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*.	**Civil Action No. 8:18-cv-01570-GJH**

PLAINTIFFS' MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

INTRODUCTION

Defendant Secretary of Commerce, in concert with the White House, the Department of Justice ("DOJ"), and the Kansas Secretary of State, and with intent to harm immigrants, particularly immigrants of color and their communities, disregarded decades of tested practice and internal Census Bureau expertise to question every resident of this country regarding their citizenship. Unless this Court enjoins their plan, those actors will obtain the predicted result, and Plaintiffs will be injured representationally and economically. Defendant Secretary Ross used the DOJ to provide pretextual cover for his decision to add a citizenship question to the 2020 Census, in the process violating statutory and constitutional law. Defendants move to dismiss this action for lack of standing and failure to state a claim. At this stage of the proceedings, Plaintiffs provide specific factual allegations that the inclusion of a citizenship question creates a substantial risk of a disproportionate undercount that will harm them and the communities they live in and serve. Defendants raise arguments that have been squarely rejected by this Court and by courts in four other cases challenging the same conduct. Defendants' arguments attacking Plaintiffs' additional claims of intentional discrimination and conspiracy are equally without merit.

BACKGROUND

In accordance with the Court's order of August 22, 2018, ECF No. 52, Plaintiffs respectfully refer the Court to and adopt the "Background" section (pp. 2-12) of the plaintiffs' memorandum of law in opposition to Defendants' motion to dismiss in *Kravitz v. U.S. Department of Commerce*, No. 18-cv-1041 (D. Md. June 22, 2018), ECF No. 29. The memorandum of law is attached for the Court's convenience. Specifically, Plaintiffs adopt the background setting forth the 1) The Constitutional, Statutory, and Regulatory Framework

Governing the Decennial Census; 2) The Census Bureau's Extensive Preparations for the 2020 Census Without a Citizenship Question; 3) The Trump Administration Uses the 2020 Census for Political Purposes; 4) The Ross Memo's Pretextual and Arbitrary Justifications for Including a Citizenship Question; and 5) A Citizenship Question Will Result in a Disproportionate Undercount, Thereby Harming Plaintiffs.

ARGUMENT

Ashcroft v. Iqbal, 556 U.S. 662 (2009) requires that a complaint "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (citations omitted). Federal Rule of Civil Procedure 12(b)(6) jurisprudence requires this Court view the allegations through a "forgiving lens," accepting the facts alleged as true and construing the pleadings in the light most favorable to the party opposing the motion. *Wright v. North Carolina*, 787 F.3d 256, 265 (4th Cir. 2015) (Fourteenth Amendment redistricting challenge stated a plausible claim for which relief could be granted). Rule 12(b)(6) dismissals "are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development." *Id*. at 263 (citations omitted).

Plaintiffs' complaint sets forth factual allegations sufficient to state plausible claims under the Enumeration Clause, the Administrative Procedure Act, the Fifth Amendment to the Constitution, and 42 U.S.C. §1985(3).

I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE.

A. Plaintiffs Have Article III Standing to Challenge the Secretary's Decision to Add a Citizenship Question to the 2020 Decennial Census Short Form.

In order to satisfy constitutional standing requirements, Plaintiffs must allege: "(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 v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

1. Individual Plaintiffs Allege Sufficient Injury-in-Fact.[1]

"To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Wikimedia Found.*, 857 F.3d at 207 (internal citations omitted). An allegation of future injury suffices where the "threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Clapper v. Amnesty Int'l*, 568 U.S. 398, 409, 414 n.5 (2013)); *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 332 (1999) (finding that plaintiffs challenging a proposed census procedure had met the injury in fact requirement based on the "threat of vote dilution," and noting that delaying consideration of plaintiffs' claims "would result in extreme—possibly irremediable—hardship.").

Plaintiffs plausibly allege that there is a substantial risk that their communities will be deprived of representation in congressional, state, and local governing bodies as a result of the "disproportionate undercount" of their population "relative to the rest of the country." First Amended Complaint, ECF No. 42, (hereinafter, "FAC") ¶¶ 4, 9, 14, 19, 23, 27, 32, 37, 42, 47, 52, 56, 60, 65, 70, 75, 79, 88, 92, 96, 101, 107, 112, 116, 124-130, 260-69, 271, 274, 276, 282,

[1] In accordance with the Court's order of August 22, 2018, ECF No. 52, Plaintiffs respectfully request that the Court reference and adopt the arguments contained in the "Plaintiffs Have Article III Standing to Challenge the Secretary's Unlawful Determination to Insert a Citizenship Question Into the 2020 Census Questionnaire" section (pp. 13-23) of the plaintiffs' memorandum of law in opposition to Defendants' motion to dismiss in *Kravitz*, ECF No. 29, and this Court's order in *Kravitz*, dated August 22, 2018, denying the Defendants' motion to dismiss. *Kravitz v. U.S. Dep't of Commerce*, No. GJH-18-1041, 2018 WL 4005229, at *5-7 (D. Md. Aug. 22, 2018).

285, 291, 294, 297, 300, 301, 304, 312, 314, 318, 323, 325, 328, 336, 349, 350, 353, 355, & 357-361; *see also U.S. House of Representatives*, 525 U.S. at 330-34; *Glavin v. Clinton*, 19 F. Supp. 2d 543, 550 (E.D. Va. 1998); *Gill v. Whitford*, 138 S.Ct. 1916, 1922 (2018). In particular, Plaintiffs plausibly allege an undercount will result in malapportioned legislative districts, and dilution of voting strength and diminished ability to elect candidates of choice in their states and localities. FAC ¶¶ 276, 294, 297, 301, 304, 312, 314, 318, 323, 325, 336, 349 & 363. Moreover, Plaintiffs allege they will suffer harm via loss of federal funding to their states and localities resulting from a census undercount. *Id*. ¶¶ 5, 10, 15, 20, 33, 38, 43, 48, 53, 57, 61, 66, 71, 76, 80, 85, 89, 97, 102, 108, 113, 117, 122, 139-41, 277, 295, 298, 306, 311, 316, 319, 322, 326, 337, 341, 344, 362 & 368; *see also Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980); *Glavin*, 19 F. Supp. 2d at 550; *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980).

