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).

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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

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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

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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.

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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"); *Golden & 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 *Golden & 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

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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 *Golden & 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 *Golden & 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

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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

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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

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[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).

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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 *Sylvia 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.

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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.

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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

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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

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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*

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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]

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[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.*

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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.

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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

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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

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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

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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),

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[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.

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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

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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

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Since 2017, Defendants have sought to diminish the political representation of Latinos, non-U.S. citizens, and other minority groups by manipulating the Census Bureau's information collection and reporting processes. First, Defendants sought to accomplish their discriminatory purpose by adding a question to the 2020 decennial census ("2020 Census") questionnaire that would have collected citizenship information from every individual in the United States. After this plan was blocked by various courts, including this Court and the Supreme Court, Defendants proceeded to plan b: create and provide to states a census redistricting dataset that purports to show citizenship for every person in the United States. The sole purpose of the redistricting citizenship dataset is to enable states to subtract purported non-U.S. citizens from the population used to draw new political boundaries, thereby drastically reducing the political strength and representation of Latinos and others.

Defendants' attempt to create a person-by-person redistricting citizenship dataset is a direct response to being thwarted in their effort to ask a citizenship question of all people responding to the 2020 Census. The attempt to add a citizenship question to the 2020 Census was accompanied by a "contrived" claim of enforcing the federal Voting Rights Act ("VRA"). *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019). By contrast, Executive Order 13880 ("EO 13880"), and Secretary Ross's directive, state their discriminatory goal overtly—create a redistricting citizenship dataset so that "State and local legislative districts [can redistrict] based on the population of voter-eligible citizens."[1]

[1] ECF No. 41, First Amended Complaint ("FAC") ¶ 60 (quoting *Executive Order on Collecting Information about Citizenship Status in Connection with the Decennial Census* at § 1 (July 11, 2019), *available at* https://www.whitehouse.gov/presidential-actions/executive-order-collecting-information-citizenship-status-connection-decennial-census/).

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Defendants' actions are nothing more than an attempt to perpetuate a scheme already halted once by the courts, and the First Amended Complaint more than adequately pleads a case and controversy. Plaintiffs challenge Defendants' attempt to use administrative records to create a redistricting citizenship dataset that is specific to every person in the country, and then share that information with the states for the purpose of redistricting—an effort that is neither routine nor a natural development of prior agency practices.

This effort to use administrative records to compile a person-by-person redistricting citizenship dataset is not decades in the making as claimed by Defendants. It is new and radical. Its goal is to equip, and invite, states to exclude certain immigrant populations when drawing political lines, thereby conducting "redistricting [that] would be advantageous to Republicans and Non-Hispanic Whites." Plaintiffs First Amended Complaint ("FAC") ¶ 81. In the words of one expert who urged the acquisition of citizenship data for redistricting, it would be a "radical departure" from prior redistricting practice. *Id.*

Defendants mischaracterize the First Amended Complaint as simply challenging the "routine" collection of administrative records, ECF. No. 60-1, Memorandum of Law in Support of Defendants Motion to Dismiss ("MTD") at 3, or "the use of administrative records to gather citizenship data," MTD at 8, before claiming that their actions are too innocuous to be challenged, *see* MTD at 21 (claiming Defendants are "merely tabulat[ing] citizenship data."). Defendants' failure to engage with Plaintiffs' claims, which are much different from Defendants' straw men, dooms the Motion to Dismiss.

Plaintiffs' First Amended Complaint more than adequately alleges that Plaintiffs have standing and the lawsuit is ripe, because Defendants' actions will harm Latinos and non-U.S. citizens, and that harm is the part of the chain of causation created by Defendants. Further,

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Plaintiffs successfully pleaded Administrative Procedure Act ("APA") and race discrimination claims. The decision to create a redistricting citizenship dataset and provide that data to states for use in redistricting is a final agency action, and this final agency action purposefully discriminates against Latinos and non-citizens. Finally, Plaintiffs adequately pleaded a 42 U.S.C. § 1985(3) claim that is not barred under the doctrine of sovereign immunity, and empowers Plaintiffs to seek injunctive relief.

LEGAL STANDARD

A complaint is sufficient when it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted). A plaintiff must allege facts sufficient to "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* General factual allegations suffice to satisfy Rule 12(b)(1), and courts must "presume that the general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citation and alternations omitted). When considering a motion to dismiss, courts must view the plaintiffs' allegations through a "forgiving lens," accepting the facts alleged as true and construing the pleadings in a light most favorable to the party opposing the motion. *Wright v. North Carolina*, 787 F.3d 256, 265 (4th Cir. 2015).

ARGUMENT

I. Plaintiffs Have Standing to Bring this Action

Plaintiffs' First Amended Complaint adequately pleaded their standing with allegations showing: "(1) injury in fact; (2) a sufficient causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision." *See Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 207 (4th Cir. 2017) (citing *Lujan*, 504 U.S. at 560). "[P]laintiffs are required only to state a plausible claim that each of the

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standing elements is present" in order to defeat a motion to dismiss for lack of standing, *Attias v. Carefirst, Inc.*, 865 F.3d 620, 625 (D.C. Cir. 2017), and courts must "presume[e] that general allegations embrace those specific facts that are necessary to support the claim," *Lujan*, 504 U.S. at 561 (1992) (alternations original).

Defendants argue that Plaintiffs have not plausibly alleged facts supporting their standing but fail to engage with Plaintiffs' specific allegations. *See generally* MTD at 10-23. In particular, Plaintiffs allege that:

- For discriminatory reasons, Defendants made the decision to use administrative records to create and provide to states a citizenship dataset for use in redistricting. *See, e.g.*, Plaintiffs' "FAC" ¶ 112. As a result of Defendants' decision, Plaintiffs will lose political representation because: 1) the use of Citizen Voting Age Population ("CVAP") by states and localities for apportionment will result in vote dilution, FAC ¶¶ 86-87, and 2) the Census Bureau's ("Bureau") citizenship dataset will contain inaccuracies that will misclassify, and therefore undercount, naturalized U.S. citizens, *see* FAC ¶¶ 66-72, which will further cause vote dilution where states and localities use CVAP as a population base, *see* FAC ¶¶ 86-87.

- Defendants made the decision to create and provide a redistricting citizenship dataset to states so that this data will be used for redistricting. *See, e.g.*, FAC ¶ 65. Defendants plan to release their redistricting citizenship dataset to states with the dataset that the Census Bureau provides to states for redistricting. FAC ¶ 91. Plaintiffs live in jurisdictions that have expressed an interest in redistricting using CVAP as a population base for apportionment. FAC ¶¶ 61, 87. Defendants plan to create and provide a redistricting citizenship dataset to states, and these jurisdictions will use the dataset for its intended purpose: to redistrict using CVAP as a population base. *See id.*

- Plaintiffs' harms will be redressed if the Court enjoins Defendants from creating the redistricting citizenship dataset. If the Bureau does not create and provide the redistricting citizenship dataset, states will continue their established practice of using the Census Bureau's traditional redistricting dataset to redistrict. *See* FAC ¶¶ 36-38, 53.

As discussed in more detail below, Plaintiffs' allegations are more than sufficient to establish standing at the pleading stage.

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A. Plaintiffs Plausibly Allege Injury in Fact

Plaintiffs have adequately alleged "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. Plaintiffs have further alleged facts showing that "the threatened injury is certainly impending, [and] there is a substantial risk that the harm will occur." *Susan B. Anthony List. v. Driehaus*, 573 U.S. 149, 158 (2014) (internal quotation marks omitted).

Plaintiffs allege that they face a concrete injury from the exclusion of non-U.S. citizens from redistricting in their jurisdictions as a result of Defendants' decision to create and provide to states a redistricting citizenship database. FAC ¶ 87. Plaintiffs allege that because Plaintiffs and members of Plaintiffs La Unión del Pueblo Entero ("LUPE") and Promise Arizona ("PAZ") (collectively, "Organizational Plaintiffs") live in jurisdictions with higher populations of immigrants, the exclusion from apportionment of non-U.S. citizens (and naturalized U.S. citizens improperly classified as non-U.S. citizens) will result in a loss of political representation. FAC ¶¶ 66-71, 85-87. In particular, excluding non-U.S. citizens and misclassified naturalized U.S. citizens will result in Plaintiffs' districts being overpopulated and result in fewer districts in which Plaintiffs and their members have the opportunity to elect their preferred candidates. FAC ¶¶ 86-87.

Plaintiffs possess standing in census cases where, as here, they face an expected loss of representation; this injury "undoubtedly satisfies the injury-in-fact requirement of Article III standing." *Dep't of Commerce v. House of Representatives*, 525 U.S. 316, 331-32 (1999); *see also Evenwel v. Abbott*, 136 S. Ct. 1120, 1125 (2016) (adjudicating claim "that basing apportionment on total population dilutes [plaintiffs'] votes in relation to voters in other Senate districts"); *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (holding that vote dilution is a "concrete harm" sufficient to confer standing). Here, Plaintiffs have alleged that vote dilution

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and the loss of representation is imminent, concrete and particularized. *Lujan*, 504 U.S. at 560. Thus, assuming all facts in the First Amended Complaint to be true, Plaintiffs have plausibly alleged that they will lose representation as a result of Defendants' decision to create and provide a redistricting citizenship dataset to states.

Defendants erroneously argue that Plaintiffs' allegations are speculative, and that vote dilution as a result of redistricting based on CVAP is not a cognizable legal injury. MTD at 15-21. First, ignoring years of Supreme Court jurisprudence, Defendants argue that Plaintiffs' injuries do not satisfy standing requirements because a series of "speculative events" must first occur before Plaintiffs suffer injury. MTD at 15-18. But the series of "speculative events" Defendants point to are not speculative at all. For example, notwithstanding the fact that Defendants have already committed to create and provide a redistricting citizenship dataset to states, Defendants argue that maybe they won't, after all, follow through with their commitment if they are unable collect a requisite amount of administrative records, ensure the quality of the data, and come up with a methodology to create and provide the data. MTD at 16-18. However, 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. *See* FAC ¶ 58-61, 65. Defendants have already ignored evidence that administrative records will not yield accurate citizenship data. FAC ¶¶ 66-72. Contrary to Defendants' assertion, Secretary Ross's directive, as reflected in the July 3 Office Management and Budget ("OMB") request ("July 3 OMB Request"), is unequivocal, FAC ¶ 65, and EO 13880 orders federal agencies to do everything in their power to facilitate the collection of this data, FAC ¶¶ 58-61.

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"It would be inequitable in the extreme" to permit Defendants "to create a significantly increased risk of harm to [Plaintiffs], and then avoid [Plaintiffs] from trying to prevent the potential harm because the party that created the risk promises that it will ensure that the harm is avoided." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002). Ultimately, Defendants' claims that the dataset they have already decided to create and give states may ultimately be incomplete and inaccurate at most provides factual support for Plaintiffs' allegations regarding vote dilution resulting from inaccuracies in the Bureau's dataset and support for their APA and equal protection claims.

Furthermore, as in other cases challenging the conduct of the decennial census, it is "certainly not necessary" for the Court to wait until the Bureau creates and provides a redistricting citizenship dataset to states "to consider the issues presented here, because such a pause [from judicial action] would result in extreme—possibly irremediable—hardship." *Dep't of Commerce*, 525 U.S. at 332.

Finally, Defendants improperly collapse a standing argument into a merits argument, conflating the question of whether Plaintiffs plausibly alleged an injury with the question of whether redistricting using CVAP as a population base is unconstitutional. MTD at 19-20. As explained above, Plaintiffs' allegations regarding their vote dilution injuries more than satisfy the pleading standard under Rule 12; Defendants can try to justify their actions under the Constitution at the merits stage of the case.

