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-PX

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

After more than a year of arguing that Defendants should collect citizenship data using administrative records rather than a citizenship question on the census, Plaintiffs return to challenge the exact decision they previously desired—the use of administrative records to gather citizenship data. Now, though, Plaintiffs do not challenge any "procedures that the defendants intend to use, or not use, in conducting the Census." *NAACP v. Bureau of the Census*, 945 F.3d 183, 193 (4th Cir. 2019). Nor do Plaintiffs challenge the "past well-planned, measured collection of citizenship data" that can "determine citizenship status for approximately 90 percent of the population." Pls.' Opp'n at 29, ECF No. 64; Exec. Order No. 13880 [the Executive Order], 84 Fed. Reg. 33821 (July 11, 2019).

Instead, Plaintiffs now contend that *if* Defendants collect more administrative records under the Executive Order, *if* the Census Bureau is able to "produce citizenship population tabulations" using these additional administrative records, *if* the Census Bureau provides "[S]tates with citizenship data" based on administrative records, *if* States choose to "use [citizen voting age population (CVAP)] as a population base for drawing congressional and state legislative redistricting plans in 2021," and *if* States choose to use the Census Bureau's administrative-record data to do so, *then* and only then will Plaintiffs suffer "vote dilution and loss of representation in unconstitutionally overpopulated districts." *See* Defs.' Mem. of Law in Supp. of Mot. to Dismiss [Defs.' Mem.] at 15–16, ECF No. 60-1 (quoting Plaintiffs' First Amended Complaint [FAC] ¶¶ 59–62, 87).

Article III does not allow this case in search of a controversy. The Executive Order and the Census Bureau's administrative-record collection have absolutely no effect on private parties; it is only, as alleged by Plaintiffs, when their *States* choose to "discriminatorily" use citizenship data in redistricting that Plaintiffs could possibly suffer any injury. Plaintiffs do not contend otherwise, readily admitting that they "challenge Defendants' decision to create and provide a redistricting citizenship dataset to states, not . . . redistricting based on CVAP." Pls.' Opp'n at 12 (citing FAC ¶¶ 96, 103, 108, 112, 115). And Plaintiffs rely on little more than inapposite "census cases" to sidestep the pure speculation that gives rise to their purported redistricting injury. So Plaintiffs lack standing and this case is not ripe for review.

Even if Plaintiffs could establish this Court's jurisdiction (they cannot), their claims fail. Nothing challenged in this case obligates any action, prohibits any activity, or in any way impacts private parties, so Plaintiffs are left to again rely on speculative CVAP-based redistricting to support their APA and Fifth Amendment claims. But the mere collection (or production) of citizenship data is neither "agency action" for APA purposes, nor does it cause a "disparate impact" for equal protection purposes. And despite using 13 pages to explain how less than 13 paragraphs of the FAC allege discriminatory motive, Plaintiffs are no closer to connecting the supposedly discriminatory Hofeller documents—which "concluded that a citizenship question must be added to the 2020 census," FAC ¶ 81—to the collection of administrative records. Plaintiffs' claim under 42 U.S.C. § 1985(3) fails

for similar reasons, but is also barred at the outset by a lack of statutory authorization for injunctive relief and sovereign immunity.

This case is a CVAP-redistricting challenge five steps removed, and it should be left to future plaintiffs who actually suffer a redistricting injury sometime after April 2021. Plaintiffs' FAC is meritless and should be dismissed.

ARGUMENT

I. This is Not a Census Case

Throughout Plaintiffs' justiciability argument, they repeatedly invoke inapposite "census cases," and, in particular, *Department of Commerce v. U.S. House of Representatives*. *See* Pls.' Opp'n at 5–10, 12–15. In that case—which involved a challenge to the use of statistical sampling in the 2000 Census—there was not only a federal statute allowing plaintiffs to challenge statistical sampling before the census, but the Supreme Court recognized that "if the [Census] Bureau is going to alter its plan to use sampling in the 2000 census, it must begin doing so by March 1999." 525 U.S. 316, 332 (1999). And because total population data derived from census itself would cause the alleged injury, the Court found it was "certainly not necessary" to "wait until the census has been conducted" because "such a pause would result in extreme—possibly irremediable—hardship."[1] *Id.*

[1] *House of Representatives* was also the exception, not the rule. As one district court recognized, the idea of challenging census procedures before the census "flies in the face of decades of litigation that legions of plaintiffs have brought . . . *after* . . . the census had

The Fourth Circuit recently followed this rationale in allowing a pre-census suit because "the injuries that the plaintiffs assert[ed] . . . ar[o]se from procedures that the defendants intend to use, or not use, in conducting the Census." *NAACP*, 945 F.3d at 193.

But this is not a census case. Plaintiffs do not challenge "procedures that the defendants intend to use, or not use, in conducting the Census," *id.*, or the census's total population figures. They instead fear "vote dilution and loss of representation" if States employ CVAP data—derived from administrative records and possibly other sources—to exclude "non-citizens from the population base used for redistricting." FAC ¶ 87.