Defendants standing arguments—that these injuries are attenuated and speculative—were recently rejected by this Court and by two other district courts.[2] In *Kravitz*, this Court found that individual plaintiffs plausibly alleged standing under Article III to challenge Defendants' decision to include a citizenship question in the 2020 Census, based on allegations regarding representational and economic losses similar to those pled by the *LUPE* plaintiffs. 2018 WL 4005229, at *5-9; *see* citations to LUPE Plaintiffs' First Amended Complaint, above.

Defendants argue, ironically enough, that their conjecture that either the federal government or individual states might re-allocate funds to offset the effect of the undercount renders the injury to individual plaintiffs too speculative. Defendants' memorandum in support of motion to dismiss ("Defs.' Mem."), dated August 24, 2018, ECF No. 54-1, at 4-6. Defendants may support that theory with evidence at trial. For now, as did the individual plaintiffs in

[2] *See, State of New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766 (S.D.N.Y. 2018); *California, et al. v. Ross, et al.*, 18-cv-1865 (N.D. Cal. Aug. 17, 2018), ECF No. 75.

Kravitz and in *Carey*, Plaintiffs here allege "concrete harm in the form of dilution of their votes and decreased federal funds flowing to their city and state, thus establishing their standing." *Carey*, 637 F.2d at 838.

Defendants argue that two additional orders, entered in federal courts in California and in New York, denying motions to dismiss for lack of standing on allegations similar to this case, are nonetheless not instructive. Defs.' Mem. at 5-6. Judge Furman of the Southern District of New York found in favor of plaintiffs because, according to Defendants "he was, at least in part, bound by Second Circuit precedent, which does not bind this Court." *Id*. at 5; *New York*, 315 F. Supp. 3d at 774 (stating that Supreme Court and Second Circuit "precedent makes clear that, while deference is certainly owed to the Secretary's decisions, courts have a critical role to play in entertaining challenges like those raised by Plaintiffs"). Presumably, the Second Circuit law to which Defendants refer to is *Carey*, 637 F.2d at 838, relied on not only by Judge Furman but by this Court as well in its discussion of individual standing, along with *City of Philadelphia*, 503 F. Supp. at 672, and *U.S. House of Representatives*, 525 U.S. at 331–32. *Kravitz*, 2018 WL 4005229, at *6-7. Defendants provide no Fourth Circuit law to the contrary.

Defendants also argue that Judge Seeborg's order, *see California, et al. v. Ross, et al.*, 18-cv-1865 (N.D. Cal. Aug. 17, 2018), ECF No. 75, is not instructive because, according to Defendants, he "improperly conflated the alleged decline in initial self-response rate with the possibility of an ultimate undercount in concluding that certain states, cities, and organizations will sustain a nonspeculative injury in fact." Defs.' Mem. at 5. Indeed, the relationship between who actually responds (self-response rate) and the undercount (the ultimate failure to include in total counts even after follow-up efforts) will be a subject for expert testimony. However, all that is required at this stage is whether Plaintiffs adequately plead a disparate undercount that

results in injuries, and Plaintiffs have done exactly that. FAC ¶¶ 260-69.

2. Individual Plaintiffs' Injuries are Fairly Traceable to Defendants' Actions.

On this point, Defendants refer this Court to their memorandum of law in support of their motions to dismiss in *Kravitz*, where they argue that the alleged harms depend upon "the intervening acts of third parties violating a clear legal duty to participate in the decennial census" and are therefore not "fairly traceable" to the Secretary's decision to insert the citizenship question into the 2020 questionnaire. Defendants' Memorandum in Support of Motion to Dismiss ("Defs.' *Kravitz* Mem."), *Kravitz v. U.S. Dep't of Commerce*, No. 18-cv-1041 (D.Md. Jun. 6, 2018), ECF No. 24-1, at 21-22. This Court rejected Defendants' argument in *Kravitz*, and for the same reasons, should do so here. *See*, *Kravitz*, 2018 WL 4005229, at *8-9.

3. Organizational Plaintiffs Have Standing.

Organizations allege standing based on two different theories: (1) representational standing, where the injury is to the organization's members, *Am. Humanist Ass'n v. Maryland-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195, 203–04 (4th Cir. 2017) (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)); *ACLU of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 429 (6th Cir. 2011); and (2) direct organizational standing, where the injury is to the organization itself, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 458 (4th Cir. 2005) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

a. Organizational Plaintiffs Allege Sufficient Facts to Establish Standing to Sue on Behalf of Their Members.

A plaintiff organization has representational standing and can sue on behalf of its members if it shows that: "(a) its members would otherwise have standing to sue in their own

right; (b) the interests it seeks 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*, 432 U.S. at 343.

Organizational Plaintiffs with members[3] ("Membership Plaintiffs") satisfy the *Hunt* requirements for representational standing because (1) at least one of their respective members would otherwise have standing to sue in their own right,[4] FAC ¶¶ 4-5, 23, 27-28, 32-33, 37-38, 42-43, 46-47, 52-53, 56-57, 60-61, 65-66, 75-76, 84-85,107-08, 112-113, 124, 274-277, 282-83, 285, 290, 294-98, 303-306, 308-12, 314-16, 328-29, 331, 335-37, 343-44, 353-54 & 362-63; (2) the interests Membership Plaintiffs seek to protect are germane to their purpose, *id*. ¶ 3, 22, 26, 31, 36, 41, 45, 51, 55, 59, 64, 74, 83, 106 & 111; and (3) neither the claim asserted nor the relief requested requires the participation of the individual members in this lawsuit, *Hunt*, 432 U.S. at 343.