B. Plaintiffs' Harms are Traceable to Defendants' Actions and Redressable by a Favorable Decision from this Court

Plaintiffs sufficiently alleged that their alleged injuries are fairly traceable to the challenged conduct of the Defendants. *See Lujan*, 504 U.S. at 560. Defendants' argument regarding traceability and redressability rests entirely on the erroneous premise that lawsuits are

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precluded where injury depends at least in part on the actions of third parties. MTD at 11-15. But Defendants wrongly "equate[ ] injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step of the chain of causation." *Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC (Lansdowne)*, 713 F.3d 187, 196-97 (4th Cir. 2013) (finding traceability where challenged action was not the last in the series of injurious acts). Even where standing "depends on the unfettered choices made by independent actors not before the court," plaintiffs can "adduce facts showing that those choices . . . will be made in such a manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562 (internal quotations and citations omitted).

Traceability exists where, for example, "third parties will likely react in predictable ways to the" challenged conduct. *See Dep't of Commerce*, 139 S. Ct. at 2566; *Block v. Meese*, 793 F.2d 1303, 1307, 1309 (D.C. Cir. 1986) (Scalia, J.) (holding plaintiff had standing to challenge classification of film as "political propaganda" based on anticipated, albeit irrational, public reaction to the classification).

Here, Plaintiffs have satisfied the "relatively modest" burden of alleging traceability and redressability at the pleading stage. *See Bennett v. Spear*, 520 U.S. 154, 171 (1997). Plaintiffs allege that 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. *See, e.g.*, FAC ¶ 65 (quoting July 3 OMB Request noting that Secretary Ross "directed the Census Bureau to . . . produce [CVAP] information prior to April 1, 2021 that states may use in redistricting."); *see also Lansdowne*, 713 F.3d at 196-97 (rejecting argument that plaintiffs' injury was not traceable to defendant cable provider's exclusivity agreements because it was up to third party providers to refuse to provide service to plaintiffs, and instead finding traceability because the "whole

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purpose" of the exclusivity agreements was for third party providers to decline service); *Mayor and City Council of Baltimore v. Trump*, No. ELH-19-3636, 2019 WL 4598011, at *17 (D. Md. Sept. 20, 2019) (where plaintiff's injuries rested on third party immigrants declining to use public benefits, finding traceability because challenged provision was designed to discourage immigrants from using public benefits).

Plaintiffs allege that, in the absence of the Bureau's redistricting citizenship dataset, jurisdictions have redistricted using total population in the "overwhelming majority of cases." FAC ¶ 53 (quoting *Evenwel*, 136 S. Ct. at 1124).[2] Plaintiffs further allege (and Defendants admit) that, given the tools by Defendants, jurisdictions in which Plaintiffs reside will redistrict using CVAP data as a population base, and Plaintiffs will suffer vote dilution as a result. FAC ¶ 87; MTD at 12 n.8 (noting Texas argued in favor of excluding non-U.S. citizens from redistricting in 2015). Plaintiffs thus plausibly allege that states and local jurisdictions in which they reside will make a choice "in such a manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562 (citation omitted).

Defendants also make disingenuous arguments that jurisdictions attempting to use CVAP to redistrict might not use the Bureau's redistricting citizenship dataset, but instead would turn to voter registration data or Census sample data currently available from the American Community Survey ("ACS"). MTD at 12-13.[3] However, jurisdictions currently redistrict using total

[2] A rare exception is *Burns v. Richardson*, 384 U.S. 73, 94 (1966), in which the Supreme Court upheld redistricting that was not based on total population. However, *Burns* is limited to its facts which showed that Hawaii acted to correct population distortions created by a large number of *non-residents*, including military personnel and tourists largely concentrated in Oahu. *Id.*

[3] Defendants' citation to *Chafin v. Chafin*, 568 U.S. 165, 172 (2013), in support of their argument that Plaintiffs' claims are not redressable because they purportedly rely on hypothetical facts is inapposite. As discussed in Section II below, the instant case is ripe for review, and Plaintiffs' lawsuit challenging Defendants' *decision* to create and provide a citizenship dataset to states does not rest on hypothetical, future facts, but on a directive that has already been issued.

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population tabulations prepared by the Bureau in the Redistricting Data File,[4] not Census datasets on voter registration or sample data, although both have existed for decades. FAC ¶¶ 36-40, 42. *See also* FAC ¶ 54 (quoting *Evenwel*, 136 S. Ct. at 11240); FAC ¶¶ 52-53, 81 (although ACS data was available, Dr. Thomas Hofeller, a redistricting expert for the Republican Party, opined that a citizenship question was necessary to generate CVAP data for use in redistricting). Plaintiffs need not "negate the kind of speculative and hypothetical possibilities suggested in order to demonstrate" traceability and the likely effectiveness of judicial relief. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78 (1978).

Plaintiffs have plausibly alleged that the sole purpose of Defendants' decision to create and provide a redistricting citizenship dataset to states is for states *to use that dataset* in redistricting. The Court should reject Defendants' attempts to disclaim the very result they seek to achieve.

C. Organizational Plaintiffs Have Standing to Sue on Behalf of their Members

Organizational Plaintiffs have more than adequately pleaded that they have standing because "(a) [their] members would otherwise have standing to sue in their own right; (b) the interests [they seek] to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State of Apple Advertising Com'n*, 432 U.S. 333, 343 (1977).

Organizational Plaintiffs pleaded that: (1) at least one of their respective members would otherwise have standing to sue in their own right, FAC ¶¶ 7, 9-10, 85, 87 and (2) the interests LUPE and PAZ seek to protect are germane to their purpose, FAC ¶¶ 6, 8. The First Amended

[4] "A [Redistricting] dataset is the assembled result of one data collection operation (for example, the 2010 Census) as a whole or in major subsets (2010 Census Summary File 1)." *Redistricting Data Datasets*, United States Census Bureau, (2017) *available at* https://www.census.gov/programs-surveys/decennial-census/data/datasets/rdo.html.

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Complaint demonstrates on its face that neither the claims asserted, nor the relief requested, requires the participation of the individual members in this lawsuit. *Hunt*, 432 U.S. at 343.

Defendants do not dispute that Organizational Plaintiffs adequately alleged the last two *Hunt* requirements, but instead argue that because Plaintiffs did not name a PAZ member with standing, Plaintiffs have failed to meet first *Hunt* requirement. MTD at 21-22. Even if Defendants were correct that Plaintiffs must name a member with standing (they are not), Plaintiffs identify Juanita Valdez-Cox as a LUPE member who has standing, and the case may proceed if at least one plaintiff has standing to sue. *Bostic v. Schaefer*, 760 F.3d 352, 370-71 (4th Cir. 2014).

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. *See* MTD at 21. Instead, an organization need only "allege facts sufficient to establish that one or more of its members has suffered, or is threatened with, an injury." *LUPE*, 353 F. Supp. 3d at 391 n.6 (rejecting defendants' argument that an organizational plaintiff must identify a particular member by name at pleading stage) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 545 U.S. 464, 487 n.23 (1982)).

None of the cases on which Defendants rely support their position. In *Valley Forge Christian College*, for example, the Court granted summary judgment in favor of defendants on standing grounds where plaintiffs alleged only that the Constitution had been violated and failed "to identify any personal injury suffered by them as a consequence of the alleged constitutional error." 454 U.S. at 485-87. The Court did not enter summary judgment based on a failure by plaintiffs to name a particular member who was harmed. Similarly, *American Chemistry Council v. Department of Transportation*, does not stand for the proposition that Organizational

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Plaintiffs must name a member with standing at the pleading stage. 468 F.3d 810 (2006). Instead, the Court noted that despite having had at least two opportunities to show standing for one of their members during the administrative appeal stage, plaintiffs had not shown that anyone had suffered an injury-in-fact. *Id.* at 819.

II. Plaintiffs' Claims are Ripe

In support of their argument that Plaintiffs' claims are unripe, Defendants again misstate Plaintiffs' allegations. MTD at 22-23. Plaintiffs challenge Defendants' decision to create and provide a redistricting citizenship dataset to states, *see, e.g.*, FAC ¶¶ 96, 103, 108, 112, 115, not, as Defendants disingenuously claim, redistricting based on CVAP. MTD at 22. All of Defendants' arguments regarding ripeness rest on this mischaracterization, and many of the cases they cite in support of their arguments are inapposite because the cases involved challenges to decisions or events that had not yet occurred.[5] In this case, Plaintiffs plausibly allege that Defendants have already made their decision and are implementing that decision in order to create and release a redistricting citizenship dataset for use in the 2021 redistricting cycle. FAC ¶¶ 1, 58, 62, 65.

[5] *See, e.g.*, *Trustguard Ins. Co. v. Collins*, 942 F.3d 195, 200 (2019) (holding claim unripe where plaintiff requested a declaratory judgment that it did not have to indemnify insured should court in another proceeding find the insured liable for car accident); *South Carolina v. United States*, 912 F.3d 720, 726-27, 728-31 (4th Cir. 2019) (holding claims unripe where state alleged it would become a permanent repository of nuclear waste but this was uncertain because defendants planned to remove waste and were statutorily required to remove waste by 2021); *Doe v. Virginia Dep't of State Police*, 713 F.3d 745, 751, 758-59 (4th Cir. 2013) (holding claim unripe where plaintiff, a registered sex offender, sought to challenge a law that excluded her from school premises unless she petitioned a state court or school board, but plaintiff had not yet filed a petition); *Johnston v. Lamone*, 401 F. Supp. 3d 598 (D. Md. 2019) (holding claims unripe where political party alleged state standards for verifying petition signatures were needlessly stringent in violation of First and Fourteenth Amendment, but political party had not yet collected signatures or submitted them to state, and plaintiff included no allegations regarding how state standards would result in needless invalidations).

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Plaintiffs allege that the case is ripe because: 1) the issues are fit for judicial decision, and 2) Plaintiffs would suffer great hardship if the Court withheld consideration of Plaintiffs' claims. *See Mayor and City Council of Baltimore*, 2019 WL 4598011, at *20 (quoting *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003)) (laying out standard for ripeness). A case is fit for decision "when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." *Lansdowne*, 713 F.3d at 198. "The hardship prong is measured by the immediacy of the threat and burden imposed on the plaintiff." *Id.* (internal quotation marks and brackets omitted). Plaintiffs meet both prongs to establish ripeness.

Plaintiffs' APA claims—that Defendants' decision is contrary to law, arbitrary and capricious, in excess of authority, and without observance to proper procedure—challenge actions already taken by Defendants and present purely legal questions. *Compare Mayor and City Council of Baltimore*, 2019 WL 4598011, at *199 (holding APA review of amendments to policy was a purely legal question); *with Johnston v. Lamone*, 401 F. Supp. 3d 598 (D. Md. 2019) (holding claims unripe where political party alleged state standards for verifying petition signatures were needlessly stringent in violation of First and Fourteenth Amendment, but additional facts regarding standards were necessary to identify the legal question). Similarly, Plaintiffs' equal protection claim challenges the decision already made by Defendants to create and provide a redistricting citizenship dataset to states. *See, e.g., Mayor and City Council of Baltimore*, 2019 WL 4598011, at *199 (holding plaintiff's equal protection claim based on prior statements by President Donald J. Trump was ripe for review).

