since at least 2002.[5] But the Census Bureau has never had a full set of administrative records to determine citizenship for every person in the country. To inform immigration policy, support research, plan investments, design programs, and aid Voting Rights Act enforcement—which requires citizenship estimates to determine the number of eligible voters in a given geographic area—the Census Bureau has used sample-based surveys. From 1970 to 2000, the Census Bureau used the long-form census, a set of over thirty questions (including citizenship) sent to one in six households during each decennial census. *Kravitz v. U.S. Dep't of Commerce*, 366 F. Supp. 3d 681, 693 (D. Md. 2019). The long form was discontinued after the 2000 Census and replaced by the American Community Survey (ACS) in 2005, a similarly lengthy survey (also including a citizenship question) that is sent to one in 38 households annually. *Id.*

[4] U.S. Census Bureau, *History of the 1997 Economic Census* (July 2000), at 63, https://www.census.gov/history/pdf/1997econhistory.pdf.

[5] J. David Brown, et al., Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census (June 2019), at Table A8, https://www2.census.gov/ces/wp/2018/CES-WP-18-38R.pdf (noting the use of Social Security records after the 2000 Census).

These surveys did not, and do not, provide perfect citizenship data. For example, because the ACS is based on a sample of the population, its citizenship data is not available at the lowest geographic level, called a "census block" and roughly equivalent to a city block. *See id.* (discussing census blocks). Instead, ACS-based citizenship data is only reported at a higher geographic level (called a "census block group"), containing about 600 to 3,000 people. *See id.* (discussing census block groups). While the Census Bureau is statutorily obligated to produce *population* data for States and localities to use in redistricting (so-called Public Law 94-171 data), it also provides citizen voting age population by race and ethnicity (CVAP) data tabulated from the ACS.[6] 13 U.S.C. § 141(c); FAC ¶ 39. Population totals are reported at the census-block level; CVAP data is not. *Kravitz*, 366 F. Supp. 3d at 692–93.

In December 2017, the Department of Justice sent a letter to the Census Bureau requesting a citizenship question on the 2020 Census, which would enhance Voting Rights Act enforcement by allowing the Census Bureau to calculate citizenship data at the census-block level. *Id.* at 698. In March 2018, the Secretary of Commerce issued a memorandum directing the Census Bureau to include a citizenship question on the 2020 Census. *Id.* at 693.

[6] *See* U.S. Census Bureau, *Citizen Voting Age Population by Race and Ethnicity (CVAP)*, https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.html.

Various parties—including two organizations and one individual in this case—challenged the Secretary's decision. *Id.* at 691. Throughout the year-long litigation, the plaintiffs consistently and forcefully argued that the Secretary's so-called Alternative C—collecting citizenship data using administrative records—was "objectively superior" to employing a citizenship question on the 2020 Census.[7] The issue eventually reached the Supreme Court, which vacated and remanded the Secretary's decision on other grounds. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2570–75 (2019).

II. The Executive Order to Continue Gathering Citizenship Data Using Administrative Records

Several weeks after the Supreme Court's decision, the President issued Executive Order 13880. While noting the Supreme Court's holding that "the Department of Commerce [ ] may, as a general matter, lawfully include a question inquiring about citizenship status on the decennial census," the President explained that "[t]he Court's

[7] *See, e.g.*, Pls.' Corrected Conclusions of Law, *Kravitz v. U.S. Department of Commerce*, No. 18-cv-1041 (D. Md. Feb. 18, 2019), ECF No. 151-2 at ¶ 129 ("The uncontroverted evidence before the Secretary demonstrated that the use of [administrative records] alone without a decennial Census citizenship question—Alternative C—was superior to [including a citizenship question] by every relevant metric, including those that the Secretary purported [ ] to value."); *id.* ¶ 178 ("[T]he only reasonable conclusion to be drawn from the [administrative record] is that Alternative C would yield more accurate citizenship data than [including a citizenship question], with no compromise of timeliness, scope, or other criteria of quality relevant to DOJ's stated use."); Pls.' Mem. in Opp'n to Defs.' Mot. for Summ. J., *LUPE v. Ross*, No. 18-cv-1570 (D. Md. Nov. 27, 2018), ECF No. 85 at 34–41, 44 (arguing that "all evidence from the Census Bureau points out that [including the citizenship question] is less accurate and more costly" than Alternative C).

ruling . . . has now made it impossible, as a practical matter, to include a citizenship question on the 2020 decennial census questionnaire." E.O. 13880, 84 Fed. Reg. at 33821. Nonetheless, the President sought to "ensure that accurate citizenship data is compiled," with the "goal of making available to the [Commerce] Department administrative records showing citizenship data for 100 percent of the population." *Id.* at 33822.

This is important, the President explained, to "help us understand the effects of immigration on our country," to "implement specific [public-benefits] programs and to evaluate policy proposals for changes in those programs," and to "generate a more reliable count of the unauthorized alien population in the country." *Id.* The President also noted that "the Supreme Court left open the question whether 'States may draw districts to equalize voter-eligible population rather than total population,'" but "because eligibility to vote depends in part on citizenship, States could more effectively exercise this option with a more accurate and complete count of the citizen population." *Id.* at 33823 (citing *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016)). Among other helpful aspects, "a more accurate and complete count of the citizen population" derived from administrative records would enable the Census Bureau to produce a CVAP tabulation at the lowest geographic level (the census block), unlike recently available CVAP tabulations derived solely from the ACS. *See id.* at 33824.

By the time of the Executive Order, the Census Bureau had enough administrative records to "determine citizenship status for approximately 90 percent of the population,"

but "remain[ed] in negotiations to" access "several additional important sets of records with critical information on citizenship" from other federal agencies." *Id.* at 33821. "[T]o eliminate delays and uncertainty, and to resolve any doubt about the duty of agencies to share data promptly with the [Commerce] Department," the President directed "all executive departments and agencies" to "provide the Department the maximum assistance permissible, consistent with law, in determining the number of citizens and non-citizens in the country," including "by providing any access that the Department may request to administrative records that may be useful in accomplishing that objective." *Id.* The President also established an "interagency working group to improve access to administrative records," and directed "the [Commerce] Department to strengthen its efforts, consistent with law, to obtain State administrative records concerning citizenship." *Id.* at 33822.

III. Plaintiffs' Challenge

Plaintiffs now take issue with the exact decision some of them previously desired—the use of administrative records to gather citizenship data. Their lawsuit stems from a purported concern that if the Census Bureau "provides [Plaintiffs'] states with citizenship data to be used along with the total population tabulations in the P.L. 94-171 Redistricting Data File," these States may "use CVAP as a population base for drawing congressional and state legislative redistricting plans in 2021." FAC ¶ 87.

On the merits, Plaintiffs overlook the Secretary's decades of gathering administrative records to allege that the mere collection of citizenship data from federal and state agencies is now part of a conspiracy "motivated by racial animus towards Latinos, and animus towards non-U.S. citizens and foreign-born persons." FAC ¶¶ 110–17. For that reason, and alleged violations of the APA, Plaintiffs seek to "[e]njoin Defendants and their agents from collecting data as dictated by EO 13380." FAC at 31. This motion follows.