Defendants' complaint here—that only one Organizational Plaintiff (LUPE) adequately identifies a member by name[5]—is also a concession that the first *Hunt* requirement has been met with regard to Plaintiff LUPE. Defs.' Mem. at 8. Defendants do not contest that Membership

[3] Plaintiffs assert representational organizational standing on behalf of the following eight Organizational Plaintiffs with members and seven legislative caucuses: La Unión Del Pueblo Entero ("LUPE"), FAC ¶¶ 3-8 & 328-331; Coalition For Humane Immigrant Rights ("CHIRLA"), *id*. ¶¶ 22-25, 282-284 & 294-295; Georgia Association of Latino Elected Officials ("GALEO"), *id*. ¶¶ 26-30 & 296-299; Labor Council For Latin American Advancement ("LCFLAA"), *id*. ¶¶ 31-35 & 343-349; Somos Un Pueblo Unido ("Somos"), *id*. ¶¶ 36-40 & 314-317; Promise Arizona ("Promise"), *id*. ¶¶ 64-68, 274-277 & 281; Chelsea Collaborative ("Chelsea"), *id*. ¶¶ 106-110 & 308-313; OCA-Greater Houston ("OCA-GH"), *id*. ¶¶ 111-114, 328-329, 332 & 336-337; Texas Senate Hispanic Caucus ("SHC"), *id*. ¶¶ 41-44 & 328-329, 334-337; Texas House of Representatives Mexican American Legislative Caucus ("MALC"), *id*. ¶¶ 45-50, 328-329, 333 & 335-337; Maryland Legislative Latino Caucus ("MLLC"), *id*. ¶¶ 83-86 & 303-307; Arizona Latino Legislative Caucus ("ALLC"), *id*. ¶¶ 74-77, 274-277 & 279; California Latino Legislative Caucus ("CLLC"), *id*. ¶¶ 51-54, 287, 289-290 & 294-295; California Asian Pacific Islander Legislative Caucus ("API Caucus"), *id*. ¶¶ 59-63, 285-286, 289-290 & 294-295; and California Legislative Black Caucus ("CLBC"), *id*. ¶¶ 55-58, 285, 288-290 & 294-295.

[4] Individual members of Organizational Plaintiffs with members also meet the injury in fact for individual plaintiffs as discussed *supra* in sections I.A.1 and 2.

[5] Defendants claim that this member, Ms. Valdez-Cox, alleges claims that are too attenuated for Article III standing. This is incorrect. *See supra* section I.A.1.

Plaintiffs adequately allege the remaining two *Hunt* requirements – that the interests they seek to protect are germane to their purpose, and that neither the claim asserted nor the relief requested requires the participation of the individual members in this lawsuit. *See generally* Defs.' Mem. at 7-8. After finding at least one plaintiff has standing, the Court need not determine if each plaintiff has standing. *Bostic v. Schaefer,* 760 F.3d 352, 370 (4th Cir. 2014).[6]

Additionally, Defendants are wrong that the "associational standing requirement demands that the organization identify a particular member" by name at the motion to dismiss phase. Defs.' Mem. at 7. At the pleading stage, an association that brings suit on behalf of its members need only to "allege that one or more of its members has suffered a concrete and particularized injury" that is "actual and imminent," and fairly traceable to defendants conduct, and that the relief sought will redress the harm. *Bldg. & Const. Trades Council of Buffalo*, 448 F.3d 138, 144-45 (2d Cir. 2006). While defendants are correct that Membership Plaintiffs will have to establish that at least one identified member has suffered or will suffer harm, that showing is for the merits stage of the litigation and not required at this stage of the proceedings.[7] None of the cases that Defendants rely upon are to the contrary. In *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), after adjudication of the merits, the Court reversed entry of permanent injunction due to lack of evidence that plaintiffs had satisfied standing requirements. In *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-87 (1982), the Court granted summary judgment on the grounds that plaintiffs had failed to

[6] Defendants are also wrong that only one member in one organization has been identified by name. Plaintiff Oliver Semans is identified as the executive director of Plaintiff Four Directions. FAC ¶¶ 120-21 & 130. For the reasons set forth *supra* in sections I.A.1 and 2, Plaintiffs also sufficiently allege Article III standing.

[7] If the Court determines that it will aid the Court in its determination, Membership Plaintiffs are prepared to submit affidavits from specific identified members to further establish standing. *See Warth*, 422 U.S. at 501 (district court can allow or require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of facts deemed supportive of plaintiffs' standing).

establish standing, not because they did not identify specifically a member who has suffered or will suffer harm, but because although the plaintiffs claimed "that the Constitution has been violated, they claim[ed] nothing else" and "[t]hey fail[ed] to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by the observation of conduct which one disagrees." *American Chemistry Council v. Department of Transportation*, 468 F.3d 810 (2006), also does not stand for the proposition that Organizational Plaintiffs must identify a specific harmed member by name at the pleadings stage. There, the court found that despite having "had at least two opportunities to show standing for one of their members… the Court [was] still left to wonder who, if anybody, [had] suffered an injury-in-fact," and the plaintiffs were not "able to show how those comments evidence that at least one of their members [had] suffered an 'actual or imminent, not conjectural or hypothetical' injury because of this alleged regulatory void." *Id.* at 818-20 (citing *Lujan*, 504 U.S. at 560); *see also New York*, 315 F. Supp. 3d at 789 (finding that membership organizations have associational standing and "that both fiscal and representational injuries resulting from an alleged undercount are sufficient to support standing").

b. Organizational Plaintiffs Have Standing to Sue on Their Own Behalf.[8]

Defendants concede that Organizational Plaintiffs allege that a citizenship question will "frustrate their organizational missions" and that it will cause Organizational Plaintiffs to expend more resources to prevent a disproportionate undercount. Defs.' Mem. at 8-9; *see also*, *e.g.*,

[8] Plaintiffs assert organizational standing on behalf of all plaintiffs except for the following seven individual plaintiffs: Juanita Valdez-Cox, FAC ¶¶ 124 & 353-354; Oliver Semans, Sr., *id*. ¶¶ 130 & 361-362; Mia Gregerson, *id*. ¶¶ 126 & 357; Raj Mukherji, *id*. ¶¶ 129 & 360; Cindy Ryu, *id*. ¶¶ 127 & 358; Sharon Santos, *id*. ¶¶ 128 & 359; and Gene Wu, *id*. ¶¶ 125 & 355-356.

FAC ¶¶ 270-73, 278-81, 284, 286-90, 292-93, 299, 302, 307, 313, 317, 320, 324, 327, 330, 332-34, 342, 345, 347 & 351-52. Defendants nonetheless argue that these allegations are insufficient and manufactured to create standing through self-inflicted harm based on their fears of hypothetical future harm. Defs.' Mem. at 9. Defendants' arguments are supported neither by facts nor law.