Plaintiffs also meet the hardship prong. Here, as in other cases where plaintiffs challenge decisions made before the census and before census data is produced, courts routinely hold that

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"it is certainly not necessary . . . to wait until the census [has taken place] to consider the issues presented." *Dep't of Commerce*, 525 U.S. at 332 (allowing case to go forward where challenged statistical adjustments would not take place until after the census); *Glavin v. Clinton*, 19 F. Supp. 2d 543, 547 (1998) (same). Here, Plaintiffs challenge Defendants' discriminatory decision to compile a "census . . . of how many citizens, non-citizens, and illegal aliens are in the United States" FAC ¶ 62 (quoting President Trump), and although the Bureau will not provide the redistricting citizenship dataset to states until 2021, it is not necessary for the Court to wait until the dataset has been created and provided to states for the Court to review Defendants' final discriminatory decision. *See Glavin*, 19 F. Supp. 2d at 547 ("Given the finality of the Department's decision to utilize statistical sampling as a means to determine the population for purposes of congressional apportionment in the 2020 Census, it is clear that ripeness concerns have no application in the instant case."); *Public Serv. Comm'n of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 244 (1952) (challenged action ripe for review where it has "taken on a fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them).

Defendants' reliance on *Miller v. Brown*, 462 F.3d 312 (4th Cir. 2006) is misplaced. MTD at 22-23. *Miller* involved a challenge to an election law that required open primaries, and identified one way to show a case is ripe for review: where plaintiffs would be "compelled to act under threat of enforcement of the challenged law." 462 F.3d at 316, 319. But, as demonstrated above, *Miller* and other cases cited by Defendants in which the challenged decision obligates or prohibits action are by no means the only ripe cases. For example, the decision to use statistical sampling during the 2000 Census challenged in *Department of Commerce* and *Glavin* did not

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force plaintiffs to act. Nonetheless, both of these cases were ripe for review. *Dep't of Commerce*, 525 U.S. at 332; *Glavin*, 19 F. Supp. 2d at 547.

III. Defendants' Decision to Create and Provide Redistricting Citizenship Data Is Reviewable Under The APA

Defendants contend that Plaintiffs' APA claims are not reviewable agency action, arguing that: (1) the executive order was a managerial tool, and (2) Plaintiffs do not challenge a cognizable agency action. *See* MTD at 34-41. Defendants are wrong on both fronts. Plaintiffs have adequately alleged that Defendants' decision to create and provide to states citizenship data with the Redistricting Data File is agency action that is reviewable under the APA. *See* FAC ¶¶ 88-109.

A. Defendants' Decision to Create and Provide Citizenship Data for Redistricting Is Not A Managerial Action and is Thus Reviewable

To avoid APA review, Defendants attempt to characterize Plaintiffs' APA claims as merely challenging EO 13880. *See* MTD at 34. But as Plaintiffs allege consistently throughout the First Amended Complaint, the APA claims are not focused on EO 13880, but challenge Defendants' decision to create and provide citizenship data for states to use in redistricting as evidenced by the July OMB Request. *See, e.g.*, FAC ¶¶ 1-4, 88-109.[6] One day after President Trump issued EO 13880, the Bureau released the OMB request stating that the Secretary "directed the Census Bureau to . . . produce [CVAP] information prior to April 1, 2021 that states may use in redistricting." *Id.* at ¶ 65 (quoting July 3 OMB Request). Plaintiffs challenge Defendants' decision, made in connection with EO 13880, to create and provide states with

[6] Subsequent statements by Defendants, such as the official Bureau policy presented by Dr. John Abowd, Chief Scientist and Associate Director for Research and Methodology at the Bureau, on September 6, 2019, further demonstrate that a final agency action has been taken and that Defendants are executing their plan as set forth in the decision. *See* John Abowd, Census Bureau Citizenship Data Research and Product Development, Census Bureau, Sept. 6, 2019, http://www.copafs.org/UserFiles/file/2019%20Documents/2019-09-06-Abowd-COPAFS%20(Approved).pdf.

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redistricting citizenship data. *See e.g., E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1246-47 (9th Cir. 2018) (holding that an agency rule that incorporated a presidential proclamation constituted an "operative rule of decision for asylum eligibility" that courts may review under the APA); *see also, Int'l Refugee Assistance Project v. Trump (IRAP)*, 373 F. Supp. 3d 650, 663 (D. Md. 2019) ("declin[ing] to find that APA review of the implementation of the Proclamation is foreclosed because the agency action was taken in response to presidential action."). Accordingly, Plaintiffs' challenge to Defendants' decision—made in connection with a presidential directive—is reviewable under the APA.

Defendants' reliance on *Chai v. Caroll*, 48 F.3d 1331 (4th Cir. 1995), and *Orbital ATK, Inc. v. Walker*, No. 1:17-cv-163(LMB/IDD), 2017 WL 2982010 (E.D. Va. July 12, 2017), is unavailing, as these cases concern whether third parties can compel executive agencies to comply with presidential orders. In *Chai,* the Fourth Circuit held that an asylum seeker could not sue to require an agency to follow an executive order or previously-withdrawn interim rules. *Chai*, 48 F.3d at 1339. Similarly, in *Orbital ATK*, the court held that a presidential policy directive (akin to an executive order) did not have the force of law against which to measure agency action. 2017 WL 2982010, at *9.

B. Defendants' Decision to Create and Provide Citizenship Data for Redistricting Is Reviewable Agency Action

Defendants further contend that "Plaintiffs do not challenge an 'agency action.'" MTD at 35. On the contrary, the challenged action in this case is both "circumscribed and discrete" and it "determines rights and obligations." MTD at 35 (internal citation and quotation omitted).

1. Defendants' Actions are Discrete and Circumscribed

An agency action that is "discrete" is reviewable under the APA. "Accordingly, courts that have conducted APA review of agency actions implementing a presidential directive are

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typically presented with a discrete agency rule or decision to review." *IRAP*, 373 F.Supp.3d at 665 (citation omitted). *See also East Bay Sanctuary Covenant,* 909 F.3d at 1246-47 (finding that an interim final rule, incorporating a presidential proclamation issued on the same day as the interim final rule, created an "operative rule of decision for asylum eligibility" that is reviewable under the APA)*; City of Carmel-by-the-Sea v. U.S. Dep't. of Transp.*, 123 F.3d 1142, 1166 (9th Cir. 1997) (reviewing whether the Federal Highway Administration's findings in a final environmental impact statement/report complied with two separate executive orders and were thus lawful under the APA); *Zhang v. Slattery,* 55 F.3d 732, 743-45, 748-49 (2d Cir. 1995) (reviewing whether a rule issued in connection with an executive order requiring the attorney general to overrule a previous Board of Immigration Appeals decision was lawfully promulgated under the APA).

Indeed, "[c]ourts are well-suited to reviewing specific agency decisions[.]" *City of New York v. Dep't of Def.*, 913 F.3d 423, 431 (4th Cir. 2013). Here, Plaintiffs allege that Defendants' discrete decision to create, and provide citizenship data for use along with the Redistricting Data File violates the APA, and Defendants do not dispute the discrete nature of that agency action. *See* MTD at 34-41.

2. Defendants' Actions Determine Plaintiffs' Rights and Obligations

Plaintiffs' allegations "demonstrate that the challenged act had an immediate and practical impact or altered the legal regime in which it operates." *City of New York*, 913 F.3d at 431 (internal citations omitted); *see also Frozen Food Express v. U.S.*, 351 U.S. 40, 44 (1956) (finding that a commission's order that categorized certain commodities as nonexempt from the agricultural exception had an "immediate and practical impact" on carriers transporting the commodities). Defendants argue that EO 13880 "has no impact whatsoever on private parties,

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let alone an 'immediate and practical' one." MTD at 36. Defendants again mischaracterize Plaintiffs' claims as merely challenging EO 13880. Plaintiffs allege that Defendants' decision to create and provide a redistricting citizenship dataset in accordance with EO 13880 will harm Plaintiffs by reducing their political representation and violating their right to equal protection under the law. *See* FAC ¶¶ 73-87. Moreover, this injury is imminent, as the Bureau already confirmed in the July 3 OMB Request that it is carrying out the Secretary's directive. *Supra* Part I (A); *see City of New York*, 913 F.3d at 43; *Frozen Food Express*, 351 U.S. at 40, 44.

Here, the rights of Plaintiffs are impaired by the vote dilution and reduction in Plaintiffs' political representation that flow from the challenged agency action. *See* FAC ¶¶ 85-87, 96. Plaintiffs further will be injured by the unreliable and faulty citizenship data created and provided by Defendants for use in redistricting. FAC at ¶¶ 3, 7, 9, 10-14, 67-72, 81, 85-87. This discrimination certainly "directly affect[s] the parties," *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992); *see also Frozen Food Express,* 351 U.S. at 44 (finding an agency action reviewable when that action had "immediate and practical impact" on the plaintiff, as well as other similarly-situated entities).[7]

Defendants further err in arguing that Plaintiffs' APA claim fails because EO 13880 does not alter the "legal regime in which it operates." *See* MTD at 37 (relying on *City of New York*, 913 F.3d at 431).[8] First, Plaintiffs have alleged an "immediate and practical impact" and thus are not required to show that the decision also altered the "legal regime in which it operated." *City of*

[7] Having established that Defendants' actions affect Plaintiffs' rights, Plaintiffs need not demonstrate that an agency action must "obligate private parties to do [some]thing" to be reviewable under the APA. *See* Defs.' Mot. at 36-37.

[8] Because Defendants mischaracterize Plaintiffs' APA claims as only challenging EO 13880, Defendants' argument that EO 13880 does not "dictate how the Census Bureau must use the administrative records once they are collected," MTD at 37-38, is irrelevant. Defendants' decision, as outlined in the July 3 OMB Request, directs the Bureau to collect, create, and provide the citizenship data file to states for use in redistricting. *See* FAC ¶ 65.

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New York, 913 F.3d at 431; *Bennett*, 520 U.S. at 178. ("[T]he action must be one by which 'rights or obligations have been determined,' *or* from which 'legal consequences will flow[.]'") (emphasis added). Second, *City of New York* did not address whether there were alterations in the "legal regime." 520 U.S. at 432-34 (finding instead that the municipalities' requested relief that the court "supervise an agency's compliance with the broad statutory mandate" was not a challenge to a discrete agency action, and that the challenged action did not determine rights and obligations).[9] Third, 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.

Defendants are also wrong in suggesting that civil or criminal liability must follow for an agency action to alter the legal regime in which it operates. MTD at 28-29 (relying on *Bennett*, 520 U.S. at 154 and *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 841 (4th Cir. 2002)).[10] Agency actions that do not trigger civil or criminal penalties are reviewable

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[9] Defendants' reliance on *Vill. of Bald Head Island v. U.S. Army Corps of Engineers*, 714 F.3d 186 (4th Cir. 2013) to support their contention that Defendants' decision does not determine rights and obligations is misplaced. In *Bald Head Island*, the plaintiff challenged the implementation of an ongoing project to deposit sand on a beach. *Id.* at 193-94. The court found that the Corps had already taken a final agency action when it announced formal approval of the project, and any subsequent "project implementation" was not reviewable under the APA. *Id.* at 195. That is not the case here, where Plaintiffs challenge Defendants' decision to create and provide a redistricting citizenship data file for states to use in redistricting.