LEGAL STANDARDS

In evaluating a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), the Court must "accept as true the allegations for which there is sufficient factual matter to render them plausible on their face." *Hutton v. Nat'l Bd. of Examiners in Optometry, Inc.*, 892 F.3d 613, 620 (4th Cir. 2018) (alterations and citations omitted). But the Court need not do the same for "legal conclusion[s] couched as [ ] factual allegation[s]." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Courts should "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citations omitted). So, to survive a Rule 12(b)(1) motion to dismiss, Plaintiffs must establish this Court's jurisdiction through sufficient allegations. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Similarly, to survive a 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its

face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "The mere recital of elements of a cause of action, supported only by conclusory statements, is not sufficient to survive a motion made pursuant to Rule 12(b)(6)." *K.M. by & Through C.M. v. Bd. of Educ. of Montgomery*, 2019 WL 330194, at *3 (D. Md. Jan. 25, 2019) (Xinis, J.) (quoting *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012)).

ARGUMENT

I. Plaintiffs Lack Standing

Article III of the Constitution limits the judicial power of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. "[R]ooted in the traditional understanding of a case or controversy," standing doctrine developed to implement this Article III command. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). It "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong," thus preventing "the judicial process from being used to usurp the powers of the political branches" and "confin[ing] the federal courts to a properly judicial role." *Id.*

Standing "requires an injury in fact that is caused by the challenged conduct and is likely to be redressed by a favorable decision." *6th Cong. Dist. Republican Comm. v. Alcorn*, 913 F.3d 393, 405 (4th Cir. 2019). As the parties invoking this Court's jurisdiction, Plaintiffs bear the burden of establishing these requirements. *Spokeo*, 136 S. Ct. at 1547. They cannot. Plaintiffs claim that they "live in states where lawmakers have expressed an interest and desire to use CVAP as a population base for drawing congressional and

state legislative redistricting plans in 2021." FAC ¶ 87. If the Census Bureau "provides those states with citizenship data," the state and local officials may exclude "non-citizens from the population base used for redistricting congressional, state legislative[,] and local districts," purportedly resulting in Plaintiffs' "vote dilution and loss of representation in unconstitutionally overpopulated districts." *Id.* This theory fails every prong of standing.

A. Plaintiffs' purported harm is not traceable any action of Defendants and not redressable by the Court.

Most obviously, Plaintiffs fail to demonstrate traceability and redressability. Standing requires Plaintiffs to show that their purported injury is "fairly traceable to the challenged action of the defendant[s], and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (alterations and citations omitted). This is important because "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (quotation marks and citations omitted). Here, it is only "independent action of some third party not before the court"—States and localities using redistricting data—that could possibly cause Plaintiffs' alleged redistricting injury, and no court order is likely to redress that injury.

For starters, Plaintiffs' claimed injury could only occur if state and local officials exclude "non-citizens from the population base used for redistricting congressional, state legislative[,] and local districts." FAC ¶ 87. But that redistricting choice is, quite obviously, an independent decision by state and local officials. The Supreme Court has

explained in no uncertain terms that "[r]edistricting is primarily the duty and responsibility of the State," *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018), and "[t]he decision to include or exclude" noncitizens and other non-voting persons "involves *choices* about the nature of representation with which we have been shown no constitutionally founded reason to interfere," *Burns v. Richardson*, 384 U.S. 73, 92 (1966) (emphasis added). The possibility that "*States* may draw districts to equalize voter-eligible population rather than total population" was explicitly left open in *Evenwel v. Abbott*, 136 S. Ct. 1120, 1133 (2016) (emphasis added). And "because eligibility to vote depends in part on citizenship, *States* could more effectively exercise this option with a more accurate and complete count of the citizen population." E.O. 18880, 84 Fed. Reg. at 33824 (emphasis added). Nothing in either law or Plaintiffs' factual allegations supports the idea that States' redistricting methodologies are anything but their own independent decisions.[8]

[8] It is true that traceability may be found "where the plaintiff suffers an injury that is produced by the determinative or coercive effect of the defendant's conduct upon the action of someone else." *Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne*, LLC, 713 F.3d 187, 197 (4th Cir. 2013) (alterations omitted). But Plaintiffs do not (and cannot) advance any allegations that Defendants' mere collection of citizenship data somehow coerces States into using that data for CVAP redistricting, or somehow makes CVAP redistricting a foregone conclusion. As Plaintiffs themselves acknowledge, States and localities expressed a desire for CVAP redistricting long before the Executive Order. *See, e.g.*, FAC ¶ 87 n.42; Brief for Appellees, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940) (State of Texas arguing for voter-eligible redistricting in 2015); Brief Amicus Curiae of Tennessee State Legislators and the Judicial Education Project in Support of Appellants, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940) (Tennessee legislators arguing for voter-eligible redistricting in 2015).

This alone is fatal to Plaintiffs' standing. *See Doe v. Obama*, 631 F.3d 157, 162 (4th Cir. 2011) (stating that "a fundamental tenet of standing doctrine" is that where a third party "makes the independent decision that causes an injury, that injury is not fairly traceable" to the defendant). But even if States make the independent choice to use CVAP for redistricting, they must also make the independent choice to use citizenship data *provided by the Census Bureau*, as opposed to other statistics like voter-registration data. *See Burns*, 384 U.S. at 92–93 (permitting a State to draw districts based on voter-registration data).[9] So before Plaintiffs could possibly suffer "vote dilution and loss of representation in unconstitutionally overpopulated districts," States must make two independent decisions: (i) whether to "exclu[de] [ ] non-citizens from the population base used for redistricting congressional, state legislative[,] and local districts," and (ii) whether to use "citizenship data" provided by the Census Bureau "along with the total population tabulations in the P.L. 94-171 Redistricting Data File." FAC ¶ 87.

That is also why a favorable decision in this case would do nothing to relieve Plaintiffs' theoretical "injury." *Lujan*, 504 U.S. at 560. Plaintiffs seek to "[e]njoin Defendants and their agents from collecting data as dictated by EO 13380." FAC at 31.

[9] More broadly, States make the independent choice to use any Census Bureau data, even total population figures, for redistricting. *See Burns*, 384 U.S. at 91 ("[T]he Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured.").

But even if they are granted this relief, States may nonetheless choose to use CVAP for redistricting based on either voter-registration data or the Census Bureau's ACS-based citizenship data.[10] The reverse is also true. Even if this Court declines Plaintiffs' requested injunction, it is entirely possible that States—or at least Arizona, Texas, and Washington, where Plaintiffs reside—may choose *not* to use CVAP for redistricting. In either case, Plaintiffs lack standing because "[f]ederal courts may not decide questions that cannot affect the rights of litigants in the case before them or give opinions advising what the law would be upon a hypothetical state of facts." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (alterations and citations omitted).

Plaintiffs' quarrel lies with their respective States, not the President, the Secretary of Commerce, or the Census Bureau. Merely collecting citizenship data and potentially providing it to the States cannot have the challenged effect on redistricting unless *States* decide to use CVAP for redistricting. And if they do so for discriminatory purposes, Plaintiffs could sue their respective States (or the relevant State officials). *See Davidson v. City of Cranston*, 837 F.3d 135, 142–43 (1st Cir. 2016); *Wright v. North Carolina*, 787 F.3d 256, 263 (4th Cir. 2015); *Terrebonne Par. NAACP v. Jindal*, 154 F. Supp. 3d 354, 363 (M.D. La. 2015); *Giles v. Ashcroft*, 193 F. Supp. 2d 258, 267 (D.D.C. 2002); *Common Cause S. Christian*

[10] As experienced demographers told the Supreme Court in 2015, "ACS data more than suffices as the raw material for building districts of 'substantially equal' numbers of eligible voters." Brief of Demographers Peter A. Morrison, et al. as Amici Curiae in Support of Appellants, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940).

Leadership Conference of Greater L.A. v. Jones, 213 F. Supp. 2d 1106, 1108 (C.D. Cal. 2001). In the meantime, Plaintiffs may seek relief through the political process—not the courts—if they dislike the collection of citizenship data through administrative records.