Defendants' reliance on *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013) is misplaced because the alleged injuries in *Clapper* are distinguishable from those at issue in his case.[9] Here there is no guesswork as to the decisions and judgment of federal authorities; rather, the Secretary's decision has already been made. Furthermore, unlike the plaintiffs in *Clapper*, the Organizational Plaintiffs' alleged harms inevitably and imminently follow from the Secretary's unlawful decision to include a citizenship question in the 2020 decennial Census. For example, several Organizational Plaintiffs allege that they have already begun diverting resources because of the Defendant's decision to add a citizenship question to the Census, and that but for the addition of the citizenship question, these financial and organizational resources otherwise would be spent toward their core activities. *See, e.g.*, FAC ¶¶ 273, 278-81, 284, 286, 289, 293, 299, 302, 307, 313, 317, 320, 324, 327, 330, 332-34, 342, 347 & 352.

Furthermore, as Defendants admit, "the Fourth Circuit has interpreted a footnote in *Clapper* to allow standing where there is "'a 'substantial risk' that the harm will occur, which in turn may prompt a party to reasonably incur costs to mitigate or avoid that harm.'" Defs.' Mem. at 9 n. 4 (citing *Beck v. McDonald*, 848 F.3d 262, 275 (4th Cir. 2017), *cert. denied*, 137 S. Ct.

[9] In accordance with the Court's order of August 22, 2018, ECF No. 52, Plaintiffs respectfully refer the Court to and adopt the arguments contained in the Argument section I.B (pp. 21-23) of the Plaintiffs' memorandum of law in opposition to Defendants' motion to dismiss in *Kravitz*, ECF No. 29.

2307 (2017).[10]

Finally, Defendants argue that "Organizational Plaintiffs give no details about the size of the supposed resource diversion or about the effect of that diversion on their other activities." Defs.' Mem. at 9. Although Organizational Plaintiffs provide more than just conclusions about their harm, they are not required to prove the merits of their claim by providing Defendants with the evidence of their harm. *Havens*, 455 U.S. at 379 (finding that plaintiffs allegation that it "has had to devote significant resources to identify and counteract the defendant[s'] racially discriminatory steering practices" was sufficient to establish that the "organization has suffered injury in fact."); *see, e.g.*, FAC ¶¶ 284 ("CHIRLA will imminently divert resources away from other advocacy activity to secure more funding and resources for increased outreach and ensure an accurate count of hard-to-count populations in California"), 281, 293, 320, 330 & 352; *c.f.*, *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972) (finding that Sierra Club's alleged injury was merely a cognizable interest and not an "injury in fact").

Defendants insinuate that Organizational Plaintiffs' claims are similar to those in *S. Walk at Broadlands Homeowner's Association v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 183 (4th Cir. 2013), where the court found that plaintiffs lacked standing because "an injury to organizational purpose, without more, does not provide a basis for standing" and the plaintiff organization failed to allege that the challenged conduct "frustrate[d] its stated organizational purpose." Here Organizational Plaintiffs alleged exactly what plaintiffs failed to do in *S. Walk*—that the addition of the citizenship question frustrates their mission and will result in injury to

[10] *Lane v. Holder*, 703 F.3d 668, 675 (4th Cir. 2012), is also distinguishable. In *Lane*, individual and organizational plaintiffs brought a challenge to statutes governing the sale and transfer of guns. The *Lane* Court found that injuries to plaintiffs were not caused by regulatory gun sale laws that imposed fees, but by a third party store-owner's decision to close its doors. Here, the injuries follow inevitably from the application of the challenged conduct of Defendants—*i.e.*, Secretary Ross's decision to add a citizenship question—and not from the decisions made by third parties.

more than simply organizational purpose but to the operations of each Organizational Plaintiff and its ability to carry out their work. Not only will Organizational Plaintiffs be forced to divert scarce resources to mitigate the negative effects of the citizenship question, they also rely on the accuracy of decennial Census data. *See*, *e.g.*, FAC ¶¶ 3, 8, 13, 18, 22, 26, 31, 36, 41, 45, 51, 55, 59, 64, 76, 78, 83, 87, 91, 95, 100, 106, 111, 120, 270-73, 278-281, 284, 292-93, 299, 302, 307, 313, 317, 320, 324, 327, 330, 332-34, 345, 347 & 351-52. Organizational Plaintiffs face a "substantial risk" of harm if the accuracy of the Census count is compromised because of the addition of the citizenship question to the 2020 form, because Organizational Plaintiffs rely on Census data to ensure that services and activities are appropriately targeted to those communities most in need or for maximum effectiveness.

c. Legislative Caucus and Individual Legislator Plaintiffs Allege Sufficient Facts to Establish Standing.

Defendants' argument that Plaintiff legislative caucuses[11] and individual plaintiffs that are state legislators[12] lack standing to bring this suit in their capacity as legislators misses the mark because these plaintiffs do not assert standing based on their capacity as legislators. Rather, Plaintiffs that are legislative caucuses allege both direct organizational standing on their own behalf and associational standing on behalf of their members. *See* Argument sections I.A.3.a. and b. above. Individual Plaintiffs that are state legislators allege standing as individuals and do not allege standing based on their capacity as legislators. *See* Argument section I.A.1 and 2 above. Therefore, none of the cases cited by Defendants regarding legislative standing apply.

[11] Plaintiffs that are legislative caucuses include: SHC, FAC ¶¶ 41-44 & 328-329, 334-337; MALC, *id.* ¶¶ 45-50, 328-329, 333 & 335-337; MLLC, *id.* ¶¶ 83-86 & 303-307; ALLC, *id*. ¶¶ 74-77, 274-277 & 279; CLLC, *id*. ¶¶ 51-54, 287, 289-290 & 294-295; API Caucus, *id*. ¶¶ 59-63, 285-286, 289-290 & 294-295; and CLBC, *id*. ¶¶ 55-58, 285, 288-290 & 294-295.

[12] Individual plaintiffs that are also state legislators include Plaintiffs: Gregerson, Mukherji, Ryu, Santos, and Wu.

d. Organizational Plaintiffs Have Standing to Bring an Equal Protection Claim.