[10] Defendants' reliance on cases in which agency action has no direct effect on the plaintiff are misplaced. *Flue-Cured* "is readily distinguished . . . because when the Fourth Circuit 'first look[ed] for direction to the Radon Act,' it noted that 'section 404 of the Radon Act prohibits the EPA (and the courts) from giving the Report 'any regulatory' effect.'" *Am. Acad. of Pediatrics v. Food & Drug Admin.*, 379 F. Supp. 3d 461, 488 (D. Md. 2019) (citing *Flue-Cured*, 313 F.3d at 858-59). *Flue-Cured* turned on this statutory language, but Defendants point to no equivalent statutory provision that prohibits the challenged action from having a regulatory effect—likely because they cannot do so. Similarly, in *Invention Submission Corp. v. Rogan*, 357 F.3d 452, 459 (4th Cir. 2004), the Patent and Trademark Office's advertisement campaign warning the public of promotional scams that did not directly affect the plaintiff, also did not mention the plaintiff or target the plaintiff in any way. *Id.* at 460. It was the actions of a journalist who read

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under the APA. *See, e.g.*, *Mayor & City Council of Balt.*, No. ELH-18-3636, 2019 WL 4598011 at *27-28 (revisions to the Foreign Affairs Manual's criteria for determining "public charge" for purposes of an immigrant visa application were reviewable agency action because legal consequences flowed from the challenged action). Moreover, discrimination determines rights and renders agency action reviewable under the APA. *See Jersey Heights Neighborhood Association v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999) (noting that a demonstration of discrimination alone is a sufficient enough injury to be considered an action determining rights).

Defendants' reliance on *Golden & Zimmerman v. Domenech*, 599 F.3d 426, 432-33 (4th Cir. 2010) is also incorrect. In that case, the court held agency action was not reviewable because the challenged Reference Guide restated an established interpretation of the Gun Control Act and simply served to inform licensees about compliance with the Gun Control Act and implementing regulations. *Id.* Here, Defendants' decision does not merely "inform" agencies, stakeholders, and individuals, but directs the preparation and distribution to states of a new redistricting citizenship dataset and determines the rights of Latinos and non-U.S. citizens. Defendants' decision is more akin to the FDA Guidance in *American Academy of Pediatrics v. FDA*, 379 F. Supp. 3d 461, 490 (D. Md. 2019), that removed a regularity requirement for new products to undergo premarket review and "immediately brought a number of new tobacco

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the report, and linked the plaintiff to the report, that had a deleterious effect on the plaintiff. *See Id.* at 459-60 ("[B]y looking at the campaign material, the public would see only that a consumer complained about an invention promoter and that invention promotion scams are causing the public $200 million in losses every year. Surely Invention Submission would not suggest that the attribution in the advertisements of $200 million in losses to patent scams was in any respect focusing the public's eye on it."). The journalist's conduct was too attenuated to be connected to the agency action. *Id.* Here, however, Defendants' decision itself harms plaintiffs by discriminating against them. Moreover, the effects are hardly the "independent" actions of third parties, but instead, actions both concerted and traceable to illegal conduct of Defendants. *See Supra* Sec. I (discussing traceability of the injury).

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products into compliance." The court held that the FDA Guidance was a final agency action that directly affected the parties and was therefore subject to judicial review. *Id.*[11]

Furthermore, Defendants' reliance on *Franklin* to argue that "the mere gathering of administrative records parallel to the census cannot constitute 'final agency action,'" MTD at 38, is inapposite. Although both *Franklin* and the instant case concern the census, the similarities end there. In *Franklin*, the Supreme Court held that the Secretary's report to the President was unreviewable because "the final action complained of is that of the President, and the President is not an agency within the meaning of the Act." 505 U.S. at 796-97. Thus, *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." *Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996) (quoting *Public Citizen v. U.S. Trade Representative*, 5 F.3d 549, 552 (D.C. Cir. 1993)). Here, Plaintiffs challenge Defendants' directive that issued in tandem with EO 13880. Unlike *Franklin*, where the final action rested with the President and not an agency, here Defendants have made the final decision, pursuant to EO 13880, to create and provide states a redistricting citizenship dataset, as evidenced by the July 3 OMB Request. Finally, Defendants' conduct at issue here is not the "mere gathering" of records, but the creation and distribution of citizenship dataset for states to use in redistricting. *See* FAC ¶¶ 65, 84.

[11] Defendants also appear to argue that EO 13880 has little effect because the Bureau has already collected 90 percent of citizenship data from administrative records, which collection is authorized by the Census Act. *See* MTD at 40-41. As discussed *supra* Section I., Plaintiffs challenge the creation and distribution of a dataset to be used to specifically to discriminate against Latinos and noncitizens by removing some of them from the population base used for redistricting. The Census Act does not authorize such discrimination. *See generally* United States Code Title 13.

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For the foregoing reasons, Plaintiffs have sufficiently alleged that Defendants' decision to create and provide a citizenship dataset along with the Redistricting Data File was a discrete decision that imminently and directly affects Plaintiffs' rights. *See City of New York*, 913 F.3d at 431. Thus, Defendants' decision is a final agency action that this Court is "well-suited" to review pursuant to the APA. *Id.*

IV. Plaintiffs Have Stated an Equal Protection Claim

A. Plaintiffs Plausibly Allege Intentional Discrimination

Defendants offer a hodge podge of arguments in support of their contention that Plaintiffs failed to properly plead an equal protection claim. All are unavailing. The First Amended Complaint meticulously sets out allegations supporting the equal protection claim.

Plaintiffs plausibly alleged that the challenged decision was motivated by intentional discrimination and adversely affects a protected group. *See La Unión del Pueblo Entero v. Ross ("LUPE I")*, 353 F. Supp. 3d 381, 393-95 (D. Md. 2018) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp. ("Arlington Heights")*, 429 U.S. 252, 264-65 (1977)). Plaintiffs' allegations bear directly on the Court's required "sensitive inquiry into such circumstantial evidence of intent as may be available[,]" including:

- the impact of the official action, *i.e.* whether it "bears more heavily on one race than another" and whether "a clear pattern, unexplainable on grounds other than race emerges from the effect of the state action even when the governing legislation appears neutral on its face";
- the historical background of the decision;
- the specific sequence of events leading up to the challenged decision;
- departures from the normal procedural sequence;
- substantive departures, "particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached"; and
- the legislative or administrative history, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.

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Arlington Heights, 429 U.S. at 264-68. A plaintiff can survive a motion to dismiss without independently establishing that each factor weights in the plaintiff's favor. *LUPE I*, 353 F. Supp. 2d at 394.

Plaintiffs more than adequately allege that Defendants are motivated by a desire to reduce the electoral strength of Latinos and other racial minorities by inviting and equipping states to exclude non-U.S. citizens from apportionment. FAC ¶¶ 2, 54-84; *see also LUPE I*, 353 F. Supp. 2d at 394-95 (holding plaintiffs stated an equal protection claim where they alleged facts touching on the *Arlington Heights* factors); *CASA de Maryland, Inc. v. Trump*, 355 F. Supp. 3d 307, 325 (D. Md. 2018) (same); *North Carolina State Conference of NAACP v. McCrory ("NAACP")*, 831 F.3d 204, 233 (4th Cir. 2016) (finding intentional discrimination where totality of the circumstances showed that defendants adopted a voting law to politically entrench themselves to the detriment of African Americans who were unlikely to vote for them). In particular, Plaintiffs allege that the decision to create and provide states with a redistricting citizenship dataset was motivated by a discriminatory purpose to increase the political representation of "Non-Hispanic Whites" to the detriment of Latinos and other racial minorities, in violation of the Fifth Amendment. FAC ¶ 80.

1. Historical Background of the Decision

Plaintiffs adequately pleaded that the historical background of the decision to create and provide a redistricting citizenship dataset evidences discriminatory animus. The Fourth Circuit requires courts to engage in a broad inquiry into historical discrimination and look at the historical origins of the challenged decision, particularly where matters of political representation are at issue. *NAACP*, 831 F.3d at 226-27.

Although earlier in its history the United States excluded certain racial minorities from

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congressional apportionment, with the attendant reduction of representation and political power (*see Evenwel*, 136 S. Ct. at 1127-29), the origins of the challenged action in this case are found in more recent history. Plaintiffs allege that the decision to have the Bureau prepare and release a redistricting citizenship dataset to the states—first by adding a citizenship question to the 2020 Census, and now by using administrative records—goes at least as far back as the Hofeller Study. *See* FAC ¶ 73. Dr. Hofeller, a leading Republican redistricting strategist and map-drawing expert for the Republican National Committee, FAC ¶ 79, prepared a memo explaining how using CVAP instead of total population to apportion population to election districts in redistricting would "be advantageous for Republicans and Non-Hispanic Whites." FAC ¶¶ 73, 79-81. He acknowledged that CVAP apportionment was a "radical departure" from prior practice, FAC ¶ 81, and concluded that it was necessary to add a citizenship question to the 2020 Census to acquire the data necessary to use CVAP as a population base for redistricting. FAC ¶ 81. This information was then promulgated among major players in the Administration. *See* FAC ¶ 73.

Plaintiffs allege that after Dr. Hofeller explained the political advantages of using CVAP as a population base for redistricting to suppress the representation of Latinos and others, Dr. Hofeller, Secretary Ross, White House officials, A. Mark Neuman (a Presidential transition team member), then-Kansas Secretary of State Kris Kobach, and U.S. Department of Justice (DOJ) attorneys, including then-Attorney General Jeff Sessions ("AG Sessions") and the head of the DOJ's Civil Rights Division John Gore, conspired to reduce the political power of people of color by using CVAP as a population base for redistricting. FAC ¶ 73.

Secretary Ross first consulted with Mr. Kobach, a proponent of excluding non-U.S. citizens from apportionment, and Steve Bannon, then a White House official, about adding a

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citizenship question to the 2020 Census. *See* FAC ¶ 74. Secretary Ross then directed U.S. Department of Commerce ("Commerce") staff to research the exclusion of non-U.S. citizens from apportionment and solicit and secure the help of DOJ. *Id.* Secretary Ross, through Commerce, coordinated with DOJ, Mr. Neuman, Dr. Hofeller, and the White House to fabricate a "need" for a Census citizenship question to better enforce the VRA, FAC ¶ 73, resulting in a letter from DOJ to the Bureau requesting the addition of the question to the 2020 Census (the "DOJ letter"), FAC ¶ 75. Dr. Hofeller provided Mr. Neuman and Mr. Gore with the substantive content of the DOJ Letter. FAC ¶ 82.[12]

Ultimately, three federal courts in six cases enjoined Defendants from adding a citizenship question on the 2020 Census, and the Supreme Court affirmed the New York district court's injunction. FAC ¶¶ 55-56, n.24. After reviewing evidence of the failed attempt to add a citizenship question to the Census, the U.S. District Court for the District of Maryland concluded: "it is becoming difficult to avoid seeing what is increasingly clear. As more puzzle pieces are placed on the mat, a disturbing picture of the decisionmakers' motives take shape." *Kravitz v. Dep't of Commerce*, 382 F. Supp. 3d 393, 402 (D. Md. 2019). *See also La Union del Pueblo Entero v. Ross*, 771 F. App'x. 323, 324-25 (4th Cir. 2019) (Wynn, J., concurring) (emphasizing that discriminatory intent can be inferred from the totality of the circumstances, including where the decisionmaker provides a pretextual rationale); *LUPE v. Ross*, Case No. 19-

[12] The Supreme Court later determined that Secretary Ross's initial "VRA enforcement rationale—the sole stated reason [for adding a citizenship question]—seems to have been contrived." FAC ¶ 56 (quoting *Dep't of Commerce*, 139 S. Ct. at 2575). Such "[p]roof that the defendant's explanation is unworthy of credence is . . . one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 147 (2000).

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1425 (4th Cir. Aug. 19, 2019), ECF No. 52 (instructing the district court to vacate its judgment on the equal protection claim).[13]

These well pleaded facts are relevant, because the historical background of 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. This history sparked a highly specific and suspect series of events that further evidenced the discriminatory intent of the Defendants.