This is therefore a hypothetical CVAP-redistricting case. And Plaintiffs do not (and cannot) cite any case in which a State's redistricting plan was adjudicated *before* a State redistricted, much less before it received the Census Bureau's redistricting data. All redistricting cases concerning a State's chosen redistricting plan—including those concerning the proper population base—occur *after* States have redistricted. *See, e.g.*, *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (explaining that "[p]laintiffs who complain of racial gerrymandering in their State" must challenge the existing redistricting plan "district-by-district"); *Evenwel v. Abbott*, 136 S. Ct. 1120, 1125 (2016) (explaining that the plaintiffs "sought a permanent injunction barring use of the *existing* Senate map in favor of a map that would equalize the voter population in each district" (emphasis added)). That makes

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been conducted." *NAACP v. Bureau of Census*, 382 F. Supp. 3d 349, 369 (D. Md. 2019), *aff'd in part, rev'd in part* 945 F.3d 183 (4th Cir. 2019).

sense because, in redistricting cases like this one, there is no redistricting plan to challenge until a redistricting plan exists. So Plaintiffs' cited "census cases" only serve to highlight a critical distinction that demonstrates a lack of standing and ripeness here.

II. Plaintiffs Lack Standing

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

As Defendants previously explained, 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. Defs.' Mem. at 11–15 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Plaintiffs concede, as they must, that States make "unfettered choices" about how to redistrict. *See* Pls.' Opp'n at 8. From there, they advance only conclusory assertions and inapposite cases to avoid the inescapable conclusion that the Court lacks jurisdiction.

Plaintiffs first advance the novel argument that their purported CVAP-redistricting injuries are traceable to Defendants' collection of administrative records because "the sole purpose of Defendants' decision to create and provide a redistricting citizenship dataset to states is so that they will use these data in redistricting." *Id.* But even if that were

true,[2] subjective intent is relevant only to the merits, not standing. It would upend the entire Article III framework for this Court's jurisdiction to hinge on the subjective intentions of defendants.

Plaintiffs' cited cases make this point clear. In *Lansdowne*, a homeowners association sued a cable-service provider, alleging that that the provider "entered into a series of contracts that conferred upon [the provider] the exclusive right to provide video services to the [housing] development." 713 F.3d 187, 191 (4th Cir. 2013). The Fourth Circuit indeed noted "that the whole purpose of [the defendant's] agreements was to preclude [the homeowners association] from contracting with competing cable providers." *Id.* at 196. But it did not find traceability on that basis. Rather, the Fourth Circuit found the injury traceable to the defendant provider—not the "competing companies" who chose "not to offer video service to [the homeowners association]"—because the defendant's exclusivity agreements had the "determinative or coercive effect" of forcing competing providers to forego cable-service offerings. *Id.* at 197.

Here, in contrast, Plaintiffs do not advance any allegation or argument that Defendants' collection of citizenship data somehow coerces States into using that data for

[2] As Defendants previously explained, the Executive Order lists other reasons for collecting and tabulating citizenship data, including to "implement specific [public-benefits] programs and to evaluate policy proposals for changes in those programs." *See* Defs.' Mem. at 6–8 (quoting E.O. 13880, 84 Fed. Reg. at 33822).

CVAP redistricting, or somehow makes CVAP redistricting a foregone conclusion. *Contra Baltimore v. Trump*, 2019 WL 4598011, at *17 (D. Md. Sept. 20, 2019) (finding traceability where "immigrants and their families will react in 'predictable ways' to the changes in the [Foreign Affairs Manual]"). This "fundamental problem" torpedoes Plaintiffs' standing because "courts are unable to evaluate with any assurance the likelihood that decisions will be made a certain way by policymaking officials acting within their broad and legitimate discretion." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989); *see Lujan*, 504 U.S. at 562 ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish.").

It is entirely possible that States may choose *not* to use CVAP data for redistricting in the upcoming redistricting cycle, which would render this lawsuit meaningless.[3] *See*

[3] The Governor of Pennsylvania contends that this argument "asks the Court to resolve the factual question of whether CVAP will be used without considering any evidence." Br. of Tom Wolf, Governor of Pennsylvania, at 5, ECF No. 65. But the Court does not need any factual development to find that Plaintiffs have not plausibly alleged standing, as is their burden at this stage. Defs.' Mem. at 10. And perhaps more alarmingly, what type of factual development do Plaintiffs and the Governor envision on this point? A survey of voters in Arizona, Texas, and Washington to determine if they will elect legislators in 2020 that will favor CVAP redistricting in 2021? Depositions of every elected legislator in those three States to determine if they will actually vote in favor of CVAP redistricting in 2021? That would be absurd, and it only proves that Plaintiffs' redistricting "injury" is both speculative and not traceable to Defendants.

Defs.' Mem. at 13–14. Indeed, many state legislators—who, in most States, would be responsible for redistricting in 2021—will not even be elected until later this year. It is also possible that States may choose to use CVAP data for redistricting *regardless* of whether Defendants are enjoined from "collecting data as dictated by EO 13380." FAC at 31. Despite Plaintiffs' protestations, States' use of census data to "equalize[] *total population*" in "the overwhelming majority of cases" says nothing about the data States would use equalize *citizen-voting-age population* or *voter-eligible* population in 2021.[4] *See* Pls.' Opp'n at 9–10; FAC ¶ 53 (emphasis added). In fact, Texas (where three individual Plaintiffs reside) recently argued to the Supreme Court that "[a]lthough its use of total-population data from the census was permissible . . . it could have used [American Community Survey] CVAP data instead." *Evenwel*, 136 S. Ct. at 1126; *see Davidson v. City of Cranston*, 837 F.3d 135, 144 (1st Cir. 2016) ("[T]he use of total population from the Census for apportionment is the constitutional default, but certain deviations are permissible, such as the exclusion of non-permanent residents, inmates, or non-citizen immigrants."). Plaintiffs lack standing both ways: either States' use of CVAP in redistricting is unknown—mean-

[4] In Missouri, for example, there is a proposed constitutional amendment that would "repeal[] the requirement that districts be based on data as reported in the federal decennial census." *See* Missouri Senate, Proposed Amendment, https://www.senate.mo.gov/20info/BTS_Web/Bill.aspx?SessionType=R&BillID=26838179.

ing that any redistricting injury is speculative and not traceable to Defendants—or "jurisdictions in which Plaintiffs reside *will* redistrict using CVAP data as a population base"—meaning that they have independently made the decision and the Court's intervention will have no effect.[5] *See* Pls.' Opp'n at 9–10 (emphasis added).