B. Plaintiffs' purported harm is far from certainly impending.

Plaintiffs also fail the injury-in-fact inquiry because no one is injured by the Defendants' mere collection of citizenship data; Plaintiffs' hypothetical injury could only occur, if ever, after a series of speculative events. "To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548. The purpose of the imminence requirement "is to ensure that the alleged injury is not too speculative for Article III purposes." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). So the "threatened injury must be *certainly impending* to constitute injury in fact, and allegations of *possible* future injury are not sufficient." *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 207–08 (4th Cir. 2017) (alterations omitted) (quoting *Clapper*, 568 U.S. at 409). Plaintiffs have alleged just such a "possible future injury" here.

Plaintiffs claim that if the Census Bureau "provides th[eir] states with citizenship data," state and local officials may exclude "non-citizens from the population base used for redistricting congressional, state legislative[,] and local districts," purportedly resulting in Plaintiffs' "vote dilution and loss of representation in unconstitutionally

overpopulated districts." FAC ¶ 87. So Plaintiffs will not suffer any harm unless (1) Defendants collect more administrative records under the Executive Order, *id.* ¶¶ 59–62; (2) the Census Bureau is able to "produce citizenship population tabulations" using these additional administrative records, *id.* ¶¶ 96, 101, 103, 108, 112; (3) the Census Bureau provides "[S]tates with citizenship data" based on administrative records, *id.* ¶ 87; (4) States choose to "use CVAP as a population base for drawing congressional and state legislative redistricting plans in 2021," *id.*; and (5) States choose to use the Census Bureau's administrative-record data to do so. The result is a "highly attenuated chain of possibilities," which "does not satisfy the requirement that threatened injury must be certainly impending." *Clapper*, 568 U.S. at 410.

First, until the Census Bureau is able to obtain administrative records under the Executive Order, the precise effect of additional records remains unknown. As the Executive Order itself notes, Defendants *already had* administrative records to "determine citizenship status for approximately 90 percent of the population," but "remain[ed] in negotiations to" access "several additional important sets of records with critical information on citizenship" from other federal agencies. E.O. 13880, 84 Fed. Reg. at 33821–22. The acquisition of administrative records from federal agencies is a complicated process. It requires extensive negotiation of a lengthy agreement, including how the data will be transferred, how the data may be used, how the data must be protected, how long the Census Bureau may retain the data, and how much the data will

cost. And this says nothing about Defendants' acquisition of *state* administrative records, which are comparably more difficult to obtain because they not only require the same extensive negotiation as federal agreements, but require these negotiations with each separate State (and sometimes multiple state agencies with the same State). Plaintiffs seek to enjoin only the speculative acquisition of administrative records obtained under the Executive Order, not any preexisting administrative records. *See* FAC at 31 (seeking to "[e]njoin Defendants and their agents from collecting data as dictated by EO 13380").[11]

Second, even if additional administrative records are acquired, they may be too unreliable to aid production of "citizenship population tabulations" by April 2021. *See id.* ¶¶ 87, 96, 101, 103, 108, 112. The Census Bureau can only produce these tabulations—including the number and location of citizens and noncitizens—when administrative records and their connections to census data are both of "high quality." *See New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 587–88 (S.D.N.Y.) (noting that administrative

[11] Although Plaintiffs seemingly seek a declaratory judgment "that production of citizenship data for use along with the P.L. 94-171 Redistricting Data File and population tabulations, or including citizenship data in the File, violates the Equal Protection guarantee of the Fifth Amendment," FAC at 31, they nowhere allege facts supporting the unprecedented relief of declaring that all citizenship data—not just citizenship data collected under the Executive Order—is invalid on equal protection grounds. In fact, the only allegations of discriminatory intent (necessary for an equal protection violation) focus on the Secretary's previous attempt to include a citizenship question on the census and the subsequent Executive Order, not any preexisting animus somehow infecting administrative records collected years ago. *See id.* ¶¶ 73–84. In any event, Plaintiffs claims are both unreviewable and meritless, as discussed above and below.

records "will be used to enumerate only a limited number of those households for which there is high quality administrative data about the household," and that "[n]oncitizen and Hispanic households are less likely to be accurately represented in quality administrative records than other groups"), *aff'd in part, rev'd in part* 139 S. Ct. 2551 (2019). Plaintiffs themselves fully acknowledge the possibility of gaps in administrative records. *See* FAC ¶¶ 66–72 (cataloguing shortcomings of administrative records and noting that the Census Bureau "will most likely never possess a fully adequate truth deck" for citizenship). So the usability of any administrative records collected under the Executive Order is still unknown.[12]

Third, even if the Census Bureau is able to gather administrative records under the Executive Order, and even if they prove reliable enough to "produce citizenship population tabulations," the methodology used to produce any citizenship data provided to States is still undetermined.[13]

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[12] The usability and completeness of citizenship data in Defendants' administrative records is currently being litigated. *See* Defendant-Interveners' Cross Claim, *Alabama v. U.S. Dep't of Commerce*, No. 18-cv-0772 (N.D. Ala. Oct. 1, 2019), ECF No. 119 at ¶¶ 42–51 (contesting the use of "data collected under EO 13880" for congressional apportionment because it "is not an enumeration of individuals, and specifically is not an enumeration of undocumented immigrants, in the U.S.").

[13] U.S. Census Bureau, *Update on Disclosure Avoidance and Administrative Data* (Sept. 13, 2019), at 13, https://www2.census.gov/cac/sac/meetings/2019-09/update-disclosure-avoidance-administrative-data.pdf? ("No final decisions have been made regarding the methodology and format of the block-level CVAP data.").

Fourth and fifth, it is anyone's guess as to whether state and local officials will make the independent decisions to both use CVAP for redistricting and use the Census Bureau's (as-yet-unknown) data in the process. As explained above, it is entirely possible that Plaintiffs' States and localities may choose to redistrict using total population, or to use voter-registration data for CVAP redistricting.

Plaintiffs build speculation on top of speculation in a feeble attempt to manufacture a redistricting injury from Defendants' mere collection of administrative records. The result is a "highly attenuated chain of possibilities," which "does not satisfy the requirement that threatened injury must be certainly impending." *Clapper*, 568 U.S. at 410. No redistricting harm may ever befall Plaintiffs, let alone redistricting harm traceable to Defendants' conduct and redressable by the Court.

C. Plaintiffs will suffer no injury to a legally protected interest.

Plaintiffs' sole alleged redistricting injury is that they will suffer "vote dilution and loss of representation in unconstitutionally overpopulated districts" if state and local officials exclude "non-citizens from the population base used for redistricting congressional, state legislative[,] and local districts." FAC ¶ 87. But standing requires Plaintiffs to show that they will suffer "an invasion of a *legally protected* interest." *Wikimedia*, 857 F.3d at 207–08 (emphasis added) (quoting *Spokeo*, 136 S.Ct. at 1548). And despite Plaintiffs' cursory assertion that CVAP redistricting is itself "unconstitutional[]," that is simply not true under current law. FAC ¶ 87.