2. Specific Sequence of Events

Plaintiffs adequately pleaded that the specific series of events surrounding the challenged action in this case further support their claim of racial discrimination. *See NAACP*, 831 F.3d at 227 (recognizing that sequences of events leading to official action can provide further evidence of racial animus).

In the immediate aftermath of the Supreme Court's decision blocking the addition of the citizenship question to the Census, Secretary Ross directed the Bureau "to proceed with the 2020 Census without a citizenship question on the questionnaire, and [instead] produce [CVAP] information . . . that states may use in redistricting." FAC ¶ 65 (quoting July 3 OMB Request). Thus, Secretary Ross directly tied his decision to create and provide to states a redistricting citizenship dataset to the citizenship question, describing it as an alternative to the citizenship question to achieve Defendants' discriminatory purpose. *See Id.*

President Trump issued EO 13880 only a few days later. FAC ¶ 1; *see also* MTD at 1.

[13] In fact, Defendants continue to maintain that they sought to include a citizenship question on the Census to "enhance Voting Rights Act enforcement by allowing the Census Bureau to calculate citizenship data at the census-block level." MTD at 5. This is despite the fact that this rationale was found to be "contrived" by the U.S. Supreme Court. *Dep't of Commerce*, 139 S. Ct. at 2575.

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The purpose of issuing EO 13880 was to speed up the process of collecting and producing a redistricting citizenship dataset. FAC ¶ 58. That same day President Trump explained during a press conference that the purpose of the order was to make sure that the census could generate an accurate dataset of non-U.S. citizens, in part, for the purpose of "administering our elections." FAC ¶ 63. Attorney General William Bar further elaborated that they were studying "whether illegal aliens could be counted for [legislative] apportionment purposes." FAC ¶ 64 (quoting Attorney General Barr). The next day, the Census Bureau published the July 3 OMB Request, a revision of the February 2019 OMB Request, that reflects Secretary Ross's directive that the bureau continue collecting citizenship data for the purposes of creating the redistricting citizenship dataset. FAC ¶ 65.

The decision to redirect Bureau and other federal government resources to create and give to states a redistricting citizenship dataset occurred "in the immediate aftermath" of the Supreme Court's June 27, 2019 decision blocking the Census citizenship question. FAC ¶¶ 56-58, 65; *see NAACP*, 831 F.3d at 226-27 (noting that the timing of the adoption of a restrictive voting law was evidence of discriminatory intent). Plaintiffs adequately pleaded that the discriminatory purpose that infected the decision to add a citizenship question to the 2020 Census also provides evidence that the agency action at issue in this case is similarly motivated. *See, e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 222-33 (1985) (looking at the original enactment of state constitutional provision to support finding that, even 80 years later and after several changes, the provision was still discriminatory); *NAACP*, 831 F.3d at 225 ("[T]hat a legislature impermissibly relied on race" in enacting a prior election law "certainly provides relevant evidence as to whether race motivated other election legislation passed by the same legislature."); *Jean v. Nelson*, 711 F.2d 1455, 1490-92 (11th Cir. 1983) (finding evidence of prior

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discriminatory policies to be probative of whether the challenged policy was motivated by discriminatory intent).

3. Departures from the Normal Procedural Sequence

Plaintiffs plausibly allege that Defendants' decision to create and provide to states a redistricting citizenship dataset significantly departs from the Bureau's normal procedural sequence. *See LUPE*, 353 F. Supp. 3d at 394 (holding plaintiffs stated a claim for an equal protection violation where plaintiffs provided, among other things, detailed allegations regarding procedural departures). In *NAACP*, for example, the voting bill at issue was rushed through the legislative process to avoid in-depth scrutiny, was afforded far less debate than normally offered to other bills, and targeted African American voters. 831 F.3d at 227-28. Finding error in the district court's "accepting the State's efforts to cast this suspicious narrative in an innocuous light," the Fourth Circuit held that such departures, even as other procedural rules were adhered to, provided "another compelling piece of the [motivation] puzzle." *Id.* at 228-29.

Plaintiffs allege that Defendants made the challenged decision *before* fully studying the issue, affording less in-depth scrutiny to this data collection than normally afforded to other data collections, and departing from other normal procedures along the way. *See, e.g.*, FAC ¶¶ 3, 91, 108. For example, Plaintiffs allege that Secretary Ross added a citizenship question to the 2020 Census and directed the Bureau collect administrative citizenship data to validate question responses just two years before the 2020 Census. FAC ¶¶ 54, 76. This was contrary to the normal procedure of informing Congress about subjects on the decennial census three years before the Census, or by April 2017, *see* FAC ¶ 23 (citing 13 U.S.C. § 141(f)).

Plaintiffs further allege that, following its normal procedures, the Bureau began to plan the contents of the Redistricting Data File at least as early as 2014. FAC ¶¶ 41-42. It was not

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until December 2018, however, that the Bureau first mentioned including citizenship data in this file in connection with the citizenship question. FAC ¶¶ 46-47. And it was not until July 3, 2019, less than a year before the 2020 Census, that Defendants first made the affirmative decision to redirect Bureau resources to collect administrative records from federal agencies and states and use these records to compile a completely new dataset to accompany the Redistricting Data File. *See* FAC ¶¶ 58, 60-61, 65. Such a hurried pace "strongly suggests an attempt to avoid in-depth scrutiny." *NAACP*, 831 F.3d at 227-28 (comparing the robust deliberations afforded to other bills to the minimal deliberations afforded to the bill at issue); *Veasey v. Abbot*, 830 F.3d, 216, 236-39 (5th Cir. 2016) (highlighting departures from normal procedural sequence, including intervention by the governor and extreme prioritization of a bill that did not present a problem of great magnitude).

Defendants emphasize that the Bureau has collected administrative data regarding citizenship in the past. MTD at 3-4. But Plaintiffs do not challenge past well-planned, measured collection of citizenship data for other purposes (e.g., validating ACS responses). Plaintiffs adequately pleaded that Defendants' unstudied and rushed decision to redirect federal resources to create a redistricting citizenship dataset, specifically for the purpose of using this data as a population base for redistricting and apportionment, departed from procedural norms and these allegations support a claim of discriminatory intent.

4. Substantive Departures

Plaintiffs also allege a number of substantive departures where "factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *Arlington Heights*, 429 U.S. at 564-65. For example, Plaintiffs allege that Secretary Ross ignored the known shortcomings of citizenship data derived from administrative sources,

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including those explained in the Bureau's March 1, 2018 memorandum concluding that citizenship data from administrative records does not produce 100 percent accurate data on citizenship, and that the Bureau "will most likely never possess a fully adequate truth deck to benchmark [citizenship] to." FAC ¶¶ 65, 66-72. Departing from these important substantive considerations, Secretary Ross directed the Bureau to produce a redistricting citizenship dataset using this flawed and incomplete data. FAC ¶ 65;[14] *see also* FAC ¶ 76 (alleging that Secretary Ross ignored the recommendation of the Bureau not to add a citizenship question to the 2020 Census).

Plaintiffs also allege that federal laws, regulations, and guidelines require that data created and provided by the Bureau have integrity, objectivity, and impartiality, that the Bureau be independent from political influence in the development, production, and dissemination of statistics, and that Defendants departed from substantive considerations when they violated many of these provisions. FAC ¶¶ 3, 27-31, 37, 108.

5. Contemporaneous Statements

The Fourth Circuit recognizes that 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." *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1064 (4th Cir. 1982). Plaintiffs nonetheless allege statements made by Defendants and their conspirators which support their allegation that Defendants were motivated by discriminatory intent.

[14] Defendants' contention that as of July 11, 2019 they had 90 percent of citizenship data necessary for the purpose of validating citizenship question responses to better enforce the federal voting rights act says nothing about the quality of this data for the purposes of apportionment, and says nothing about the sufficiency of Plaintiffs' discriminatory intent allegations. *See* FAC ¶ 3.

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For example, contemporaneous statements reflect that Defendants first "contrived" a reason for gathering citizenship information from the total U.S. population. FAC ¶ 54. After the U.S. Supreme Court held that Secretary Ross's rationale was pretextual, Defendants and the President publicly revealed their real reason to create and provide citizenship data—to conduct redistricting and apportionment based on CVAP instead of total population. FAC ¶¶ 56, 58-65. Statements made by President Trump and Attorney General William Bar regarding EO 13880 also support Plaintiffs' allegations that Defendants seek to reduce the political power of racial minorities and non-U.S. citizens. *See, e.g.*, FAC ¶¶ 63-64 (noting that some jurisdictions "may want to draw state and local legislative districts based upon the voter-eligible population, and that there is "a dispute over whether illegal aliens can be included for apportionment purposes") (internal quotation omitted). Plaintiffs' general allegations of racial animus, FAC ¶¶ 112, 115, further support their claim of discriminatory intent, s*ee Hutton v. Nat'l Bd. of Exam'rs in Optometry, Inc.*, 829 F.3d 613, 620 (4th Cir. 2018) (on a motion to dismiss, courts "presume that general allegations embrace those specific facts that are necessary to support the claim.").

Defendants concede that their purpose in preparing and distributing a redistricting citizenship dataset is to enable states to "design State and local legislative districts based upon the voter-eligible citizens." MTD at 36 (quoting EO 13880 at 33823).[15] Plaintiffs plainly allege that removing non-U.S. citizens from the apportionment base used for redistricting would, as described by the expert who drafted Defendants' plan, be "advantageous to . . . Non-Hispanic Whites" FAC ¶ 81. Defendants' admission that their purpose is to provide the tool to states

[15] Plaintiffs note that equating CVAP, which is what the redistricting citizenship dataset contains, and voter eligibility is incorrect. The redistricting citizenship dataset does not contain information related to criminal conviction history or mental competency—voter eligibility requirements found in most states.

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needed to subtract primarily Latinos and Asian Americans from the apportionment base demonstrates the adequacy of Plaintiffs' allegations, and does not undermine it.

6. Disparate Impact

Finally, Plaintiffs allege that Defendants' creation and provision to states of a redistricting citizenship dataset will have a disparate impact on the basis of race and national origin. *Arlington Heights*, 429 U.S. at 266 ("The impact of the official action whether it 'bears more heavily on one race than another,' . . . may provide an important starting point.") (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). Plaintiffs allege that they live in areas with relatively larger Latino and non-U.S. citizen populations when compared to the population of the U.S. and their states. FAC at ¶¶7, 9, 10-14, 85, 87. Furthermore, citizenship data based on administrative records will be inaccurate, and the Bureau's own research confirms that inaccuracies will be greater for naturalized citizens, those in mixed-immigration status households, certain U.S. citizens, and certain types of immigrants. FAC ¶¶ 66-72. Given that Latinos and Asian Americans are overrepresented among immigrants, naturalized citizens and those in mixed-immigration status households, Plaintiffs adequately pleaded disparate impact. Furthermore, although not necessary to set forth an equal protection claim, Plaintiffs adequately pleaded that Defendants relied on Dr. Hofeller's explanation that, for example in Texas, redistricting based on CVAP would benefit "Non-Hispanic Whites," FAC ¶ 81, and that Defendants intended this disparate impact to occur, FAC ¶¶ 81-83. Redistricting based on CVAP as a population base will result in a disproportionate harm to Latinos and non-U.S. citizens, because they will live in "unconstitutionally overpopulated districts." FAC ¶ 87.