Defendants argue that Organizational Plaintiffs lack prudential standing because "the operative complaint does not allege that the Secretary intentionally discriminated against any of the Organizational Plaintiffs" specifically, and instead assert that the Complaint "alleges that the Secretary discriminated against *particular people*." Defs.' Mem. at 12 (emphasis in original). Defendants' argument fails because it mischaracterizes Plaintiffs' discrimination claim as relying exclusively on harm to third parties, and because it is unsupported by law.

First, Defendants do not argue that *individuals* do not have standing to bring an equal protection claim. Here, Membership Plaintiffs assert associational standing to challenge the impact of the discriminatory and unconstitutional conduct on behalf of their members—many of which are communities of color, immigrants, non-U.S. citizens, members of mixed immigration status households, and the subjects of Defendants' purposeful discrimination. *See, e.g.*, FAC ¶¶ 4, 23, 27, 32, 37, 42, 47, 52, 56, 60, 65, 75, 84, 107, 112, 260 & 271. As discussed in detail above, *see supra* Argument section I.A.1, Membership Plaintiffs' members are harmed because, among other things, they (1) will be deprived of representation in the U.S. House of Representatives and in state and local elected bodies, (2) they will suffer a dilution of their voting strength and diminished ability to elect candidates of their choice, and (3) an undercount will result in loss of federal funds for programs on which members rely. *See, e.g.*, FAC ¶¶ 271, 276-77, 290, 294-95, 297-98, 301, 304-06, 309-12, 314-16, 328-29, 336-37 & 349.

Courts have held that advocacy organizations similar to Membership Plaintiffs are the type of organizations who can bring associational standing claims based on harms to their members. *Casa De Maryland v. U.S. Dep't of Homeland Security*, 284 F. Supp. 3d 758, 771 (D. Md. 2018) (rejecting arguments that CASA lacked associational standing because it was not the

"object of any governmental policy," explaining that CASA had both direct and associational standing to challenge the rescission of DACA); *see also Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 283 (E.D.N.Y. 2018) (finding that MRNY has standing to assert its "claim on behalf of its members and clients who were adversely affected by Defendants' allegedly wrongful adjudication of their DACA renewal requests.").

Moreover, as explained above, Organizational Plaintiffs allege direct injury to their associations, and have standing on their own behalves.[13] *See, e.g.*, FAC ¶¶ 273, 275, 278-281, 283, 284, 286, 287-290, 292-293, 296, 299, 302, 305, 307, 310, 313, 315, 317, 320, 324, 327, 330-335, 342, 345-349 & 351-352. As such, the third-party doctrine and its requirements do not apply because Organizational Plaintiffs themselves suffer an injury as a result of the addition of a citizenship question to the 2020 Census. *See, e.g.*, *Bassett v. Snyder*, 951 F. Supp. 2d 939, 953 (E.D. Mich. 2013) (finding that unlike cases where plaintiffs bring claims on behalf of others [*e.g.*, an attorney bringing claims on behalf of her clients], where plaintiffs assert "their own Fourteenth Amendment rights to equal protection and due process," they have standing to bring those cases and the prudential requirements do not apply); *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002) (fair housing organization had standing to sue for housing discrimination claims based on diversion of resources and frustration of its mission); *White Tail Park*, 413 F.3d at 460-61 (finding that organization that advocated for promoting the values of social nudism had standing to bring a First Amendment challenge on its own behalf based on frustration of its mission and alleged reduction of the size of its audience).

Furthermore, several courts have found that corporations and organizations have standing

[13] Organizational Plaintiffs (all plaintiffs except for the seven Individual Plaintiffs) assert direct organizational standing, and Membership Plaintiffs (LUPE, CHIRLA, LCLAA, Somos, PAZ, Chelsea, OCA-GH, SHC, MALC, MLLC, ALLC, CLLC, API Caucus, and CLBC) additionally assert associational standing.

to assert an Equal Protection violation on their own behalf. For example, in *Carnell Const. Corp. v. Danville Redevelopment & Hous. Auth.*, 745 F.3d 703, 715 (4th Cir. 2014), the Fourth Circuit held that a minority-owned corporation had standing to sue for race discrimination pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII") and that "prudential considerations should not bar review of a claim of race discrimination suffered by such a corporation. . . ." Several other circuits similarly hold that corporations and organizations can suffer harm from discrimination and that those entities have standing to litigate that harm. *See, e.g.*, *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 706-07 (2d Cir. 1982), *cert. denied*, 459 U.S. 857, 103 S. Ct. 127, 74 L.Ed.2d 110 (1982) (finding that non-profit organization whose mission is to produce theatrical and artistic production which particularly reach and involve Black and Hispanic communities has standing to sue county officials for allegedly denying its funding application for racial reasons); *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1060 (9th Cir. 2004) (finding that minority-owned business had standing to bring discrimination claim under 42 U.S.C. § 1981); *Northeast Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016), *cert. denied*, 137 S. Ct 2265 (2017) (the Sixth Circuit explicitly held that an organization had standing to bring equal protection claims challenging Ohio voting laws); *Germans v. Group Health Ass'n, Inc.*, 931 F.2d 1565, 1258 (D.C. Cir. 1991), *vacated on other grounds*, 502 U.S. 1068, 1569-70 (1992) (finding that plaintiff corporation ("CSI") had standing to bring discrimination where it alleged that the defendant "discontinued its contractual relationship with CSI solely because an individual associated with CSI was Jewish.").

4. Plaintiffs' Funding-Related Injuries Are Within the Zone of Interests Protected by the Enumeration Clause.

The Court should reject Defendants' argument that "even if Plaintiffs had adequately pled

a non-speculative injury, that injury would not bring them within the zone of interests protected by the Constitution's Enumeration Clause." Defs.' Mem. at 14. As discussed in great detail above, *see supra* Argument sections I.A.1 and 2, Plaintiffs properly plead standing under Article III, alleging that there is a direct causal relationship between their injuries and the Secretary's decision resulting in a failure to accurately enumerate the population. As this Court noted in its *Kravitz*, "[c]ourts have long recognized that the census accomplishes more than just a person-by-person headcount. . . ." 2018 WL 4005229, at *12 (citing *U.S. House of Representatives,* 525 U.S. at 341). The accuracy of the enumeration guarantees the equitable distribution of resources, and plaintiffs are those "adversely affected" within the meaning of *Lujan,* 497 U.S. at 883.