The Supreme Court explicitly left open the possibility for States to "draw districts to equalize voter-eligible population rather than total population," and it has suggested that States may constitutionally redistrict on either basis. *Evenwel*, 136 S. Ct. at 1126–32 (total population); *Burns*, 384 U.S. at 90 (registered-voter population). Indeed, "[i]t has long been constitutionally acceptable, but by no means required, to exclude non-voting persons . . . from the apportionment base, so long as the apportionment scheme does not involve invidious discrimination." *Davidson*, 837 F.3d at 143 (quoting *Burns*, 384 U.S. at 92); *Kaplan v. Cty. of Sullivan*, 74 F.3d 398, 401 (2d Cir. 1996) (same). So the mere use of CVAP in redistricting does not cause "vote dilution and loss of representation in unconstitutionally overpopulated districts." FAC ¶ 87.[14] It is only when Plaintiffs' state and local officials choose to use CVAP *with discriminatory intent* that Plaintiffs will suffer

[14] Plaintiffs also point out that "[e]xclusion of non-citizens from the population count used for [congressional] apportionment creates a significant risk that states in which large numbers of non-citizens reside, including Texas and Arizona, will suffer a reduction in the number of congressional seats that would otherwise be apportioned to them." FAC ¶ 86. But Defendants do not understand Plaintiffs to be asserting an injury on this basis because they advance no allegation, nor could they, that Defendants will use citizenship data collected under the Executive Order to exclude noncitizens in congressional apportionment. If Plaintiffs were to rely on that theory for standing, however, Defendants would likely seek to transfer venue to the Northern District of Alabama where that issue is currently being litigated. *See* First Am. Compl., *Alabama v. U.S. Dep't of Commerce*, No. 18-cv-0772 (N.D. Ala. Sept. 10, 2019), ECF No. 112 at ¶¶ 1–4 (alleging that *inclusion* of noncitizens in congressional apportionment is unconstitutional); Defendant-Interveners' Cross Claim, *Alabama v. U.S. Dep't of Commerce*, No. 18-cv-0772 (N.D. Ala. Oct. 1, 2019), ECF No. 119 at ¶¶ 50—56 (alleging that *exclusion* of noncitizens in congressional apportionment based on administrative records is unconstitutional).

a legally cognizable injury. *Davidson*, 837 F.3d at 143; *Kaplan*, 74 F.3d at 401. And, as explained above, Plaintiffs may attempt to enjoin such conduct by suing their state and local officials, not Defendants who merely tabulated citizenship data.

D. Organizational Plaintiffs lack standing.

In addition the infirmities identified above, the Organizational Plaintiffs have other standing problems: suing on behalf of their members or on their own behalves.

An organization does not have Article III standing to sue on behalf of its members unless "its members would otherwise have standing to sue in their own right." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). A general reference to unidentified members is insufficient for organizational standing. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.23 (1982); *see also Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 820 (D.C. Cir. 2006). Here, Promise Arizona (PAZ) does not identify a single member who may suffer an injury. *See* FAC ¶¶ 6–14. And although La Unión del Pueblo Entero (LUPE) identifies one member (Plaintiff Juanita Valdez-Cox) who may hypothetically suffer an injury, she—and therefore LUPE—still lack standing for the reasons explained above. *Id.*

When an organization sues on its own behalf (rather than on behalf of its members), it must satisfy the same Article III standing requirements that apply to individuals. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982). But Organizational Plaintiffs do not even attempt to allege any injuries distinct from their

members, like a "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources." *Id.* at 379.

II. Plaintiffs' Claims Are Not Ripe

Ripeness "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Trustgard Ins. Co. v. Collins*, 942 F.3d 195, 199 (4th Cir. 2019) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). In that sense, "[a]nalyzing ripeness is similar to determining whether a party has standing." *South Carolina v. United States*, 912 F.3d 720, 730 (4th Cir. 2019) (quoting *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006)). Just as Plaintiffs "cannot assert standing based on an alleged injury that lies at the end of a highly attenuated chain of possibilities," Plaintiffs' "claim is not ripe for judicial review if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.* (citations omitted).

"The question of whether a claim is ripe turns on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* (citations omitted). Neither factor favors Plaintiffs. "A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." *Miller*, 462 F.3d at 319; *Johnston v. Lamone*, 401 F. Supp. 3d 598, 607 (D. Md. 2019). Here, as explained above, the action in controversy—redistricting based on CVAP—is far from final and entirely dependent on unknown facts underlying a "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, including

States' independent redistricting decisions. *See Doe v. Va. Dep't of State Police*, 713 F.3d 745, 758 (4th Cir. 2013) ("Where an injury is contingent upon a decision to be made by a third party that has not yet acted, it is not ripe as the subject of decision in a federal court.").

"The hardship prong [of ripeness] is measured by the immediacy of the threat and the burden imposed on" Plaintiffs. *Miller*, 462 F.3d at 319. By Plaintiffs' own admission, the Census Bureau would not provide citizenship data to the States—whether based on administrative records or the ACS—until April 2021. *See* FAC ¶¶ 1, 15, 65, 87. And as explained above, it is far from certain that Plaintiffs would suffer any redistricting harm whatsoever. But perhaps more importantly, there is no burden on Plaintiffs at all. Cases have been deemed ripe where, for example, a "challenged statute imposed a continuing injury on [plaintiffs'] associational rights," *Miller*, 462 F.3d at 319–20, or a challenged "policy impose[d] the heavy burden of requiring a pit bull owner to either vacate his or her home or abandon a family pet," *Weigel v. Maryland*, 950 F. Supp. 2d 811, 830 (D. Md. 2013), or a challenged policy forced "harmful consequences [for plaintiffs] such as the cancellation and postponements of surgeries" and "the prospect of discharge [from the military] and inability to commission as an officer," *Stone v. Trump*, 280 F. Supp. 3d 747, 767 (D. Md. 2017). In stark contrast, Defendants' collection of administrative records, facilitated by the Executive Order, neither obligates Plaintiffs to, nor prohibits Plaintiffs from, any action. This case is not ripe and it should be dismissed.

III. Plaintiffs' APA Claims Should be Dismissed

Plaintiffs seem to target their APA claims at the Executive Order, and they challenge the Secretary's compliance with this presidential directive. FAC ¶¶ 88–109; *see, e.g.*, *id.* ¶ 103 ("Defendant Ross's decision to follow EO 13380 and direct the Census Bureau to, among other things, collect citizenship data . . . violates the APA and must be set aside."). But "[i]t is firmly established that presidential action is not subject to APA review." *Int'l Refugee Assistance Project v. Trump*, 373 F. Supp. 3d 650, 662 (D. Md. 2019) (citing *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992)).

It is true that, in certain circumstances, courts may apply the APA to an *agency's implementation* of an executive order. *See U.S. Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326 (D.C. Cir. 1996) ("Appellants could not possibly have relied on the APA for a cause of action prior to the Secretary's issuance of regulations implementing the Executive Order."); *Serv. Emps. Int'l Union Local 200 v. Trump*, 2019 WL 4877273, at *7 (W.D.N.Y. Oct. 3, 2019) (collecting cases for the proposition that "an APA challenge to an agency's implementation of an executive order (or other presidential directive) is not permissible prior to some independent, concrete action by the agency"). For at least two reasons, however, that gets Plaintiffs no closer to an actionable APA claim.

First, the Executive Order was merely a managerial tool designed "to eliminate delays and uncertainty, and to resolve any doubt about the duty of agencies to share data promptly with the [Commerce] Department." E.O. 13880, 84 Fed. Reg. at 33822. It was

not "issued pursuant to statutory mandate" or "a delegation from Congress of lawmaking authority." *U.S. Dep't of Health & Human Servs. v. Fed. Labor Relations Auth.*, 844 F.2d 1087, 1096 (4th Cir. 1988). To the contrary, it was "intended for the internal management of the President's cabinet," so neither the Executive Order nor its implementation are reviewable by courts. *Chai v. Carroll*, 48 F.3d 1331, 1339 (4th Cir. 1995); *see U.S. Dep't of Health & Human Servs.*, 844 F.2d at 1095; *Orbital ATK, Inc. v. Walker*, 2017 WL 2982010, at *9 (E.D. Va. July 12, 2017) (rejecting an APA challenge where the presidential directive at issue was "intended primarily as a managerial tool for implementing the President's personal [ ] policies" (quoting *Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 235–36 (8th Cir. 1975))).