Plaintiffs further allege that the decision to provide states with citizenship data for use in redistricting bears more heavily on Latino, Asian-American, and non-U.S. citizen populations

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because it will result in less political representation for these communities. *See* FAC ¶¶ 2, 4, 7, 9-14, 80-81, 85-87. In particular, Plaintiffs allege that jurisdictions' use of CVAP data to apportion population for redistricting will result in: 1) less majority-minority CVAP districts; and 2) malapportionment. *Id.* Plaintiffs allege that Defendants made the decision to create and provide citizenship data because of, not in spite of, this disparate impact. FAC ¶¶ 60, 63-65, 73, 80-84.

i. Disparate Impact is Not a Necessary Element of an Equal Protection Claim

Defendants' argument that Plaintiffs failed to allege disparate impact as a necessary element of an equal protection claim is factually incorrect and legally unfounded. First, Defendants cite no case to support their argument that Plaintiffs asserting an equal protection claim must allege discriminatory effects. *See* MTD at 32; *see also Arlington Heights*, 429 U.S. at 265 ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.") (quoting *Washington*, 426 U.S. at 242). Second, even if pleading discriminatory effects was a requirement, Plaintiffs have more than satisfied it. *See supra* Sec. IV.A.6; *see also* FAC ¶¶ 67-72, 86, 87 (alleging that administrative data regarding citizenship is inaccurate and misclassifies some naturalized U.S. citizens as non-U.S. citizens, and that Plaintiffs live in states where there is a higher population of non-U.S. citizens). Plaintiffs allege facts related to discriminatory effects in satisfaction of one of the *Arlington Heights* factors, not because equal protection plaintiffs are required to plead disparate effects.

B. Defendants' Other Arguments Are Unavailing

Defendants misstate equal protection law when they assert that "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." MTD at 33 n.16. It is well-

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established that individuals treated differently because they are non-U.S. citizens can prevail on an equal protection claim. *See, e.g.*, *Bernal v. Fainter*, 467 U.S. 216, 226 (1984) (strict scrutiny applied to law that prevented non-U.S. citizen from becoming a notary public); *Nyquist v. Mauclet*, 432 U.S. 1, 7-9 (1977) (applying strict scrutiny to law that prevented non-U.S. citizens from receiving state financial aid, and finding that the law was unconstitutional); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate."); *Traux v. Raisch*, 239 U.S. 33, 37 (1915) (striking down an anti-non-U.S. citizen labor law as unconstitutional under Equal Protection Clause of the Fourteenth Amendment).

Furthermore, even if the Court found that the Plaintiffs are not entitled to strict scrutiny, the level of scrutiny that a court applies to analyze an equal protection claim (e.g. strict scrutiny, intermediate scrutiny or rational basis review) has nothing to do with whether a plaintiff can assert an equal protection claim. *See, e.g.*, *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 366 (2001) (reflecting that constitutional protections still exist under the equal protection clause, even though challenged law did not target a suspect classification).

Defendants' argument that this case involves "the mere collection of administrative records" and thus there cannot be an equal protection challenge rests on a mischaracterization of Plaintiffs' complaint and ignores the facts surrounding the challenged action. *See* MTD at 32. Plaintiffs do not challenge the "mere" collection of administrative records. *See e.g.*, FAC ¶ 61, 65, 112) ("Defendant Ross 'directed the Census Bureau to proceed with the 2020 Census without a citizenship question on the questionnaire, and rather to produce Citizen Voting Age Population

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(CVAP) information prior to April 1, 2021 that states may use in redistricting.'"). Even if Defendants hope to prove that Plaintiffs' challenge involves mere record collection, that is a dispute of fact. Disputes of fact are properly resolved at the merits, not the pleading, stage of litigation. Defendants will have an opportunity later in the case to present their competing version of the facts; at this point, Plaintiffs well-pleaded facts are taken as true and Defendants' fact disputes cannot sustain their motion to dismiss. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) ("[I]n evaluating a Rule 12(b)(6) motion to dismiss, a court accepts all well-pleaded facts as true and construes these facts in the light most favorable to the plaintiff in weighing the legal sufficiency of the complaint.").

The same is true for Defendants' unsuccessful attempt to re-litigate the facts that led one court to conclude, "it is becoming difficult to avoid seeing that which is increasingly clear. As more puzzle pieces are placed on the mat, a disturbing picture of the decionsmakers' motives take shape." *Kravitz*, GJH-18-1041, Opinion, Dkt. No. 175 at 13. The question before the Court is whether Plaintiffs adequately pleaded that Defendants are motivated by discriminatory intent—not whether Defendants deny those allegations.

Finally, Plaintiffs also sufficiently allege that Latinos, other racial minority individuals, and non-U.S. citizens will be harmed if Defendants are not enjoined from continuing their discriminatory conduct. *See supra* Sec. I (standing); *see supra* Sec. IV.A.6 (disparate impact).

V. Plaintiffs Have Stated a Cause of Action under 42 U.S.C. § 1985(3)

Plaintiffs more than adequately pleaded a claim under 42 U.S.C. § 1985(3) that Defendants and others are engaged in a conspiracy to create and provide to states a redistricting citizenship dataset in order to increase the political power of non-Hispanic whites and reduce the power of Latinos, other racial minority individuals, and non-U.S. citizens. Further, creating and providing a redistricting citizenship dataset from administrative sources is an overt act that is part

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of the same conspiracy Defendants initiated when they attempted to add a citizenship question to the 2020 Census. *See, e.g.*, FAC ¶¶ 54-56, 58, 60-65. Accordingly, plaintiffs adequately pleaded that such a conspiracy exists.

A. Injunctive Relief is Available as a Remedy for § 1985(3) Violations

Defendants erroneously argue that § 1985(3) provides no basis for injunctive relief. MTD at 37-38. It is well-established, however, that "[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979); *see also Plata v. Schwarzenegger*, 603 F.3d 1088, 1094 (9th Cir. 2010) (same); *LUPE I*, 353 F. Supp. 3d at 398 n.7 (noting that argument that § 1985(3) prohibits injunctive relief is "not persuasive"); *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 608 (1966) (holding that courts retain authority under All Writs Act "[i]n the absence of explicit direction from Congress"); *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 539 (7th Cir. 2012) (holding that "when all that a plaintiff seeks is to enjoin an unlawful act, there is no need for express statutory authorization" from Congress).

Congress did not divest federal courts of their equitable powers when it enacted § 1985(3), and this Court thus retains the power to enjoin Defendants from violating § 1985(3).[16]

[16] Defendants erroneously argue that the Court must dismiss Plaintiffs' APA claims if their conspiracy claim survives. MTD at 44-45. In support of this argument, Defendants cite 5 U.S.C. § 704, which provides that the APA allows review of "final agency actions for which there is no other adequate remedy in a court[.]" Defendants interpret this language to mean that if a plaintiff brings an APA claim for injunctive relief, they cannot add additional claims that provide for the same relief. This is incorrect. Instead, the Supreme Court in *Bowen v. Massachusetts* held that the "no other adequate remedy" language is "merely a restatement of the proposition that one need not exhaust administrative remedies that are inadequate," and is meant to make clear that Congress did not intend for the APA "to duplicate the previously established special statutory procedures relating to specific agencies." 487 U.S. 879, 901-03 (1988) (alteration and internal quotation omitted). Section 704 does not speak to what other claims, in addition to an APA claim a plaintiff, may bring in federal court, and the Court should reject this meritless attempt to dismiss Plaintiffs' APA claims.

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See, e.g., *Mizell v. N. Broward Hospital Dist.*, 427 F.2d 468, 473 (5th Cir. 1970) (holding that the power to issue an injunction "is available to a trial court in an action brought under Section 1985, even though that section refers in precise terms only to a suit for damages"); *Action v. Gannon*, 450 F.2d 1227, 1237-38 (8th Cir. 1971) (en banc) (in holding that injunctive relief is available under § 1985(3), reasoning that "[f]ederal courts have the power to afford all remedies necessary to the vindication of federal substantive rights defined in statutory and constitutional provisions except where Congress has explicitly indicated that such remedy is not available").

B. Sovereign Immunity Does not Bar Plaintiffs' § 1985(3) claim.

The Supreme Court has long held that federal officials may be sued for injunctive relief to prevent future infringement of federal laws. *See, e.g.*, *Larson v. Domestic Foreign Com. Corp.*, 337 U.S. 682, 689-691 (1949) (federal officers may be enjoined from acting unconstitutionally); *Unimex, Inc. v. Dep't of Hous. and Urban Dev.*, 594 F.2d 1060, 1062 (5th Cir. 1979) (same). Here, Plaintiffs allege that Defendants acted unconstitutionally when they conspired to violate Plaintiffs' rights to equal protection of the law, in violation of the Fifth Amendment of the Constitution. Because Plaintiffs seek only injunctive relief, not damages, Plaintiffs' § 1985(3) claim is not barred on sovereign immunity grounds.[17] *See Ziglar v. Abassi*,

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[17] The cases cited by Defendants are either inapposite or not persuasive for the proposition for which Defendants cite them. *United States v. Testan,* 424 U.S. 392, 392 (1976), *Davis v. Dep't of Justice*, 204 F.3d 723, 725 (7th Cir. 2000), and *Unimex*, 594 F.2d at 1061 all involved claims for damages, not injunctive relief. Further, in *Unimex*, the Fifth Circuit acknowledged that had plaintiffs alleged that defendant federal officials acted *ultra vires*, plaintiffs could have brought an action for injunctive relief. 594 F.2d at 1062 (citing *Larson*, 337 U.S. at 691, and 5 U.S.C. § 702). *Larson* supports Plaintiffs' argument that their § 1985(3) claim is not barred by sovereign immunity. 337 U.S. at 689-691. There, the Supreme Court acknowledged that federal employees may be sued for injunctive relief in their official capacities where, like Defendants here, they violate the Constitution. *Id.* Finally, although the plaintiffs in *Affiliated Professional Home Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999), sought both monetary

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137 S. Ct. 1843, 1853 (2017) (entertaining § 1985(3) claim against federal administration officials acting in their official capacity).

C. Plaintiffs' Allegations Support a Claim Under 42 U.S.C. § 1985(3)

Plaintiffs have sufficiently stated a claim under § 1985(3) because they plausibly allege: "(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). Plaintiffs allege that Defendants, including Secretary Ross and Commerce and Census Bureau officials, worked with individuals in the White House, including President Trump, and others outside of the administration to create and provide a citizenship redistricting dataset to the states because it would negatively affect the representation of Latinos, Asian Americans and non-U.S. citizens. FAC ¶¶ 1-2, 46-47, 49, 73-74, 80-83. Defendants carried out overt acts in furtherance of this conspiracy, from the collection of citizenship and immigration administrative records, to the effort to add a citizenship question to the decennial census, to the most recent executive order and implementing actions. FAC ¶¶ 54-56, 58-65, 73-78, 85.

Contrary to Defendants' claim, MTD at 40-41, Plaintiffs allege more than the existence of the Hofeller Study. Plaintiffs' First Amended Complaint also includes allegations regarding: 1) Mr. Kobach's involvement early in 2017 in persuading the Commerce Department to add a Census citizenship question to 2020 Census, FAC ¶ 74; 2) Secretary Ross's request that Commerce research excluding immigrants from apportionment, *id.*; 3) The involvement of Dr.

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damages and injunctive relief, the Fifth Circuit did not address the plaintiffs' request for injunctive relief.