B. Plaintiffs' Claims Are Not Barred By The Political Question Doctrine.

In accordance with the Court's order of August 22, 2018, ECF No. 52, Plaintiffs respectfully refer the Court to adopt the arguments contained in the "Plaintiffs Claims Are Not Barred by the Political Question Doctrine" section (pp. 24-29) of the Plaintiffs' memorandum of law in opposition to Defendants' motion to dismiss in *Kravitz*, ECF No. 29.

Plaintiffs additionally refer to this Court's order in *Kravitz*, 2018 WL 4005229 at *9-12 (finding that plaintiffs' claims were not barred by the political question doctrine and "[w]hether or not Congress or the Census Bureau has violated their expansive breadth of authority is, therefore, a justiciable question.") (citing *U.S. Dep't. of Commerce v. Montana,* 503 U.S. 442, 458 (1992)).

C. Plaintiffs' APA Claims Are Justiciable.

In accordance with the Court's order of August 22, 2018, ECF No. 52, Plaintiffs respectfully request that the Court reference and adopt the arguments contained in the "The Secretary's Decision to Add a Citizenship Question to the Census is Reviewable Under the

APA" section (pp. 29-33) of the Plaintiffs' memorandum of law in opposition to Defendants' motion to dismiss in *Kravitz,* ECF No. 29.

Plaintiffs additionally refer to this Court's order in *Kravitz*, 2018 WL 4005229 at *14-16 (holding that plaintiffs APA claims are justiciable and that "[t]here is a strong presumption favoring judicial review of agency action.") (citing *Speed Mining, Inc. v. Fed. Mine Safety and Health Review Com'n*, 528 F.3d 310, 316–17 (4th Cir. 2008); *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quoting 5 U.S.C. § 701(a)(2)).

II. PLAINTIFFS ALLEGE A VIOLATION OF THE ENUMERATION CLAUSE.

Plaintiffs allege adequate facts to state a claim for violation of the Constitution's Enumeration Clause.[14] The Enumeration Clause requires the Secretary's conduct of the census to bear "a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purposes of the census." *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996). As this Court found in *Kravitz*, 2018 WL 4005229, even though the Enumeration Clause "contains few specific requirements, it sets forth matters of general principle, and 'certain basic constitutional choices may prove relevant' in evaluating the validity of the Census Bureau's action." *Id*. at *13 (quoting *Utah v. Evans*, 536 U.S. 452, 478 (2002)). While courts have found that the Enumeration Clause does not require the Census Bureau achieve numerical perfection, it does require Defendants to conduct the Census in a manner that is reasonably designed to achieve distributive accuracy, *Kravitz*, 2018 WL 4005229, at *13; *see also Utah*, 536 U.S. at 488; *Wisconsin*, 517 U.S. at 20-21, and, therefore, "when the Census Bureau unreasonably compromises the distributive accuracy of the census, it may violate the

[14] In accordance with the Court's order of August 22, 2018, ECF No. 52, Plaintiffs respectfully refer the Court to and adopt the arguments contained in the "Plaintiffs Have Plausibly Alleged a Violation of the Enumeration Clause" section (pp. 33-35) of the Plaintiffs' memorandum of law in opposition to Defendants' motion to dismiss in *Kravitz,* ECF No. 29.

Constitution," *Kravitz*, 2018 WL 4005229, at *13 (citing *Wisconsin*, 517 U.S. at 19-20; *Evans*, 536 U.S. at 500).

Here, Plaintiffs allege that Defendants violated the Enumeration Clause by: (1) adding a citizenship inquiry that experts in the field—including scientific experts within the Census Bureau itself—agree will produce a disproportionate undercount of certain hard-to-count populations, *see* FAC ¶¶ 196-207, 213-18 & 261; (2) adding the citizenship question at the eleventh hour without any pretesting in the context of decennial Census, unlike other demographic questions that are well-tested to ensure that there are no adverse impacts on response rates, *see* FAC ¶¶ 155-67 & 191-95; and (3) adding the citizenship question for discriminatory reasons to purposefully deter certain demographic—Latinos, Asian Americans, African Americans, Native Americans, limited English proficient speakers and immigrants—from participating in the Census, *see* FAC ¶¶ 173-195 & 219-54; *see also* section III *infra*. These allegations plausibly establish that the manner in which the Defendants are conducting the census—*i.e.*, including an untested citizenship question—will intentionally hinder the accuracy of the census and therefore violate the Enumeration Clause.

This Court should again reject Defendants' argument that, "[t]his theory, taken to its logical conclusion, would mean that the Enumeration Clause prohibits any demographic questions that may theoretically reduce response rates and cause some differential undercount," Defs.' Mem. at 16, Plaintiffs' challenge is based on very specific grounds that the addition of the untested citizenship question, added for iniquitous reasons, in the current political climate, will inevitably lead to an inaccurate count. *See Kravitz*, 2018 WL 4005229, at *14.

III. PLAINTIFFS PROPERLY PLEAD AN INTENTIONAL DISCRIMINATION CLAIM.

Defendants appear to concede that Plaintiffs sufficiently allege adverse effect from the

placement of the citizenship question on the decennial census short form. *See* Defs.' Mem. at 15. The motion to dismiss the intentional discrimination claim rests solely on an argument that Plaintiffs fall short of plausibly pleading Secretary Ross's discriminatory intent. The kind of decision at issue here is governed by *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). The Supreme Court recognized in that case that governmental administrative decision-making is seldom the product of a single dominant motive, discriminatory or otherwise, because government officials are required to balance competing considerations. "But racial discrimination is not just another competing consideration." *Id*. at 265. The *Arlington Heights* Court consequently set forth several factors that comprise a "sensitive inquiry" into available direct and circumstantial evidence. *Id*. at 266-68. Taken together in support of those factors, Plaintiffs allege an abundance of facts that plausibly lead to the conclusion that intentional discrimination was a motivating factor in the decision to add a citizenship question to the Decennial Census short form.