Second, given that the Executive Order is simply managerial, it is unsurprising that Plaintiffs do not challenge a cognizable "agency action." The APA authorizes suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. "The term 'action' as used in the APA is a term of art that does not include all conduct on the part of the government." *City of New York v. U.S. Dep't of Def.*, 913 F.3d 423, 430 (4th Cir. 2019) (quoting *Vill. of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 193 (4th Cir. 2013)). Cognizable "agency action" under the APA must satisfy two key criteria: it must be "circumscribed and discrete," and it must "determine rights and obligations." *Id.* at 431 (citations and alterations omitted).

The latter requirement "ensures that judicial review does not reach into the internal workings of the government, and is instead properly directed at the effect that agency conduct has on private parties." *Id.* "To meet this requirement, a party must demonstrate that the challenged act had an immediate and practical impact, or altered the legal regime in which it operates." *Id.* (citations and alterations omitted). "It is not enough for plaintiffs to simply identify a governmental action that ultimately affected them through the 'independent responses and choices of third parties,' or mere 'coercive pressures.'" *Id.* (citation omitted). The collection of administrative records fails this test.

Indeed, Plaintiffs' APA claims are the paradigmatic example of improperly "reach[ing] into the internal workings of the government." *Id.* The Executive Order simply seeks to "ensure that accurate citizenship data is compiled" from administrative records already held by federal and state agencies. *See* E.O. 13880, 84 Fed. Reg. at 33821 (ordering "all executive departments and agencies" to "provide the [Commerce] Department the maximum assistance permissible, consistent with law, in determining the number of citizens and non-citizens in the country"). It has no impact whatsoever on private parties, let alone an "immediate and practical" one. *See City of New York*, 913 F.3d at 431.

The Court need look no further than the recent challenges to the 2020 Census to understand this point. In those cases, plaintiffs challenged the Secretary's decision to include a citizenship question on the 2020 Census, arguing that it violated the

Constitution and the APA. *See, e.g.*, *La Union del Pueblo Entero v. Ross*, 353 F. Supp. 3d 381 (D. Md. 2018). Moving to dismiss plaintiffs' APA claims, the government acknowledged that the Secretary's decision was "final agency action." *See, e.g.*, *New York*, 351 F. Supp. 3d at 627 ("There is no dispute th[at] Secretary Ross's decision constitutes 'final agency action' reviewable under the APA."). That was because the Secretary's decision imposed an obligation on private parties—*i.e.*, U.S. residents—to truthfully answer the citizenship question in 2020. *See* 13 U.S.C. § 221. Here, in contrast, Defendants' collection of administrative records from other federal and state agencies do not obligate private parties to do anything. *See NAACP v. Bureau of the Census*, 399 F. Supp. 3d 406, 425 (D. Md. 2019) (rejecting APA challenges to the Census Bureau's plans to conduct the 2020 Census because they did not determine rights and obligations of private parties).

It also cannot be said that the Executive Order "alter[s] the legal regime in which it operates." *City of New York*, 913 F.3d at 431 (citations omitted). It neither dictates how the Census Bureau must use the administrative records once they are collected, nor is anyone exposed to civil or criminal penalties for failing to follow it. *Cf. Bennett v. Spear*, 520 U.S. 154, 178 (1997) (holding that the legal regime is altered by one agency's determination when the action agency would expose itself to civil and criminal penalties if it disregarded that determination); *see Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 861 (4th Cir. 2002) (holding that an EPA Report did not alter the legal regime because "no statutory scheme triggers potential civil or criminal penalties for

failing to adhere to the Report's recommendations"). Beyond ordering "*all executive departments and agencies*"—not private parties—to "provide the [Commerce] Department the maximum assistance permissible," *see* E.O. 13880, 84 Fed. Reg. at 33821 (emphasis added), the Executive Order in no way "determine[s] rights and obligations" for the Department of Commerce, the Census Bureau, other federal agencies, Plaintiffs, or anyone else.

The Supreme Court's decision in *Franklin v. Massachusetts* alone resolves this case. 505 U.S. 788 (1992). There, plaintiffs challenged the Secretary's *use of administrative records* to count federal employees serving overseas, arguing that the Secretary's tabulation of census results violated the APA. *Id.* at 794–96 (explaining that the Census Bureau used the "home of record" in the Department of Defense's personnel files to allocate individuals). Strikingly, the Supreme Court held that the Secretary's final report to the President conveying the census results did not constitute "final agency action" because "the action that creates an entitlement to a particular number of Representatives and has a direct effect on the reapportionment is the President's statement to Congress, not the Secretary's report to the President." *Id.* at 797. So if the Secretary's tabulation of final census results—*including* administrative records—is not "final agency action" under the APA, then the mere gathering of administrative records parallel to the census cannot constitute "final agency action" either.

Fourth Circuit law reinforces this point, consistently rejecting APA claims like those at issue here. *City of New York*, 913 F.3d at 434–35 (holding that the Department of Defense's compliance with statutory requirements was not "agency action" under the APA because it did not "in any way determine [the plaintiffs'] rights and obligations"); *Bald Head Island*, 714 F.3d at 188–93 (finding no "agency action" where plaintiffs "commenced [the] action to challenge the adequacy of [a project's] performance and to require the [Army Corps of Engineers] to do what it had undertaken to do when approving the project," which was not a "determination of rights and obligations"); G*olden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 427–28 (4th Cir. 2010) (discussed below); *Invention Submission Corp. v. Rogan*, 357 F.3d 452, 459 (4th Cir. 2004) (holding that the Patent and Trademark Office's advertising campaign was not "final agency action" because it "was not the consummation of any decisionmaking process that determined rights or obligations or from which legal consequences flowed"); *Flue-Cured Tobacco*, 313 F.3d at 861 (holding that publication of an EPA report that classified environmental tobacco smoke as a potentially harmful human carcinogen was not an "agency action" reviewable under the APA).

In G*olden & Zimmerman, LLC v. Domenech*, for example, the plaintiffs challenged the "Federal Firearms Regulations Reference Guide 2005,' which [was] published by the Bureau of Alcohol, Tobacco, Firearms and Explosives ('ATF') to provide information designed to help licensees comply with all of the laws and regulations governing the

manufacture, importation, and distribution of firearms and ammunition." 599 F.3d at 427–28 (alterations omitted). The court rejected this challenge because, although the Reference Guide "inform[ed] the regulated community of what violates the law," it did "not itself *determine* the law or the consequences of not following it." *Id.* at 432–33. Notably, the court explained, "if the ATF had never published the Reference Guide . . . the ATF would still have had the authority to prosecute licensees for engaging in the conduct described in [it] because legal consequences do not emanate from [the Reference Guide] but from the Gun Control Act and its implementing regulations." *Id.* at 433.