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Hofeller and Mr. Neuman in drafting the DOJ Letter requesting a citizenship question for pretextual reasons, FAC ¶ 82; 4) Secretary Ross's decision to add a citizenship question to the 2020 Census notwithstanding the Bureau's recommendations to the contrary, FAC ¶ 76; and 5) statements by Defendants, President Trump, and Attorney General William Bar in July 2019 admitting that, after more than a year of hiding their true purpose and consistent with the Hofeller Study, that found that using CVAP would diminish the political power of minority groups, Defendants were in fact moving forward to create and give states citizenship data for use in redistricting and apportionment, FAC ¶¶ 60-65.[18,19]

Plaintiffs' allegations are nothing like the allegations in the cases cited by Defendants. In *Simmons*, the Fourth Circuit provided examples of conclusory allegations of conspiracy, including cases where the "§ 1985(3) claim was essentially an afterthought with little more to support it than the respective racial identities of the individuals involved." 47 F.3d at 1377 (quoting *Gooden v. Howard Cnty.*, 954 F.2d 960, 969-70 (4th Cir. 1992)) (alteration omitted).[20] Here, Plaintiffs allege with specificity that Defendants conspired to create and provide citizenship data for use in redistricting and with the purpose of discriminating against Latinos, Asian Americans and others.

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[18] In *LUPE I*, the U.S. District Court for the District of Maryland held that plaintiffs pleaded sufficient facts to state a claim for conspiracy by defendants to violate plaintiffs' constitutional rights. *LUPE I*, 353 F. Supp. 3d at 397-98. Notably, this was before Dr. Hofeller's study became public, and before Defendants and President Trump admitted their true purpose for collecting and reporting citizenship data in July 2019.

[19] Defendants argue that some of the conspirators were only involved with the citizenship question. MTD at 42. But there is no requirement that all conspirators be involved at every step of the conspiracy. Instead, *Simmons* requires only that conspirators have a meeting of the minds (here, to use citizenship data in redistricting to reduce the political power of Latinos and other groups), and that they commit an overt act in furtherance of the conspiracy. 47 F.3d at 1376. Plaintiffs allege that Dr. Hofeller, Mr. Kobach, Mr. Neuman, AG Sessions, Secretary Ross, among others, committed such overt acts.

[20] It was also uncontested in *Simmons* that one of the alleged conspirators had acted on his own. *Simmons,* 47 F.3d at 1377-78.

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Hinkle v. City of Clarksburg, West Virginia, also cited by Defendants, involved not a motion to dismiss, but a summary judgment motion where defendants had proffered evidence that contradicted plaintiffs' allegations. 81 F.3d 416, 241-43 (1996). And, unlike the claims in *Hinkle*, Plaintiffs' allegations here are not "rank speculation and conjecture," MTD at 44, but are instead supported by allegations related to documents released in connection with the citizenship question cases, FAC ¶¶ 55-56. Plaintiffs further alleged facts connected to the Hofeller Study and other documents evidencing the important roles played by Dr. Hofeller and Mr. Neuman in the conspiracy. *See* FAC ¶¶ 79-83.

D. The Intracorporate-Conspiracy Doctrine Does Not Apply in this Case

Defendants erroneously argue that the intracorporate-conspiracy doctrine, an antitrust principle that provides that "there is no unlawful conspiracy where officers within a single corporate entity consult among themselves and then adopt a policy for the entity." *Ziglar*, 137 S. Ct. at 1867, applies in this case, MTD at 43-44. Plaintiffs here allege a conspiracy between private parties and individuals working for different state and federal governments. *See* FAC ¶¶ 73-84; *see also Ziglar*, 137 S. Ct. at 1867 (in discussing whether intracorporate-conspiracy doctrine applies to civil rights suits, focusing on whether officers were members of the same department, not members of the same branch of government).[21] Further, "[i]ndividuals are not immune from liability under [§] 1985(3) merely because the same corporation employs them," and they remain liable for their "unauthorized acts in furtherance of [the] conspiracy[.]" *Hodgin v. Jefferson*, 446 F. Supp. 804, 807 (D. Md. 1978); *see also Buschi v. Kirven*, 775 F.2d 1240,

[21] To the extent there is a question of fact as to whether Commerce and DOJ officials are part of the same governmental body, this does not defeat Plaintiffs' claim at the motion to dismiss stage. *Kronberg v. LaRouche*, No. 1:09-CV-947-AJT/TRJ, 2010 WL 1443898, at *8 (E.D. Va. Apr. 9, 2010) (denying defendants' motion to dismiss where there was a question of fact as to whether the intracorporate-conspiracy doctrine applied).

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1251-53 (4th Cir. 1985) (same). Plaintiffs alleged that the conspirators took steps to disadvantage Latinos, Asian Americans, and non-U.S. Citizens individuals in violation of their right to equal protection, and Defendants' acts were therefore unauthorized.[22]

Even though the Supreme Court did not decide the issue, it acknowledged in *Ziglar* that it "has not given its approval to [the intracorporate-conspiracy] doctrine in the specific context of § 1985(3)," and that "[t]here is a division in the courts of appeals . . . respecting the validity or correctness of the intracorporate-conspiracy doctrine with reference to § 1985 conspiracies." 137 S. Ct. at 1868. The Court should thus further decline to dismiss Plaintiffs' § 1985(3) claim on the basis of unsettled law. *Wright*, 787 F.3d at 263 (holding that the fact that a plaintiff's claim does "not fall within the four corners of . . . prior case law . . . does not justify dismissal under Rule 12(b)(6)," and that dismissal in these circumstances is "especially disfavored") (internal quotation marks omitted). Indeed, Plaintiffs here "should be given an opportunity to develop evidence before the merits are resolved." *Id.* (internal quotation marks omitted).

[22] Moreover, to the extent there is a question as to whether an exception to the intracorporate-conspiracy doctrine applies under the facts of this case, such a question requires denial of Defendants' Motion to Dismiss. *Bell v. City of Roanoke Sheriff's Office*, No. 7:09-cv-214, 2009 WL 5083459, at *4 (W.D. Va. Dec. 23, 2009) ("Because the applicability of the exceptions to intracorporate immunity entail a factual inquiry, the court will deny the defendants' motion to dismiss").

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Dated: January 9, 2020

Respectfully submitted,

By /s/ Terry Ao Minnis

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° *Not admitted in DC.*

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CERTIFICATE OF SERVICE

I certify that on this 9th day of January, 2020, I caused a copy of Plaintiffs' Response to Defendants' Motion to Dismiss to be sent to all parties receiving CM/ECT notices in this case.

/s/ Terry Ao Minnis
Terry Ao Minnis

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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).

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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

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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

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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).

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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

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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).

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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.

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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.

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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?

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[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).

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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

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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.

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[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.").

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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

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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

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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

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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),

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[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.

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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.

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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.

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[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)).

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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.

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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.

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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

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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-

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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.

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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.*

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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

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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.

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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."

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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).

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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.

---

[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.

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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

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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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DATED: February 6, 2020

Respectfully submitted,

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From: Cannon, Michael (Federal) [MCannon@doc.gov]
Sent: 7/8/2020 8:25:54 PM
To: Brebbia, Sean (Federal) [SBrebbia@doc.gov]; Melissa L Creech (CENSUS/PCO FED) [Melissa.L.Creech@census.gov]; Davis, Caitlin (Federal) [CDavis4@doc.gov]; DiGiacomo, Brian (Federal) [bDiGiaco@doc.gov]; Heller, Megan (Federal) [MHeller@doc.gov]; Nowell, Laura (Federal) [LNowell@doc.gov]; Olson, Stephanie (Federal) [SOlson@doc.gov]; Miles F Ryan III (CENSUS/PCO FED) [Miles.F.Ryan.III@census.gov]; Sharma, Sapna (Federal) [SSharma@doc.gov]; Zimmerman, Paul (Federal) [PZimmerman@doc.gov]
Subject: LUPE II Material
Attachments: (b) (5) [redacted]

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(b) (5) [redacted]

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CC: Ron S Jarmin (CENSUS/DEPDIR FED) [Ron.S.Jarmin@census.gov]
Subject: Fwd: Responses to RFAs
Attachments: Response to MALDEF's RFAs 7-2-20.docx; ATT00001.htm

(b) (5) [redacted]

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Date: July 17, 2020 at 6:15:17 PM EDT
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CC: John Maron Abowd (CENSUS/ADRM FED) [john.maron.abowd@census.gov]
Subject: Re: Need assistance
Attachments: 20200903 Overview Process to DOC FINAL.pdf; 20200903 Overview Process to DOC FINAL.pptx

I think so, this is what we have.

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From: Victoria Velkoff (CENSUS/ADDP FED) <Victoria.A.Velkoff@census.gov>
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Cc: John Maron Abowd (CENSUS/ADRM FED) <john.maron.abowd@census.gov>
Subject: Need assistance

Do either of you have the final version of the slides that John and I presented to the secretary and the dep sec for August 31 and September 3?

Thanks

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Subject: Fw: 2020 Census Risk and Issue Deliverables for GAO & OIG - August 2020
Attachments: 2020 Census Portfolio Risk and Issue Documents August 2020 GAO.zip; 2020 Census Program Risk and Issue Documents August 2020 GAO.zip; 2020 Census Program Risk and Issue Registers August 2020 OIG.zip

Good morning Jim,

Attached are the files (risk registers) for delivery to OIG and GAO. Please, let us know if/when ready to send out. Holding off for now.

Thanks, Sara

Sara A. Rosario Nieves
Chief, Strategic Planning and Portfolio Management | Decennial
U.S. Census Bureau | Office 301.763.2941 | Room (b) (6) | Cell: (b) (6)
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Cc: Deidre C Hicks (CENSUS/DCMD FED) <Deidre.C.Hicks@census.gov>
Subject: 2020 Census Risk and Issue Deliverables for GAO & OIG - August 2020

Sara and Britney,

Attached are two zip files containing the risk and issue related documents for GAO for both the 2020 Census portfolio and program levels. Also attached is the program level risk and issue registers for OIG.

Let me know if there are any questions.

Thank you.

Michael Niosi, 2020 Census Risk and Issue Process Manager
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Subject: Fwd: SDNY Opinion/Order from 3-judge court
Attachments: Census (SDNY) - Opinion and Order.pdf; ATT00001.htm; 165 - Court's Final Judgment and Injunction - NY v. Trump (10 Sept 2020).pdf; ATT00002.htm

(b) (5)

[redacted]


(b) (5)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al.,	:	
Plaintiffs,	:	20-CV-5770 (RCW) (PWH) (JMF)
-v-	:	OPINION AND ORDER
DONALD J. TRUMP, *in his official capacity as President of the United States*, et al.,	:	
Defendants.	:	

Before: RICHARD C. WESLEY, United States Circuit Judge
PETER W. HALL, United States Circuit Judge
JESSE M. FURMAN, United States District Judge

PER CURIAM.

The Constitution provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2. To enable that apportionment, it mandates that an "actual Enumeration" be conducted "every . . . ten Years, in such Manner as [Congress] shall by Law direct," an effort commonly known as the decennial census. *Id.* art. I, § 2, cl. 3. Congress has delegated the task of conducting the census to the Secretary of Commerce, who is required to

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report "[t]he tabulation of total population by States" to the President. 13 U.S.C. § 141(a)-(b). The President, in turn, is required to transmit to Congress "a statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population, and the number of Representatives to which each State would be entitled" using a mathematical formula "known as the method of equal proportions." 2 U.S.C. § 2a(a). Throughout the Nation's history, the figures used to determine the apportionment of Congress — in the language of the current statutes, the "total population" and the "whole number of persons" in each State — have included every person residing in the United States at the time of the census, whether citizen or non-citizen and whether living here with legal status or without.

On July 21, 2020, however, the President announced that this long-standing practice will no longer be the case. In a Presidential Memorandum issued on that date (and entered into the Federal Register two days later), the President declared that, "[f]or the purpose of the reapportionment of Representatives following the 2020 census" — which, as of today, is still ongoing — "it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status." Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020) (ECF No. 1-1) (the "Presidential Memorandum").[1] To implement this new policy, the President ordered the Secretary of Commerce (the "Secretary") to provide him two sets of numbers for each State: first, the total population as determined in the 2020 census and, second, the total population as determined in the 2020 census minus the number of "aliens who are not in a lawful immigration status." *Id.* The President left it to the Secretary of Commerce to figure out how to calculate the number of "aliens who are not in a lawful immigration status" in each State. But one thing is

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[1] Unless otherwise noted, all docket references are to 20-CV-5770.