A. Plaintiffs Allege Facts Sufficient to State a Claim for Intentional Discrimination Under *Arlington Heights*.

The Supreme Court in *Arlington Heights* identified a non-exhaustive list of factors that may constitute part of the "mosaic" of evidence that can give rise to an inference of discrimination: (1) disparate impact, *i.e.*, whether the action "bears more heavily on one race than another"; (2) the "historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes"; (3) [d]epartures from the normal procedural sequence" and "[s]ubstantive departures. . ." "particularly if the factors usually considered important. . . favor a decision contrary to the one reached," and (4) "contemporary statements" by those deciding the issue. 429 U.S. at 266-68.

Facts pled that are material and relevant to those factors are no less probative because

Secretary Ross, as head of the Department of Commerce, is alleged to be the "sole decision-maker." His ultimate decision-making authority does not render the review of the administrative process that led to his decision irrelevant for *Arlington Heights* purposes, and Defendants cite no case law to the contrary. The Secretary's role as decision-maker does not constrain this Court's "sensitive inquiry" into the evidence. *Id*.

Indeed, in this case it appears that the decision may not have only ended up on the Secretary's desk, but it was directed there in the first place for reasons quite unrelated to the motivation ultimately claimed by the Secretary, making the intervening administrative process a sham—a point most certainly relevant under the *Arlington Heights* inquiry.

1. Plaintiffs' Complaint Alleges Disparate Impact.

Defendants do not contest that Plaintiffs plausibly allege disparate impact as part of their equal protection claim, but instead argue that Plaintiffs do not plausibly allege a "consistent pattern" of actions that caused the disparate impact, by Secretary Ross, or by anyone. Defs.' Mem. at 19. However, *Arlington Heights* requires only an examination of whether the "official action. . .bears more heavily on one race than another." *Id*. at 266 (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)). The Supreme Court observes that such disparate impact evidence can amount to a "clear pattern, unexplainable on grounds other than race," that results from an otherwise neutral piece of legislation. *Id*. (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)); *Guinn v. United States*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939); *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125 (1960)). The "pattern" is the impact itself, not a separate requirement to show multiple bad acts by Secretary Ross, or by anyone. Moreover, *Arlington Heights* is crystal clear that a "consistent pattern" of official racial discrimination is not a "necessary predicate" to an equal protection violation, which could take the form of a "single

invidiously discriminatory governmental act." *Arlington Heights*, 429 U.S. at 266 n. 14 (citing *City of Richmond v. United States*, 422 U.S. 358, 378 (1975)).

Plaintiffs sufficiently allege predictable disparate impact on immigrant communities of color. FAC ¶¶ 260-269. Indeed, Census Bureau findings confirm that including a citizenship question on the census will decrease the response rate among certain minority communities to which Plaintiffs belong, traditionally hard-to-count populations that will be predictably fearful, suspicious, and reluctant to respond. *Id*. ¶¶196-212. Census Bureau officials admitted that the citizenship question is "particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate." *Id*. ¶213. Secretary Ross himself admitted that the question was placed last on the census form in anticipation that it might make respondents uncomfortable. *Id*. ¶ 211.

The racially disproportionate effect that Plaintiffs allege and Defendants admit provides an "important starting point." *Arlington Heights*, 429 U.S. at 266.

2. Plaintiffs Adequately Allege Facts That Reveal Discriminatory Intent Regarding the Historical Background of the Decision to Include a Citizenship Question in the Decennial Census.

Defendants incorrectly believe that because Secretary Ross is the "decision-maker," his, and only his, statements are relevant to whether the decision's historical background reveals discriminatory intent. Again, Defendants misconstrue, and indeed miss the entire point of the *Arlington Heights* inquiry. *Arlington Heights* not only does not require explicit discriminatory comments, its structure exists because "discriminatory intent is rarely susceptible to direct proof." *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 606 (2d Cir. 2016) (citing *Arlington Heights*, 429 U.S. at 266). Hence, this factor examines the history of the decision to impose a citizenship question on the decennial census. That historical background is set forth in

the operative Complaint, is confirmed by the administrative record, and reveals that (1) the original proponents of the question, who collaborated with Secretary Ross, were motivated by the racially discriminatory intent to dilute the political power of immigrant communities of color; and (2) that the Census Bureau, currently and historically, opposes the inclusion of a citizenship question on the Census because of its predictable negative effect on accuracy and cost.

Plaintiffs allege that Defendants conspired with a number of Trump Administration officials, DOJ officials, and Kansas Secretary of State Kris Kobach to add a citizenship question to the decennial Census in order to depress the numbers of immigrant communities of color in the total count, thereby decreasing their impact on, and benefit from, the allocation of political power. FAC ¶¶ 375-376. Mr. Kobach urged President Trump to ensure that the Census included a citizenship question because California in particular has an inflated number of Congressional seats "by counting illegal aliens." *Id*. ¶ 241. A Draft Executive Order subsequently issued that directed the Census Bureau to include a citizenship question on the decennial census in order to "fulfill several campaign promises" and to address the "flow of illegal entries and visa overstays." *Id*. ¶¶ 238-240. The Draft Executive Order made no mention of voting rights enforcement. *Id*. ¶ 240. Mr. Kobach expressed the identical White House priority to Secretary Ross, complaining that "aliens who do not actually 'reside' in the United States are still counted for congressional apportionment purposes." *Id*. ¶¶ 174-77. Mr. Kobach's emails reveal that he contacted Secretary Ross on this issue "at the direction of Steven Bannon," then-White House advisor to President Trump. *Id*. ¶175. The Trump re-election campaign sent an email asking recipients whether they were "on [President Trump's] side" in his plan to have the Census Bureau "ask people whether or not they are citizens." *Id*. ¶¶ 185-186.

Defendants attempt to discount the history of the decision that reveals the explicit

motives of Mr. Kobach and others, again arguing that Secretary Ross was the ultimate decisionmaker, and that there is no nexus between their remarks and the Secretary's decision. Defendants are wrong. Plaintiffs' allegations include references to documentary evidence that it was Mr. Kobach and White House officials who ensured that the administration's interest in putting a citizenship question on the Census reached the Secretary and was implemented. *Id*. ¶¶ 241, 174-77. Thus, their advocacy and purpose for the addition of the question is part of the decision's historical background.