As Defendants previously explained, Plaintiffs' quarrel lies with their respective States, and they can sue those States (or the relevant state officials) if they use CVAP redistricting for discriminatory purposes. *See* Defs.' Mem. at 14–15. But if Plaintiffs have standing to challenge Defendants' mere collection of citizenship data on the theory it could be provided to States and *States* may choose to improperly use that data, then the federal government could be barred from its most routine intergovernmental activities. Could the Federal Bureau of Investigation be enjoined from providing law-enforcement information to local police departments for fear that the police may use the information to conduct unconstitutional searches? Could the Department of Education be enjoined from providing statistical information to colleges for fear that colleges could use the information to implement a discriminatory policy? Could the Department of Health and Human Services be enjoined from providing healthcare information to hospitals for fear that hospitals could use the information to discriminate against particular patients?

[5] Fourth Circuit law is clear that even if Defendants' citizenship data—which may or may not be derived from administrative records collected under the Executive Order—makes it easier for States to redistrict based on CVAP, this "does not alter the analysis." *Frank Krasner Enter., Ltd. v. Montgomery Cty.*, 401 F.3d 230, 236 (4th Cir. 2005).

Surely not. Those plaintiffs' disputes would rest with the police, colleges, and hospitals that improperly used the data, not the federal agency that supplied it.

This Court lacks jurisdiction for the straightforward reason that Plaintiffs' purported redistricting injury "is not directly linked to the challenged [conduct] because an intermediary . . . stands directly between the plaintiffs and the challenged conduct in a way that breaks the causal chain." *Frank Krasner Enter., Ltd. v. Montgomery Cty.*, 401 F.3d 230, 236 (4th Cir. 2005); *Lane v. Holder*, 703 F.3d 668, 673–74 (4th Cir. 2012).

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

Plaintiffs now readily admit that they "challenge Defendants' decision to create and provide a redistricting citizenship dataset to states, not . . . redistricting based on CVAP." Pls.' Opp'n at 12 (citing FAC ¶¶ 96, 103, 108, 112, 115). That concession alone is fatal to their standing because their only asserted injury is that States may employ CVAP data to exclude "non-citizens from the population base used for redistricting." FAC ¶ 87. And Plaintiffs nowhere allege, nor could they, that anyone is "injured" by the mere collection of administrative records or the production of citizenship data.

Dispositive concessions aside, Defendants also explained that Plaintiffs lack standing because they will not suffer any harm absent a speculative chain of events, including that Defendants would collect more administrative records under the Executive Order and that those records would be usable. Defs.' Mem. at 15–19. Plaintiffs' primary response is that this chain of events is "not speculative at all" because "nothing in either

EO 13880 or Sectary Ross's directive indicates that Defendants will not create and provide states with a redistricting citizenship dataset if the citizenship data is spotty or unreliable according to Census Bureau standards." Pls.' Opp'n at 6.

This entirely misses the point. The Census Bureau will no doubt provide CVAP data to the States, as it has for the last 20 years.[6] But the citizenship data provided to States may not come from administrative records gathered under the Executive Order. As Defendants previously explained, the Census Bureau *already had* administrative records to "determine citizenship status for approximately 90 percent of the population." Defs.' Mem. at 16 (quoting E.O. 13880, 84 Fed. Reg. at 33821–22). Not to mention that the extent of citizenship records acquired under the Executive Order is still unknown, the usability of any such records is still unknown, and the methodology used to produce any citizenship data for States is still unknown. Defs.' Mem. at 16–18. The FAC contains no allegation that the Executive Order or any other decree obligates the Census Bureau to use unreliable administrative records, even *if* they are acquired from other agencies sometime in the next year.

[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 ("This special tabulation was created after Census 2000 and again after the 2010 Census. Since its publication in February of 2011, it has been produced annually and is usually published in the first week of February.").

The remainder of Plaintiffs' argument relies almost exclusively on standing in "census cases." *See* Pls.' Opp'n at 5–7. As Defendants explained above, those cases are inapplicable to this hypothetical CVAP-redistricting case. *See* Section I., *supra*.

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

Defendants previously explained that Plaintiffs do not allege "an invasion of a *legally protected* interest" because CVAP redistricting is currently allowable. Defs.' Mem. at 19–21. (*Wikimedia Found. v. NSA*, 857 F.3d 193, 207–08 (4th Cir. 2017)). Plaintiffs' only response is that this "improperly collapse[s] a standing argument into a merits argument." Pls.' Opp'n at 7. But it is Plaintiffs who defined their own alleged "injury" as the (speculative) result of legal conduct. *See* FAC ¶ 87. That cannot suffice for standing. Put differently, "standing doctrine, of course, depends not upon the merits, but on whether the plaintiff is the proper party to bring the suit." *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 460 (4th Cir. 2005) (alterations and quotations omitted). And the proper parties to bring this suit are future plaintiffs subjected to CVAP redistricting who decide sue their respective States (or the relevant state officials). *See* Defs.' Mem. at 14–15.