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clear: that number would not come from the census itself, as the 2020 census is not collecting information regarding citizenship status, let alone legal immigration status in this country, and the 2020 census will count illegal aliens according to where they reside.

In these consolidated cases, filed only three days after the Presidential Memorandum, two sets of Plaintiffs — one, a coalition of twenty-two States and the District of Columbia, fifteen cities and counties, and the United States Conference of Mayors (the "Governmental Plaintiffs") and the other, a coalition of non-governmental organizations (the "NGO Plaintiffs") — challenge the decision to exclude illegal aliens from the apportionment base for Congress on the ground that it violates the Constitution, statutes governing the census and apportionment, and other laws. On August 7, 2020, they filed a motion for summary judgment or, in the alternative, a preliminary injunction. Plaintiffs allege that the Presidential Memorandum will cause, or is already causing, two forms of irreparable harm. First, noting that the Presidential Memorandum itself identifies a State — believed to be California — that would stand to lose two or three seats in the House of Representatives if illegal aliens are excluded from the apportionment base, they argue that the Memorandum will result in the loss of seats in the House. Second, they argue that the Presidential Memorandum is having an immediate impact on the census count — which is still ongoing — and that that, in turn, is resulting, and will result, in various forms of injury. Defendants — the President, Secretary of Commerce Wilber L. Ross, Jr., Director of the U.S. Census Bureau Steven Dillingham (the "Director"), the United States Department of Commerce (the "Department"), and the Bureau of the Census (the "Census Bureau") — oppose Plaintiffs' motion and filed a cross-motion to dismiss, arguing that the Court lacks jurisdiction to entertain Plaintiffs' claims and that the exclusion of illegal aliens from the apportionment base is a lawful

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exercise of the President's discretion with respect to the conduct of the census and apportionment.

For the reasons that follow, Plaintiffs are entitled to summary judgment. The Presidential Memorandum violates the statutes governing the census and apportionment in two clear respects. First, pursuant to the virtually automatic scheme established by these interlocking statutes, the Secretary is mandated to report a single set of numbers — "[t]he tabulation of total population by States" under the decennial census — to the President, and the President, in turn, is required to use the same set of numbers in connection with apportionment. By directing the Secretary to provide two sets of numbers, one derived from the decennial census and one not, and announcing that it is the policy of the United States to use the latter in connection with apportionment, the Presidential Memorandum deviates from, and thus violates, the statutory scheme. Second, the Presidential Memorandum violates the statute governing apportionment because, so long as they reside in the United States, illegal aliens qualify as "persons in" a "State" as Congress used those words.

On those bases, we declare the Presidential Memorandum to be an unlawful exercise of the authority granted to the President by statute and enjoin Defendants — but not the President himself — from including in the Secretary's report to the President any information concerning the number of aliens in each State "who are not in a lawful immigration status under the Immigration and Nationality Act." Presidential Memorandum, 85 Fed. Reg. at 44,680. Because the President exceeded the authority granted to him by Congress by statute, we need not, and do not, reach the overlapping, albeit distinct, question of whether the Presidential Memorandum constitutes a violation of the Constitution itself.

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The merits of the parties' dispute are not particularly close or complicated. Before getting to the merits, however, we must confront a question that is closer: whether we have jurisdiction to even consider the merits.

It is axiomatic that federal courts are courts of limited jurisdiction and may consider the merits of a case only if the case is of the sort traditionally amenable to, and resolvable by, the judicial process. That requires a plaintiff seeking relief in federal court to demonstrate that it has "standing" to bring suit and that its claims are ripe for decision. Here, if the sole harm that Plaintiffs alleged were the harm to their apportionment interests, they might not satisfy the requirements of standing and ripeness, as the Secretary has not yet taken any public action in response to the Presidential Memorandum and could conceivably conclude that it is not feasible (or lawful) to exclude illegal aliens from the apportionment base. But Plaintiffs allege — and have proved — that they are suffering, and will suffer, more immediate and certain injuries by virtue of the harm that the Presidential Memorandum is causing to the accuracy of the census count itself. In light of those injuries, we conclude that we have jurisdiction to grant Plaintiffs the relief they are seeking.

BACKGROUND

The following background facts, drawn from the admissible materials submitted by the parties and materials of which the Court may take judicial notice, are undisputed except where noted. *See, e.g.*, *Vt. Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004).[2]

A. The Constitutional and Statutory Scheme

Article I of the Constitution requires that an "actual Enumeration" of the population, known as the decennial census, be conducted "every . . . ten Years, in such Manner as [Congress]

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[2] We discuss facts relevant to the issues of standing and ripeness below.

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shall by Law direct." U.S. Const. art I, § 2, cl. 3. The primary purpose of this enumeration was to apportion congressional representatives among the States "according to their respective Numbers." *Id.* The number of Representatives apportioned to each State determines, in turn, that State's share of electors in the Electoral College. *See id.* art. II, § 1, cl. 2; *see also* 3 U.S.C. § 3. For the first eighty years of the Nation's history, the States' "respective Numbers" were calculated according to the formula set forth in the Constitution's infamous "Three-Fifths Clause," which provided that the "actual Enumeration" established by the census would be arrived at by "adding to the whole Number of free Persons . . . , and excluding Indians not taxed, three fifths of all other Persons" — "all other Persons" being people then held as slaves. U.S. Const. art I, § 2, cl. 3. In 1868, that provision was modified by the Fourteenth Amendment, which provides that "Representatives shall be apportioned among the several States according to their respective numbers, *counting the whole number of persons in each State*, excluding Indians not taxed." U.S. Const. amend. XIV, § 2 (emphasis added).[3]

The modern census is governed by the Census Act, which Congress most recently amended in 1976. *See* Act. of Oct. 17, 1976 (the "Census Act" or the "Act"), Pub. L. No. 94-521, 90 Stat. 2459 (codified in scattered sections of 13 U.S.C.). Section 141(a) of the Act broadly delegates to the Secretary the duty to "take a decennial census of population as of the first day of April of such year . . . in such form and content as he may determine." 13 U.S.C. § 141(a). The Act then mandates that "[t]he tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date" — in this

[3] For practical purposes, the "Indians not taxed" proviso was rendered moot by the Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)), which declared that all Native Americans born in the United States are citizens.

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case, January 1, 2021 — "and reported by the Secretary to the President of the United States." *Id.* § 141(b). Within a short time thereafter — in this case, between January 3 and January 10, 2021 — "the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the . . . decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member." 2 U.S.C. § 2a(a). The Clerk of the House of Representatives must, in turn, "send to the executive of each State a certificate of the number of Representatives to which such State is entitled" within fifteen days of the President's statement. *Id.* § 2a(b). With limited exceptions not relevant here, the Census Act strictly prohibits disclosure — even to other federal agencies — of any data or information concerning individual respondents to the census. *See* 13 U.S.C. §§ 8-9; *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 523 (S.D.N.Y.), *aff'd*, 139 S. Ct. 2551 (2019).

B. The Use of Census Data

Although the "initial" — and core — "constitutional purpose" of the census was to "provide a basis for apportioning representatives among the states in the Congress" (and, in turn, allocating members of the Electoral College), the census has long "fulfill[ed] many important and valuable functions for the benefit of the country." *Baldrige v. Shapiro*, 455 U.S. 345, 353 (1982). As the Supreme Court has observed, it "now serves as a linchpin of the federal statistical system by collecting data on the characteristics of individuals, households, and housing units throughout the country." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 341 (1999) (internal quotation marks and citation omitted). Indeed, "[t]oday, policy makers at all levels of government, as well as private businesses, households, researchers, and nonprofit

organizations, rely on an accurate census in myriad ways that range far beyond the single fact of how many people live in each state." *New York v. Dep't of Commerce*, 351 F. Supp. 3d at 519 (citation omitted). Among other things, the data are now used not only for apportionment, but also "for such varied purposes as computing federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies." *Baldrige*, 455 U.S. at 353 n.9.

In *New York v. Department of Commerce*, the court described many of the varied uses beyond congressional apportionment to which the federal, state, and local governments put census data, which Plaintiffs reiterate in this case. *See* 351 F. Supp. 3d at 596-99, 610-13. To provide a few examples here:

- The federal government relies on census data to allocate vast sums of money among and within States. In fiscal year 2016, for example, at least 320 such programs allocated about $900 billion using census-derived data. *See id.* at 596.

- State governments — including those among the Governmental Plaintiffs here — mandate the use of census data to draw intrastate political districts. *See id.* at 594-95, 612; *House of Representatives*, 525 U.S. at 333 n.4, 334; *see also, e.g.*, ECF No. 76-11 ("Brower Decl."), ¶ 16-18 (Minnesota); ECF No. 76-37 ("Rapoza Decl."), ¶ 5 (Rhode Island).

- State law requires the use of census data for various purposes, ranging from the allocation of governmental resources and imposition of expenses among local governments to the setting of utility fees and official salaries. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d at 612-13 (citing various state statutes).

- State and local governments — including those among the Governmental Plaintiffs here — rely on census data, including granular local-level "characteristic data," to perform essential government functions. New York City, for example, makes important decisions about how to allocate public services in reliance on demographic data derived from the census, as when its Department of Education redraws school zone boundary lines, ECF No. 76-21, ("Salvo Decl."), ¶ 15; when its Department of Health deploys resources based on its best understanding of the age, race, and Hispanic origin characteristics within particular communities, *id.* ¶ 14; and when its Population Division uses age data to target services for aged individuals, *id.* ¶ 16.

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Thus, inaccuracies in federal census data would affect state and local governments — and, by extension, their residents — in many ways, only some of which would be measurable. Critically, in many instances, that would be true even if the total population counts were not materially affected — because of the importance of accuracy at the local or subgroup level.[4]

C. The Citizenship Question Litigation and Its Aftermath

This is not the first time issues relating to the 2020 census have been brought in this District. On March 22, 2018, the Secretary announced that he had decided to include "a question about citizenship on the 2020 decennial census questionnaire," claiming "that he was acting at the request of the Department of Justice (DOJ), which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2562 (2019). Shortly thereafter, two groups of plaintiffs — including most, if not all, Plaintiffs here — filed suit in this District, alleging that the decision to include the citizenship question violated the Constitution and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.* On January 15, 2019, after an eight-day bench trial, Judge Furman issued detailed findings of fact and conclusions of law, holding that the Secretary's decision was arbitrary and capricious, contrary to law, and pretextual. *New York v. Dep't of*

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[4] Although less relevant here, accurate census data is also critical to others, including scholars and private-sector businesses. *See, e.g.*, Br. of *Amici Curiae* 16 Businesses & Business Organizations at 3, ECF No. 103-1 ("Businesses Amicus") ("The Census provides critical data that informs decision-making in both the private and public sectors. . . . Consequently, government action that threatens the accuracy of Census data directly harms the businesses nationwide that rely on that data."); MARGO J. ANDERSON, THE AMERICAN CENSUS: A SOCIAL HISTORY 260-61 (2d ed. 2015) (describing how "[s]ocial scientists in university settings, in businesses, or in stand-alone research organization [have become] the market" for census data in the modern era). For instance, businesses rely on census data "to make a variety of decisions, including where to put new brick-and-mortar locations, how to market their products, and how to predict which products will be successful in a given market. . . . All of these things depend on the availability of accurate Census data." Businesses Amicus 2.

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