The Executive Order here is even further removed from "determin[ing] the law" than the Reference Guide in G*olden & Zimmerman*: it provides no information to "the regulated community of what violates the law," *id.* at 432–33, but merely functions as an internal guide for "all executive departments and agencies" to "provide the [Commerce] Department the maximum assistance permissible, consistent with law, in determining the number of citizens and non-citizens in the country." *See* E.O. 13880, 84 Fed. Reg. at 33821. Surely, if a Reference Guide explaining the law to regulated parties does not "determine rights and obligations," then neither does the President's managerial decision. And, like the Reference Guide in G*olden & Zimmerman*, Defendants can, and have, gathered administrative records *without* the President's recent directive. *See id.* 33821–22 (noting that the Census Bureau already had administrative records to "determine citizenship status for approximately 90 percent of the population"). Their

authority to do so derives from the Census Act, not a recent directive "to eliminate delays and uncertainty" in the process. *See* 13 U.S.C. § 6(a) ("The Secretary, whenever he considers it advisable, may call upon any other department, agency, or establishment of the Federal Government . . . for information pertinent to the work provided for in this title."); E.O. 13880, 84 Fed. Reg. at 33821–22 ("[T]o to eliminate delays and uncertainty . . . I am hereby ordering all agencies to share information requested by the Department to the maximum extent permissible under law.").

Plaintiffs are clearly concerned about the conduct of States and localities when they receive citizenship data from the Census Bureau in 2021. *See* FAC ¶¶ 1, 15, 65, 87. But the APA "does not provide judicial review for everything done by an administrative agency," *Invention Submission Corp.*, 357 F.3d at 459 (citation omitted), and "[i]t is not enough for plaintiffs to simply identify a governmental action that ultimately affected them through the independent responses and choices of third parties," *City of New York*, 913 F.3d at 431 (citations omitted). Managerial "policy statements," like the Executive Order, "are properly challenged through the political process and not the courts." *Invention Submission Corp.*, 357 F.3d at 459.

IV. Plaintiffs' Equal Protection Claim Should be Dismissed

Plaintiffs' equal protection claim alleges that "[t]he collection of citizenship data and the production of citizenship population tabulations for use along with the P.L. 94-171 Redistricting Data File violates the equal protection guarantee of the Fifth

Amendment because it is motivated by racial animus towards Latinos, and animus towards non-U.S. citizens and foreign-born persons." FAC ¶ 112. To state an equal protection claim,[15] Plaintiffs must plausibly allege that the decision at issue has an adverse effect on a protected group and was motivated by discriminatory animus. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *La Union del Pueblo Entero*, 353 F. Supp. 3d at 393. They fail both prongs.

As explained above, the mere collection of administrative records does not impact anyone, let alone disparately impact Plaintiffs. *See* Argument Section I., *supra*. The Executive Order is even explicit that its goal is to "mak[e] available to the [Commerce] Department administrative records showing citizenship data for 100 percent of the population," citizens and noncitizens alike. E.O. 13880, 84 Fed. Reg. at 33822. It is only when States and localities use citizenship data produced by the Census Bureau (sometime after April 2021, if ever) that Plaintiffs would be impacted. That alone resolves their equal protection claim. *See Feeney*, 442 U.S. at 272.

But even if Plaintiffs somehow alleged an adverse effect from the collection of administrative records, they fail to allege facts plausibly suggesting discriminatory intent for this collection. *Id.* at 274. Put simply, Plaintiffs have not met their burden of plausibly

[15] "Although the Fourteenth Amendment's Equal Protection Clause does not apply to the federal government, the Fifth Amendment's Due Process Clause contains an equal protection component." *Stop Reckless Econ. Instability Caused by Democrats v. Fed. Election Comm'n*, 814 F.3d 221, 233 (4th Cir. 2016), *cert. denied,* 137 S. Ct. 374 (2016).

alleging that the decisionmaker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279.

The Supreme Court and the Fourth Circuit have identified various factors that may be probative of whether a decisionmaker was motivated by discriminatory intent:

> (1) evidence of a "consistent pattern" of actions by the [decisionmaker] disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the [decisionmaker] . . . ; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by [the decisionmaker] on the record or in minutes of [ ] meetings.

Cent. Radio Co. v. City of Norfolk, 811 F.3d 625, 635 (4th Cir. 2016) (quoting S*ylvia Dev. Corp. v. Calvert Cty.*, 48 F.3d 810, 819 (4th Cir. 1995)). None of these factors favor Plaintiffs.

First, Plaintiffs have not plausibly alleged a "consistent pattern" of actions by *anyone* that disparately impacted Latinos, noncitizens, and foreign-born persons.[16] They

[16] Plaintiffs cannot maintain an equal protection claim based on "animus towards non-U.S. citizens and foreign-born persons," FAC ¶ 112, because they are not suspect classifications. The federal government makes many distinctions between citizens and noncitizens, both for privileges (such as voting, jury service, and eligibility for benefits) and for immigration laws. *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."); *Lewis v. Thompson*, 252 F.3d 567, 583-84 (2d Cir. 2001); *Moving Phones P'ship L.P. v. FCC*, 998 F.2d 1051, 1055-56 (D.C. Cir. 1993). In any event, Plaintiffs have not set forth plausible allegations of discriminatory animus toward any of their named groups.

name only one incident, Defendants' failed inclusion of a citizenship question on the 2020 Census, as the touchstone of discriminatory motivation here. *See* FAC ¶¶ 73–84. But one event can hardly be called a "consistent pattern," especially because the attempt to include a citizenship question was enjoined and could not possibly have "disparately impact[ed] members of a particular class of persons." *Cent. Radio*, 811 F.3d at 635.

Regardless, even their allegations of that one incident are lacking. The proverbial smoking gun cited for discriminatory intent is a document of the late Dr. Thomas Hofeller, in which he noted inclusion of a citizenship question to "shift from redistricting based on total population to CVAP." FAC ¶ 81 ("To generate the necessary CVAP data and achieve this goal of diluting Latino representation while increasing over-representation of non-Latino Whites, Dr. Hofeller concluded that a citizenship question must be added to the 2020 census."). But there are no allegations that the sole decisionmaker with statutory authority to add a citizenship question—*i.e.*, the Secretary, *see* 13 U.S.C. § 141(f)(2)—ever read, received, or was even aware of Dr. Hofeller or his supposedly incendiary documents.[17] And those deficient allegations are still significantly

[17] At most, Plaintiffs allege that Dr. Hofeller "drafted and gave to Commerce and DOJ officials . . . the substantive content of the December 2017 DOJ letter requesting the addition of the citizenship question." FAC ¶ 82. Their allegations say nothing about the "substantive content of the December 2017 DOJ letter" including his idea to "shift from redistricting based on total population to CVAP," *id.* ¶ 81, or whether the "Commerce and DOJ officials," *id.* ¶ 82, were even aware of Dr. Hofeller's findings, let alone that they shared Dr. Hofeller's supposed motive to use CVAP redistricting for *discriminatory* purposes.

removed from any action at issue in this case: the Secretary's collection of administrative records, and the President's facilitation of that process. So none of Plaintiffs' allegations, FAC ¶¶ 73–84, shed any light on "the decisionmaker's purposes." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

Second and relatedly, the FAC says nothing about a discriminatory historical background surrounding any action at issue in this case. Again, the FAC's equal protection claim rests solely on insufficient allegations related to a census citizenship question, not the collection of administrative records. Plaintiffs identify no "history of discrimination by the [decisionmaker]" relevant to determining "the decisionmaker's purposes" in collecting administrative records or expediting that process. *Id.* at 267; *Cent. Radio*, 811 F.3d at 635.

Third, Plaintiffs fail to plausibly allege any departures from normal procedures such that discriminatory intent could be inferred. As explained above, the Secretary of Commerce has the statutory authority to collect data from other agencies. *See* 13 U.S.C. § 6(a). Secretaries of Commerce have long exercised this statutory authority to gather administrative records, including those on citizenship. And by the time of the Executive Order, Defendants *already had* administrative records to "determine citizenship status for approximately 90 percent of the population." E.O. 13880, 84 Fed. Reg. at 33821–22. While Plaintiffs make oblique references to generally applicable standards of Office of Management and Budget Policy Directives, the Paperwork Reduction Act, and the

Information Quality Act, *see* FAC ¶¶ 26–31, they nowehere explain how those guidelines apply to the collection of administrative records, how this collection violated any of those guidelines, or how the Secretary's current collection of administrative data differs from the procedures used for the last century.