D. Organizational Plaintiffs lack standing.

Plaintiffs now concede that they have not pleaded facts supporting standing for LUPE and PAZ to sue on their own behalves. *See id.*; Pls.' Opp'n at 10–12. Instead, they rely only on the purported standing of PAZ's and LUPE's members. Pls.' Opp'n at 10–12. But as Defendants explained, PAZ lacks standing because it does not identify a single

member who may suffer an injury. Defs.' Mem. at 21–22. PAZ does not dispute this shortcoming, countering that "Defendants cite to no Fourth Circuit case that stands for the proposition that organizational plaintiffs must name a member with standing at the pleading stage." Pls.' Opp'n at 11.

That is an inexplicable argument given both binding Supreme Court precedent and Fourth Circuit cases upholding dismissal *at the pleading stage* due to organizations' failure to identify at least one specific member. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) ("[T]he Court has required plaintiffs claiming an organizational standing to identify members who have suffered the requisite harm."); *see, e.g.*, *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013) (upholding dismissal for lack of standing at the pleading stage because the plaintiff "failed to identify a single *specific member* injured by the [conduct at issue]"). Regardless, PAZ and all other Plaintiffs lack standing for the reasons explained above.

III. Plaintiffs' Claims Are Not Ripe

Plaintiffs argue this case is ripe because they "challenge Defendants' decision to create and provide a redistricting citizenship dataset to states, not, as Defendants disingenuously claim, redistricting based on CVAP." Pls.' Opp'n at 12 (citations omitted). But even under Plaintiffs' own formulation, Defendants have not "release[d] a redistricting citizenship dataset for use in the 2021 redistricting cycle." *Id.* That is important because the extent of citizenship records acquired under the Executive Order is still unknown, the

usability of any such records is still unknown, and the methodology used to produce any citizenship data for States is still unknown. *See* Section II.B., *supra*; Defs.' Mem. at 15–19. This case is therefore "not ripe for judicial review" because "it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *South Carolina v. United States*, 912 F.3d 720, 730 (4th Cir. 2019) (citations omitted).

Nor do Plaintiffs identify any "hardship . . . of withholding court consideration." *Id.* Defendants' collection of administrative records and production of citizenship data (whether based on administrative records or otherwise) does not affect Plaintiffs in any way. And Plaintiffs' reliance on prior "census cases" is misplaced for the reasons explained above. *See* Section I., *supra*; *see also Virginia v. Reno*, 117 F. Supp. 2d 46, 52 (D.D.C. 2000) (three-judge court) (finding a dispute about adjusted census data unripe because the Census Bureau would not "make its final decision on whether to release adjusted data [until] after it evaluates the quality and accuracy of the [post-enumeration] process"), *aff'd*, 531 U.S. 1062 (2001).

IV. Plaintiffs' APA Claims Should be Dismissed

Plaintiffs now seemingly concede that they cannot use the APA to challenge the Executive Order, instead arguing that they are challenging "Defendants' decision to create and provide a redistricting citizenship dataset [to States] in accordance with EO 13880." Pls.' Opp'n at 15, 18. It is unclear how challenging "Defendants' decision . . . in

accordance with EO 13880" differs in any meaningful way from challenging the Executive Order itself.[7] *Compare* FAC at 31 (seeking to "[d]eclare that Secretary Ross's decision to follow EO 13380" violates the APA and to "[e]njoin Defendants and their agents from collecting data as dictated by EO 13380") *with* Pls.' Opp'n at 15 (explaining that Plaintiffs' "APA claims are not focused on EO 13880"). But it doesn't matter. Regardless of how Plaintiffs reframe their APA claims, they still cannot explain how anything challenged in this case has an "immediate and practical impact" or "alter[s] the legal regime in which it operates." *See* Defs.' Mem. at 24–31 (quoting *City of New York v. U.S. Dep't of Def.*, 913 F.3d 423, 431 (4th Cir. 2019)).

Plaintiffs first attempt to deflect this fatal flaw by doubling down on their argument that "Defendants [ ] mischaracterize Plaintiffs' claims as merely challenging EO 13880" instead of "Defendants' decision to create and provide a redistricting citizenship dataset in accordance with EO 13880." Pls.' Opp'n at 18. Even if that were true (it is not),

[7] This is especially true because, contrary to Plaintiffs' contentions, the Secretary never "deci[ded] to create and provide citizenship data for states to use in redistricting." Pls.' Opp'n at 15. Plaintiffs cite to only a July 2019 OMB submission for "evidence" that the Secretary made this decision. *See* Pls.' Opp'n at 15, 21; FAC ¶ 65. But they conveniently overlook a September 2019 OMB submission—predating this lawsuit—that superseded the July 2019 OMB submission. That September submission said nothing about any Secretarial decision, noting only: "the President issued an Executive Order that found that the [Supreme] Court's ruling has made it impossible, as a practical matter, to include a citizenship question in the 2020 Census." *See* Office of Information and Regulatory Affairs, 2020 Census Supporting Statement A (Sept. 9, 2019), https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201909-0607-001.

Plaintiffs entirely miss the point. Defendants' collection of administrative records "to create and provide a redistricting citizenship dataset" does not determine the rights or obligations of anyone; it does not impact private parties, obligate any action, or prohibit any activity. *See City of New York*, 913 F.3d at 431.

Plaintiffs' remaining arguments are simply an attempt to obfuscate this straightforward conclusion. For example, Plaintiffs contend that "the rights of Plaintiffs are impaired by the vote dilution and reduction in Plaintiffs' political representation that flow from the challenged agency action."[8] Pls.' Opp'n at 18. But as Plaintiffs themselves explain, they are challenging "Defendants' decision to create and provide a redistricting citizenship dataset to states, not . . . redistricting based on CVAP." *Id.* at 12 (citing FAC ¶¶ 96, 103, 108, 112, 115). So the only "immediate and practical impact," *City of New York*, 913 F.3d at 431, of the Census Bureau "creat[ing] and provid[ing] a redistricting citizenship dataset" is that States will receive "a redistricting citizenship dataset." How States then decide to use that dataset is irrelevant to whether there is "agency action" because "[i]t is not enough for plaintiffs to simply identify a governmental action that ultimately

[8] Plaintiffs also claim that they "will be injured by the unreliable and faulty citizenship data created and provided by Defendants for use in redistricting." Pls.' Opp'n at 18. As explained above, this is pure speculation—not only because the reliability of any future administrative records is unknown, but also because the Census Bureau will only use administrative records to produce citizenship data when administrative records and their connections to census data are both of "high quality." Defs.' Mem. at 17–18. In any event, even providing defective citizenship data to States would not determine the rights or obligations of anyone.

affected them through the independent responses and choices of third parties." *Id.* (citations omitted).

Plaintiffs then badly mischaracterize *Franklin*, trying in vain to avoid its inevitable holding. As Defendants explained, 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. Defs.' Mem. at 28 (citing *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). Plaintiffs' only response is to disingenuously quote the D.C. Circuit's discussion of *Franklin*'s presidential-action holding, not *Franklin*'s final-agency-action holding.[9] Pls.' Opp'n at 21. Again, the Supreme Court held that the Secretary's tabulation of census results did not constitute "final agency action" because "the action that . . . has a direct effect on the reapportionment is the President's statement to Congress, not the Secretary's report to the President." *Franklin*, 505 U.S. at 797. So too here. The actions that would have a "direct effect" on Plaintiffs are the States' (speculative) redistricting decisions, not the Census Bureau's collection and production of citizenship information.

[9] Plaintiffs claim that "*Franklin* is limited to 'those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties.'" Pls.' Opp'n at 21 (quoting *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996)). But Plaintiffs conveniently omit the first half of the quoted sentence, which explains that the D.C. Circuit was merely discussing "*Franklin*'s denial of judicial review of presidential action." *Chamber of Commerce*, 74 F.3d at 1327 (alterations omitted) (quoting *Pub. Citizen v. U.S. Trade Representative*, 5 F.3d 549, 552 (D.C. Cir. 1993)).

Plaintiffs also try, and fail, to distinguish the overwhelming weight of controlling Fourth Circuit Law. They claim, for example, that *Golden & Zimmerman*—a challenge to the 2005 Reference Guide informing gun licensees about compliance with the Gun Control Act—is inapplicable because "Defendants' decision does not merely 'inform' agencies, stakeholders, and individuals, but directs the preparation and distribution to states of a new redistricting citizenship dataset." Pls.' Opp'n at 20. That conclusory assertion is nonsensical. After admitting that they are not challenging CVAP-based redistricting, *id.* at 12, Plaintiffs are left with only the Census Bureau's collection and production of citizenship data using administrative records from other agencies. But APA "challenges are 'properly directed at the effect that agency conduct has on private parties,' not the agencies themselves." *NAACP v. Bureau of the Census*, 399 F. Supp. 3d 406, 425 (D. Md.) (quoting *City of New York*, 913 F.3d at 431), *aff'd in part, rev'd on other grounds*, 945 F.3d 183 (4th Cir. 2019). And Plaintiffs conveniently avoid the fact—critical in *Golden & Zimmerman*—that Defendants' authority to collect administrative records derives from the Census Act, not a recent presidential or secretarial directive. *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 432–33 (4th Cir. 2010) (rejecting APA challenge because "legal consequences do not emanate from [the Reference Guide] but from the Gun Control Act and its implementing regulations"). Plaintiffs similarly fail to rebut Defendants' other cited cases. *Compare* Defs.' Mem. at 29–31 *with* Pls.' Opp'n at 19 n.9–10.

Plaintiffs also state, without elaboration, "that Defendants' decision to create and provide citizenship data for the purpose of redistricting, as alleged, changes the legal regime related to redistricting and political representation." Pls.' Opp'n at 19. But Plaintiffs nowhere elucidate how "creat[ing] and provid[ing] a redistricting citizenship dataset" impacts any legal determinations or exposes anyone to civil or criminal penalties. *See* Defs.' Mem. at 27–28 (citing *Bennett v. Spear*, 520 U.S. 154, 178 (1997) and *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 861 (4th Cir. 2002)). And the simple creation of "a redistricting citizenship dataset" is a far cry from Plaintiffs' only cited case, which held that "revisions to the [Foreign Affairs Manual] alter[ed] the visa application regime [for immigrants] by eliminating, in effect, a safe harbor once extended to the receipt of non-cash benefits."[10] *Baltimore*, 2019 WL 4598011, at *27–28.

[10] Plaintiffs erroneously cite *Jersey Heights Neighborhood Association v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999) for the proposition that "discrimination determines rights and renders agency action reviewable under the APA." Pls.' Opp'n at 20. But there, the Fourth Circuit merely recognized that the agency action—a Record of Decision approving a highway bypass—discriminatorily precluded residents from "exercise[ing] their participatory rights" under the Federal Aid Highway Act. *Jersey Heights*, 174 F.3d at 186. Here, in contrast, the collection and production of citizenship data does not affect Plaintiffs, or their rights, in any way. Plaintiffs are fully able to sue their respective States (or the relevant state officials) if they use CVAP for redistricting.