Fourth, Plaintiffs do not advance any plausible allegations of "contemporary statements by [the decisionmaker]" from which discriminatory intent could be inferred. *Cent. Radio*, 811 F.3d at 635. For example, Plaintiffs cite the President's statements that the Executive Order will help "generate[] an accurate count of how many citizens, non-citizens, and illegal aliens are in the United States of America," and that citizenship data may be used by some States who "may want to draw state and local legislative districts based upon the voter-eligible population." FAC ¶¶ 62–63. Both of those sentiments were clearly expressed in the text of the Executive Order. *See* E.O. 13880, 84 Fed. Reg. at 33821–22 (noting the goal of "making available to the [Commerce] Department administrative records showing citizenship data for 100 percent of the population"); *id.* at 33823 (noting that citizenship data may allow "States to design State and local legislative districts based on the population of voter-eligible citizens"). And a discriminatory purpose cannot be inferred from either. Again, Secretaries of Commerce have long collected administrative records, including those on citizenship. And the Supreme Court explicitly left open the possibility for States to "draw districts to equalize voter-eligible population rather than total population." *Evenwel*, 136 S. Ct. at 1133. As the Executive Order explains, "because

eligibility to vote depends in part on citizenship, States could more effectively exercise this option with a more accurate and complete count of the citizen population." E.O. 13880, 84 Fed. Reg. at 33823. So, again, none of Plaintiffs' allegations raise a plausible inference of discriminatory motive to collect administrative records—a collection that some of these Plaintiffs previously advocated.

Whether examined individually or collectively, through the lens of the Fourth Circuit's factors or not, the FAC contains no facts plausibly suggesting that discriminatory intent motivated any action at issue. Plaintiffs' equal protection claim should be summarily rejected.

V. Plaintiffs' 42 U.S.C. § 1985(3) Claim Should be Dismissed

Plaintiffs also advance a claim under 42 U.S.C. § 1985(3), alleging that "President Trump, Defendant Ross, Defendant Dillingham, John Gore, Attorney General Sessions, Kris Kobach, and Stephen Bannon conspired to collect citizenship data and produce citizenship data for use along with the P.L. 94-171 Redistricting Data File so that states can use CVAP data to apportion state and local districts." FAC ¶ 115. This official-capacity claim fails on multiple threshold grounds and, in any event, fails to state a claim.

A. Section 1985 does not authorize courts to award injunctive relief.

Plaintiffs' conspiracy claim fails at the outset because § 1985 only authorizes courts to award damages, not the injunctive relief Plaintiffs seek here. *See id.* at 31–32 (prayer for relief). By its terms, § 1985(3) provides only that a plaintiff "may have an action *for*

the recovery of damages . . . against any one or more of the conspirators." 42 U.S.C. § 1985(3) (emphasis added). The statute says nothing about injunctive relief. In stark contrast, § 1985(3)'s companion provision, also enacted as part of the Ku Klux Klan Act of 1871, authorizes "action[s] at law, *suit[s] in equity*, or other proper proceeding[s] for redress." 42 U.S.C. § 1983 (emphasis added). As this comparison reveals, Congress both considered and authorized differing remedies under two statutory provisions of the same act: a violation of § 1983 may incur damages or injunction relief, while a violation of § 1985(3) can incur only damages. And "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

The Court should therefore conclude that "the statutory relief available under § 1985 'is limited to the recovery of damages'" and that, in requesting only injunctive relief, Plaintiffs' claim fails. *Tufano v. One Toms Point Lane Corp.*, 64 F. Supp. 2d 119, 133 (E.D.N.Y. 1999) (quoting *Cuban v. Kapoor Bros., Inc.*, 653 F. Supp. 1025, 1033 (E.D.N.Y. 1986), *aff'd*, 229 F.3d 1136 (2d Cir. 2000).[18]

[18] Neither the Supreme Court nor the Fourth Circuit have decided whether § 1985(3) authorizes injunctive relief. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 n.16 (1993). Two other circuits have indicated that injunctive relief is available under § 1985(3). *See Action v. Gannon*, 450 F.2d 1227, 1237–38 (8th Cir. 1971) (en banc); *Mizell v. N. Broward Hosp. Dist.*, 427 F.2d 468, 473 (5th Cir. 1970). Neither case is persuasive. *Action* simply relied on *Mizell*. And *Mizell* relied on dicta in *Jones v. Alfred H.*

B. Plaintiffs' § 1985(3) claim is barred by sovereign immunity.

Plaintiffs' § 1985(3) claim also fails because it is barred by sovereign immunity. Sovereign immunity prohibits cases against the federal government unless Congress has unequivocally consented to suit. *United States v. Testan*, 424 U.S. 392, 399 (1976). Sovereign immunity is not limited to cases naming the United States as a defendant; it also bars cases against federal officials in their official capacities because the relief requested would run against the federal government. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). Civil rights statutes like 42 U.S.C. § 1985(3) do not waive the federal government's sovereign immunity. *Unimex, Inc. v. Dep't of Housing & Urban Dev.*, 594 F.2d 1060, 1061 (5th Cir. 1979). Sovereign immunity thus "bars []§ 1985(3) . . . suits brought against the United States and its officers acting in their official capacity." *Davis v. U.S. Dep't of Justice*, 204 F.3d 723, 726 (7th Cir. 2000); *accord Affiliated Prof'l Home Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999).

While a § 1985(3) suit against federal officers in their *individual capacities* might be permissible if Plaintiffs alleged that the officers acted beyond their statutory powers and that the powers themselves, or their exercise, were constitutionally void, *see Dugan v.*

Mayer Co., 392 U.S. 409, 414 (1968), and on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238–40 (1969), both of which interpreted a statute (42 U.S.C. § 1982) that—unlike § 1985(3)—confers substantive rights without specifying a remedy. By contrast, § 1985(3) is solely remedial, *see United Bhd. of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 833 (1983), and that remedy is limited to damages.

Rank, 372 U.S. 609, 621 (1963), Plaintiffs have sued Defendants only in their official capacities, FAC ¶¶ 15–16. So their § 1985(3) claim is barred by sovereign immunity.

C. Plaintiffs fail to state a claim under § 1985(3).

Even if Plaintiffs' § 1985(3) claim were viable, their allegations are entirely conclusory and fail to state a claim. To state an actionable conspiracy under § 1985(3), Plaintiffs must allege non-conclusory facts plausibly showing:

> (1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy.

Simmons v. Poe, 47 F.3d 1370, 1376 (4th Cir. 1995) (citation omitted). Plaintiffs also must adequately allege "an agreement or a 'meeting of the minds' by defendants to violate the claimant's constitutional rights"—that is, a "joint plan[] to deprive [the plaintiff] of his constitutional rights." *Id.* at 1377. In applying these "very high" standards, *Brissett v. Paul*, 141 F.3d 1157 (4th Cir. 1998) (unpublished), the Fourth Circuit "has rarely, if ever, found that a plaintiff has set forth sufficient facts to establish a section 1985 conspiracy," *Simmons*, 47 F.3d at 1377. No such "sufficient facts" can be found in the FAC.