Because Plaintiffs have not—and cannot—plausibly allege that Defendants' actions have given rise, in any way, to "legal consequences, rights, or obligations," *Flue-Cured Tobacco*, 313 F.3d at 858, their APA claims should fail.

V. Plaintiffs' Equal Protection Claim Should be Dismissed

A. Disparate impact is a required element for equal protection claims that Plaintiffs cannot satisfy.

Defendants explained that Plaintiffs' equal protection claim fails at the outset because the mere collection of administrative records does not impact anyone, let alone disparately impact Plaintiffs. Defs.' Mem. at 32. Perhaps recognizing this flaw, Plaintiffs argue that disparate impact is not a "necessary element of an equal protection claim," but that they have nonetheless alleged a disparate impact because "[r]edistricting based on CVAP as a population base will result in a disproportionate harm to Latinos and non-U.S. citizens." Pls.' Opp'n at 32–33. They're wrong.

The Fourth Circuit has consistently held that "[t]o succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001); *see Kolbe v. Hogan*, 849 F.3d 114, 146 (4th Cir. 2017) (same); *King v. Rubenstein*, 825 F.3d 206, 220 (4th Cir. 2016) (same). More simply, "[t]o establish an equal protection violation, a plaintiff must show discriminatory intent as well as disparate effect." *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1355 (4th Cir. 1989). It is no surprise, then, that

numerous cases in this district—including one in which Plaintiffs themselves participated—echo the disparate-impact requirement of equal protection claims. *See LUPE v. Ross*, 353 F. Supp. 3d 381, 393 (D. Md. 2018) (explaining, in a case involving three of the same Plaintiffs here, that "[t]o state an Equal Protection claim under the Fifth Amendment, Plaintiffs have to plausibly allege that Defendants' decision was motivated by discriminatory animus and its application has an adverse effect on a protected group"); *see United States v. Taylor*, 2019 WL 5625975, at *3 (D. Md. Oct. 31, 2019) ("To state a cognizable claim for denial of equal protection, [a plaintiff] must allege discriminatory intent as well as disparate impact."); *Samuel v. Hogan*, 2018 WL 1243548, at *7 (D. Md. Mar. 9, 2018) (same); *Blankumsee v. Galley*, 2016 WL 270073, at *8 (D. Md. Jan. 21, 2016) (same); *Usher v. Maryland*, 2005 WL 8174442, at *4 (D. Md. July 14, 2005) (same). Plaintiffs cannot escape the disparate-impact requirement.

Nor have they plausibly alleged a disparate impact. Plaintiffs only argument is that "[r]edistricting based on CVAP as a population base will result in a disproportionate harm to Latinos and non-U.S. citizens." Pls.' Opp'n at 32. But in Plaintiffs' own words: "Plaintiffs challenge Defendants' decision to create and provide a redistricting citizenship dataset to states, not . . . redistricting based on CVAP." *Id.* at 12 (citing FAC ¶¶ 96, 103, 108, 112, 115). And there is no impact on anyone, let alone any disparate impact on Plain-

tiffs, from the Census Bureau's mere "creat[ion] and provi[sion] [of] a redistricting citizenship dataset to states." *See* Defs.' Mem. at 11–15, 32. Plaintiffs' equal protection claim fails on this basis alone.

B. Plaintiffs do not plausibly allege a discriminatory intent to gather administrative records.

Plaintiffs also fail the equal-protection inquiry's second prong. As Defendants explained, "the FAC contains no facts plausibly suggesting that discriminatory intent motivated any action at issue," whether "examined individually or collectively, through the lens of the Fourth Circuit's factors or not." Defs.' Mem. at 37. In response, Plaintiffs use 13 pages attempting to explain how less than 13 paragraphs in the FAC "nudge [their] claim of purposeful discrimination across the line from conceivable to plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 683 (2009) (alterations and quotations omitted). They fail.

Plaintiffs do not contest Defendants' point that there is no "'consistent pattern' of actions by the [decisionmaker] disparately impacting members of a particular class of persons." Defs.' Mem. at 33–35 (quoting *Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 635 (4th Cir. 2016)). As Defendants' explained, Plaintiffs "name only one incident, Defendants' failed inclusion of a citizenship question on the 2020 Census, as the touchstone of discriminatory motivation here," 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.'" *Id.*; *contra N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 223 (4th Cir.

2016) (finding discriminatory motivation where "[t]he record [wa]s replete with evidence of instances since the 1980s in which the North Carolina legislature has attempted to suppress and dilute the voting rights of African Americans").

And Plaintiffs' arguments about the "historical background of the decision" and the "specific sequence of events" boil down to a single point: "the decision to accomplish CVAP redistricting was rooted in a study that advocated for the creation of a redistricting citizenship dataset and the failed attempt to add a citizenship question to the Census." Pls.' Opp'n at 26. But Defendants already debunked this theory based on Plaintiffs' own FAC. 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. *See* Defs.' Mem. at 34 & n.17. And the Hofeller-related allegations (focused only on a citizenship question) are still significantly removed from anything at issue in this case.[11] *Id.* (citing FAC ¶¶ 81–82); *see Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (upholding a facially neutral Presidential directive despite previous versions of the same policy found by lower courts to discriminate on the basis of religion); *Karnoski v. Trump*, 926 F.3d 1180,

[11] As Judge Hazel observed in reassigning this case, treating the citizenship question and the collection of administrative records as "part of a larger conspiracy" requires "the Court to view the cases at a high level of generality." Opinion at 6, ECF No. 50. The Court's review of this case should only relate to "the intent behind Executive Order 13880 and Secretary Ross' directive." *Id.*

1199 (9th Cir. 2019) (analyzing anew a policy barring transgender persons from military service—after a prior version was enjoined—because "the 2018 Policy is significantly different from the 2017 Memorandum in both its creation and its specific provisions").

As for substantive and procedural departures from the normal process, Plaintiffs' position is particularly risible. Exactly one year ago, Plaintiffs themselves were arguing that the Secretary's collection of citizenship data through administrative records was "objectively superior" to employing a census citizenship question "by every relevant metric." *See* Defs.' Mem. at 6 & n.7. So it is especially bizarre for Plaintiffs to now claim that the Secretary "ignored the known shortcomings of citizenship data derived from administrative sources." Pls.' Opp'n at 29–30. Plaintiffs even concede that they "do not challenge past well-planned, measured collection of citizenship data for other purposes (e.g., validating ACS responses)," but have no response to Defendants' point that those *same* administrative records—which "determine citizenship status for approximately 90 percent of the population"—will be used to tabulate citizenship data, Defs.' Mem. at 35 (quoting E.O. 13880, 84 Fed. Reg. at 33821–22), and that the effect of any *newly gathered* administrative records is entirely unknown. *See* Section II.B., *supra*. That is probably why Plaintiffs support their argument with only inapplicable and conclusory paragraphs from the FAC, Pls.' Opp'n at 28 (citing FAC ¶¶ 3, 91, 108), and procedural irregularities in the process

leading up to the *citizenship question*, *id.* at 28 ("Plaintiffs allege that Secretary Ross added a citizenship question to the 2020 Census . . . just two years before the 2020 Census.").[12]

Lastly, Plaintiffs contradict their own claim of discriminatory animus by arguing that Defendants previously "'contrived' a reason for gathering citizenship information from the total U.S. population," but now "Defendants and the President publicly reveal[] their real reason to create and provide citizenship data—to conduct redistricting and apportionment based on CVAP instead of total population." *Id.* at 31. As Plaintiffs themselves recognize, officials "seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority," *id.* at 30, so Plaintiffs' admission that Defendants have "publicly revealed their real reason" belies any claim of any discriminatory motive.[13]

Contrary to Plaintiffs' lengthy contentions (based on 13 short paragraphs of the FAC), they have not even "adequately pleaded that [a] discriminatory purpose [ ] infected

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[12] Plaintiffs note the non sequitur that the Census "Bureau began to plan the contents of the Redistricting Data File at least as early as 2014" and "[i]t was not until December 2018, however, that the Bureau first mentioned including citizenship data in this file." Pls.' Opp'n at 28–29. But Plaintiffs do not allege anything out of the ordinary about this sequence. To the contrary, Plaintiffs' own cited sources explain the timeline for the Redistricting Data Program, which includes the bulk of operational steps from 2017 through early 2021. *See* FAC ¶ 40 n.10 (citing https://www.census.gov/programs-surveys/decennial-census/about/rdo/program-management.html?).

[13] Plaintiffs' again cite to Dr. Hofeller's study that noted CVAP redistricting would be "advantageous to . . . Non-Hispanic Whites." Pls.' Opp'n at 31. But, as explained above, Plaintiffs again fail to link Dr. Hofeller or his study to any relevant decisonmakers.

the decision to add a citizenship question to the 2020 Census," much less that anything "at issue in this case is similarly motivated." *Id.* at 27.

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

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

Defendants previously explained that Plaintiffs' § 1985(3) claim—which seeks only injunctive relief—should be dismissed because injunctive relief is not available under § 1985(3). Defs.' Mem. at 37–38. Plaintiffs provide no meaningful response, instead relying on two non-binding, thinly reasoned cases from the 1970s and the general proposition that federal courts retain their equitable powers. Pls.' Opp'n at 36–37. The Court should reject Plaintiffs' feeble attempt to advance their § 1985(3) claim.

Defendants already debunked Plaintiffs' cited cases. Defs.' Mem. at 38 n.18. And as for the Court's general equitable powers, it is true that "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). But just such a "necessary and inescapable inference" exists here. As Defendants previously explained—and Plaintiffs do not contest—both § 1985(3) and § 1983 were enacted as part of the Ku Klux Klan Act of 1871. Defs.' Mem. at 37–38. Yet § 1985(3) provides only "for the recovery of damages," while § 1983 authorizes "action[s] at law, *suit[s] in equity*, or other proper proceeding[s] for redress."

42 U.S.C. § 1983 (emphasis added). This was not an accident. "[W]here 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); *see Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1078 (2018) ("[T]his Court has no license to 'disregard clear language' based on an intuition that 'Congress must have intended something broader.'"); *Dean v. United States*, 556 U.S. 568, 572 (2009) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face."). The "inescapable inference" is that injunctive relief is not available under § 1985(3).

Like Defendants' cited cases—left unaddressed by Plaintiffs—this Court should conclude that "the statutory relief available under § 1985 is limited to the recovery of damages," and that Plaintiffs' claim fails because they request only injunctive relief. *See* Defs.' Mem. at 38.