As noted above, Plaintiffs' theory seems to be, in essence, that various individuals with discriminatory animus conspired to include a citizenship question on the 2020 Census. FAC ¶¶ 73–84. The purported proof of this conspiracy is a document of the late Dr. Thomas Hofeller, in which he noted inclusion of a citizenship question to "shift from

redistricting based on total population to CVAP." *Id.* ¶¶ 81, 83. Plaintiffs simply state that "[t]he same discriminatory motivation behind adding the citizenship question motivated Defendants" to seek citizenship information through administrative records. *Id.* ¶ 84. This does not come close to plausibly alleging a civil conspiracy under § 1985(3).

To begin, Plaintiffs have not alleged "an overt act committed by the defendants in connection with the conspiracy" that "results in injury to" them. *Simmons*, 47 F.3d at 1376. The only overt act Plaintiffs arguably allege is the Executive Order's facilitation of collecting citizenship data through administrative records. *Cf.* FAC ¶¶ 58, 84. But, as explained above, the mere collection of administrative records causes no harm to anyone, let alone Plaintiffs. *See* Argument Section I., *supra*.

Plaintiffs also do not attempt to allege any facts from which to infer "a specific class-based, invidiously discriminatory animus to" gather administrative records. *Simmons*, 47 F.3d at 1376. Instead, their allegations of discriminatory motive focus exclusively on the 2020 Census citizenship question; they say nothing about the motives for collecting administrative records. *See* Argument Section IV., *supra*; FAC ¶¶ 73–84.

That is fatal to not only § 1985's discriminatory-animus element, but also its meeting-of-the-minds element. *Simmons*, 47 F.3d at 1376. Plaintiffs explicitly note the purported conspirators of a discriminatory plot to include a citizenship question on the census. *See* FAC ¶ 73 ("Defendant Ross, members of the Trump Administration, A. Mark Neuman, then-Kansas Secretary of State Kris Kobach, members of the DOJ . . . and

Republican strategist Dr. Thomas Hofeller conspired to add a citizenship question to the 2020 census."). And they piece together disparate actions of these individuals in a convoluted attempt to demonstrate this plot and its underlying motivations. *See id.* ¶¶ 73–83 (alleging, for example, that "Defendant Ross . . . coordinated with AG Sessions, other members of the DOJ, and the White House to fabricate a 'need' for the citizenship question"). But setting aside the sufficiency of those allegations on their own terms, the FAC is utterly devoid of facts demonstrating that purported conspirators reached "an agreement" or a "meeting of the minds" on a "joint plan" to gather administrative records in order to deprive Plaintiffs of their constitutional rights. *Simmons*, 47 F.3d at 1376–77.

Plaintiffs do not even plausibly allege the *members* of the purported conspiracy. They claim that "President Trump, Defendant Ross, Defendant Dillingham, John Gore, Attorney General Sessions, Kris Kobach, and Stephen Bannon conspired to . . . produce citizenship data for use along with the P.L. 94-171 Redistricting Data File." FAC ¶ 115. But Plaintiffs own allegations make clear that then-Attorney General Sessions, then-Assistant Attorney General Gore, then-Kansas Secretary of State Kris Kobach, and then-White House adviser Stephen Bannon were only involved, if at all, with the inclusion of a citizenship question. *See, e.g.*, *id.* ¶¶ 74–75. None of these individuals are alleged to have been involved in the decision to collect citizenship information through administrative records. That makes sense because three of the four—Messrs. Sessions, Kobach, and Bannon—left their respective positions long before the President issued his

Executive Order, while Mr. Gore left his position shortly thereafter.[19] And Dr. Hofeller—the author of documents at the heart of the "conspiracy" that allegedly evinced discriminatory animus—had been deceased for almost a year when the President issued his Executive Order.[20]

Plaintiffs' allegations about the remaining "conspirators"—President Trump, Defendant Ross, and Defendant Dillingham—are perfunctory, at best. Dr. Dillingham, for example, appears only in the FAC's caption, its description of parties and venue, and its conclusory causes of action. *See id.* ¶¶ 16, 20, 115–16. But no matter. As Executive Branch officials, the President, the Secretary of Commerce, and the Director of the Census Bureau are legally incapable of a § 1985(3) conspiracy. The intracorporate-conspiracy doctrine applies to § 1985(3) claims, *Buschi v. Kirven*, 775 F.2d 1240, 1251–52 (4th Cir. 1985),

[19] Devlin Barrett, et al., *Jeff Sessions forced out as attorney general*, Washington Post (Nov. 7, 2018), https://www.washingtonpost.com/world/national-security/attorney-general-jeff-sessions-resigns-at-trumps-request/2018/11/07/d1b7a214-e144-11e8-ab2c-b31dcd53ca6b_story.html; Associated Press, *Kobach says he's seriously considering US Senate bid in 2020* (Jan. 19, 2019), https://apnews.com/9de85ad8578243e3aa7fbbcab28e5de0; Sam Levine, *DOJ Official Who Played Big Role In Push For Citizenship Question To Leave Trump Admin*, Huffington Post (Aug. 9, 2019), https://www.huffpost.com/entry/john-gore-leaving-doj_n_5d4d8fa0e4b09e7297459561; Andrew Rafferty, et al., *Steve Bannon Out as White House Chief Strategist*, NBC News (Aug. 18, 2017), https://www.nbcnews.com/politics/politics-news/steve-bannon-out-white-house-chief-strategist-n793921.

[20] Michael Wines, *Thomas Hofeller, Republican Master of Political Maps, Dies at 75*, New York Times (Aug. 21, 2018), https://www.nytimes.com/2018/08/21/obituaries/thomas-hofeller-republican-master-of-political-maps-dies-at-75.html.

and dictates that "there is no unlawful conspiracy when officers within a single corporate entity consult among themselves and then adopt a policy for the entity," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017). The rationale for this doctrine is that "[c]onspiracy requires an agreement . . . between or among two or more separate persons," but "[w]hen two agents of the same legal entity make an agreement in the course of their official duties . . . their acts are attributed to [the] principal," so "there has not been an agreement between two or more separate people." *Id.* Because the President, the Secretary of Commerce, and the Census Bureau's Director are all Executive Branch officers, they cannot conspire for purposes of § 1985(3). *See Ziglar*, 137 S. Ct. at 1867; *Buschi*, 775 F.2d at 1251–52.

At bottom, Plaintiffs' § 1985(3) claim "amounts to nothing more than rank speculation and conjecture." *Hinkle v. City of Clarksburg*, 81 F.3d 416, 422 (4th Cir. 1996). Their allegations, to the extent there are any, are implausible, incomplete, and insufficient to satisfy their "weighty burden" of "establish[ing] a civil rights conspiracy." *Id.* at 421.

D. If Plaintiffs' § 1985(3) claim is viable, their APA claims should be dismissed.

If Plaintiffs may pursue an official-capacity § 1985(3) claim, then their claims under the APA must be dismissed because they have an adequate alternative remedy. The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704; *see Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009). Here, Plaintiffs seek nearly the same relief under the APA and § 1985(3): an order declaring illegal "Secretary

Ross's decision to follow EO 13380" and "[e]njoin[ing] Defendants and their agents from collecting data as dictated by EO 13380." FAC at 31; *see id.* ¶¶ 88–117. If the Court allows Plaintiffs' § 1985(3) claim to proceed, and the Court has not already dismissed Plaintiffs' APA claims for the reasons explained above, then the Court should dismiss Plaintiffs' APA claims because Plaintiffs would have an "other adequate remedy in a court." 5 U.S.C. § 704.

CONCLUSION

The Court should dismiss Plaintiffs' FAC for the reasons explained above.

DATED: December 18, 2019

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