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

Plaintiffs' § 1985(3) claim is also barred by sovereign immunity. Defendants previously argued, and multiple circuits have held, that sovereign immunity bars § 1985(3) suits against federal officers in their official capacities. *See* Defs.' Mem. at 39–40; *Davis v. U.S. Dep't of Justice*, 204 F.3d 723, 726 (7th Cir. 2000); *Affiliated Prof'l Home Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999); *Unimex, Inc. v. Dep't of Housing & Urban Dev.*, 594 F.2d 1060, 1061 (5th Cir. 1979).

Plaintiffs neither dispute those cases' central holdings, nor do they cite a single case holding that sovereign immunity does *not* bar § 1985(3) claims for injunctive relief against federal officers sued in their official capacities.[14] Instead, Plaintiffs simply note that Defendants' cited cases primarily concerned claims for damages under § 1985(3), not injunctive relief. *See* Pls.' Opp'n at 37 n.17. True enough. But that only proves Defendants' point: injunctive relief is unavailable under § 1985(3). *See* Section VI.A., *supra*.

In any event, even if injunctive relief were available, sovereign immunity would apply equally to § 1985(3) claims for both damages and injunctive relief. In *Unimex*, for example, the Fifth Circuit held that a plaintiff's claims were not only barred by sovereign immunity because "the monetary damages, if awarded, would be paid from the public fisc," but also because "each official was sued in an official capacity" and "the complaint does not allege any specific misconduct by either of them in his or her private capacities." *Unimex*, 594 F.2d at 1061–62. And Plaintiffs expressly acknowledge that, although there was little discussion of the plaintiffs' request for injunctive relief in *Affiliated Professional Home Health*, the Fifth Circuit nonetheless barred the plaintiff's § 1985(3) claim on sovereign-immunity grounds. *See* Pls.' Opp'n at 37 n.17. This Court should therefore conclude that Plaintiffs' § 1985(3) claim is barred by sovereign immunity.

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[14] Plaintiffs cite *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), but that case involved § 1985(3) claims against federal officials in their *individual* capacities. Regardless, the Court dismissed the § 1985(3) claims on another threshold immunity ground and did not discuss sovereign immunity. *Id.* at 1865–69.

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

In any event, "[b]ecause of the high threshold that a Plaintiff must meet to establish a prima facie case under section 1985, courts often grant motions of dismissal." *Davis v. Hudgins*, 896 F. Supp. 561, 571 (E.D. Va. 1995), *aff'd*, 87 F.3d 1308 (4th Cir. 1996). This case should be no different; Plaintiffs themselves barely defend their § 1985(3) claim.

Plaintiffs make no effort to rebut Defendants' argument that Plaintiffs have not alleged "an overt act committed by the defendants in connection with the conspiracy" that "results in injury to" them. Defs.' Mem. at 41 (quoting *Simmons v. Poe*, 47 F.3d 1370, 1376 (4th Cir. 1995)). Nobody is injured by the mere collection of administrative records or the provision of citizenship data to States. *Id.*

And Plaintiffs essentially concede that their allegations of discriminatory motive do not focus on the collection of administrative records, but focus exclusively on the 2020 Census citizenship question. Pls.' Opp'n at 39 n.19. Their only response is that "there is no requirement that all conspirators be involved at every step of the conspiracy." *Id.* Yet, even if that were true, Plaintiffs nowhere explain how various purported conspirators could have 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. Defs.' Mem. at 42–43. Here, as in many other cases, Plaintiffs' § 1985(3) claim should be summarily rejected. *See, e.g.*, *Soc'y Without A Name v. Virginia*, 655 F.3d 342, 347 (4th Cir. 2011) (rejecting a § 1985 claim where the plaintiff "fail[ed] to allege with any specificity

the persons who agreed to the alleged conspiracy, the specific communications amongst the conspirators, or the manner in which any such communications were made"); *Hejirika v. Maryland Div. of Correction*, 264 F. Supp. 2d 341, 347 (D. Md. 2003) (rejecting a § 1985 claim where the plaintiffs "allege various instances of discrimination and then, in a conclusory fashion, state a conspiracy claim).[15]

CONCLUSION

The Court should dismiss Plaintiffs' FAC for the reasons explained above and in Defendants' prior memorandum of law.

[15] Defendants explained that Plaintiffs' § 1985(3) claim should also be dismissed in light of the intracorporate-conspiracy doctrine because Executive Branch officials are legally incapable of forming a conspiracy. Defs.' Mem. at 43–44. Plaintiffs counter with the odd argument that the intracorporate-conspiracy doctrine should not apply because it is "unsettled law." Pls.' Opp'n at 40–41. But the Fourth Circuit has squarely held that the doctrine applies to § 1985(3) claims. *See Buschi v. Kirven*, 775 F.2d 1240, 1251–53 (4th Cir. 1985). The Court should decline Plaintiffs' invitation to disregard binding Fourth Circuit law. *See Facey v. Dae Sung Corp.*, 992 F. Supp. 2d 536, 542 (D. Md. 2014) (applying the intracorporate-conspiracy doctrine to bar a § 1985 claim). And to the extent Plaintiffs argue that the intracorporate-conspiracy doctrine does not bar § 1985(3) claims alleging unauthorized acts, that contention is also unavailing. The unauthorized-acts exception is "less well recognized" than other exceptions, *Buschi*, 775 F.2d at 1253 n.4, and applies to only individual-capacity cases, not official-capacity cases. *See id.* at 1252–53. If the exception applied any time a defendant's action was alleged to be unauthorized, as Plaintiffs seemingly contend, the exception would swallow the rule because every § 1985(3) conspiracy is by definition unlawful and unauthorized.

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