3. Plaintiffs Allege That Defendants Departed, Procedurally and Substantively, From Past Practice.

The operative Complaint contains numerous allegations regarding the departures from the "normal procedural sequence," and substantive departures occurred in the wholesale baseless rejection of Census Bureau findings that normally would lead to "decision contrary to the one reached." *Arlington Heights*, 429 U.S. at 267.

First, the Department of Commerce overruled findings based on extensive internal research by career Census Bureau staff that adding a citizenship question to the decennial census would be very costly, would harm the quality of the census count, and would provide less accurate citizenship data than are available from administrative sources. FAC ¶¶ 202-207. Census Bureau researchers warned the Secretary that asking the question would result in disproportionately higher non-response rates for households with at least one non-citizen than for all other households. They also warned that analysis of prior survey data shows a much higher item non-response rate for the citizenship question for Blacks and Hispanics than for whites. *Id*. ¶ 204.

Second, the current internal findings reflect long-standing opposition by the Census Bureau to including a citizenship question on the decennial census. Prior Census Bureau

directors warned that accuracy would suffer, and that the decision to add a citizenship question would "seriously frustrate" the ability to fulfill the apportionment purposes of the Census. *Id*. ¶¶ 213-218. The Secretary also ignored the warning of six former Census Bureau directors who argued that addition of the question without the normal testing would invalidate the valuable results of the normal End-to-End testing, which strives to replicate the exact conditions of the decennial census to aid in planning staffing needs, projections of response rates, communication strategies and cost projections. *Id*. ¶ 218.

Third, the decision not to test the question, in itself, was a serious departure from past practice and procedures. *Id*. ¶¶ 157-167. The allegations plausibly allege procedural and substantive departures from past practice, and indeed lead to the plausible inference that Secretary Ross, and the others who engaged him in this process, intended the outcome that is predicted by experts in the Census Bureau—disproportionate undercounting of immigrant households of color.

Fourth, Plaintiffs allege, and the administrative record confirms, that the "specific sequence of events leading up to" the decision to add the citizenship question, *Arlington Heights*, 429 U.S. at 267, suggest that Secretary Ross' rationale for the decision was a purposefully engineered sham orchestrated with the assistance of the DOJ. That sham was compounded by the Secretary's misrepresentation to Congress that it was the Department of Justice that requested the addition of the question in order to enable their enforcement of the Voting Rights Act ("VRA"). *See Kravitz*, 2018 WL 4005229, at *17.

The sequence of events that Secretary Ross initially reported was that he "set out to take a hard look" at the citizenship question "[f]ollowing receipt" of the December 12, 2017 DOJ

request. A.R. 3893.[15] In fact, the sequence of events was exactly the opposite, as he later admitted in a June 6, 2018 supplement to the Administrative Record. FAC ¶ 190. Indeed, more than a year prior to that admission, and nearly eight months prior to the DOJ request, Secretary Ross stated in a May 2, 2017 e-mail that he was "mystified why nothing have [sic] been done in response to my months old request that we include the citizenship question." A.R. 3699. Later that same day, the director of the Commerce Department's office of policy and strategic planning stated in an email that "[w]e need to work with Justice to get them to request that citizenship be added back as a census question." A.R. 3710. A trier of fact could infer from the Secretary's shifting explanations and falsity concerning his motives and that he was covering up a discriminatory purpose. *See New York*, 315 F. Supp. 3d at 810-811 (noting, on similar allegations and evidence, that "there is certainly much 'about the sequence of events leading up to the decision' at issue in these cases 'that would spark suspicion….'") (citing *Arlington Heights*, 429 U.S. at 269).

Indeed, this Court recently observed, based on similar allegations and documentary evidence from the administrative record, that plaintiffs in *Kravitz*, 2018 WL 4005229, "made a strong preliminary showing that Defendants have acted in bad faith, and that Defendants' stated reason for adding the citizenship question—to further enforce the VRA—was pretextual. . . ." and that the DOJ "request" was "manufactured by senior Department of Commerce officials." *Id*. at *17.

Defendants are incorrect in their assertion that the Complaint lacks allegations regarding

[15] All of facts are taken from the First Amended Complaint, ECF No. 42, and the Administrative Record ("A.R."), and assumed to be true. The Court may take judicial notice of matters of public record and consider documents in the A.R., which is public record. *See Phillips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009); *see also Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 655 n.4 (4th Cir. 2004) (taking judicial notice of published stock prices when considering a motion to dismiss).

normal procedures for adding, or even "reinstating," (as that term is incorrectly used) a citizenship question to the 2020 Census short form. The Complaint sets forth extensive allegations regarding, for example, the PRA requirements, OMB guidelines and recommendations, FAC ¶¶ 146-156, and the testing procedures normally used, including the testing of other demographic questions, *id*. ¶¶ 157-167. As stated above, the Complaint also alleges that Secretary Ross disregarded and in part flouted those prior practices and procedures, in order to carry out the wishes of the administration.

Finally, Defendants argue that "the citizenship question that will be asked on the 2020 Census is identical to the one that was extensively tested before being added to the ACS." Defs.' Mem. at 20. Defendants' argument in this regard may be a fact in dispute, may be the subject of battling experts at trial, and may even be ultimately determined to be frivolous due to the clear differences between a decennial headcount and a survey. In any case, it cannot mean that Plaintiffs may not proceed beyond the pleading stage. Plaintiffs plausibly allege that the Census Bureau did not employ the testing procedures normally followed when adding a new or revised question to the decennial census short form.

4. Plaintiffs Allege Numerous "Contemporary Statements" by Those Involved in Ensuring That the Secretary Carried out the Administration's Intent to Discriminate Against Immigrant Communities of Color.

Plaintiffs allege a number of invidiously discriminatory statements made by those who orchestrated and carried out the campaign to include a citizenship question on the decennial census. *See Arlington Heights*, 429 U.S. at 268. Those allegations are found at ¶¶ 219-254 of the operative Complaint, and need not be repeated here, except to say that they include statements from the top—from President Trump making vile statements that leave no doubt as to his belief that immigrant communities of color are criminal and relatively worthless, and anti-

immigrant statements by current and former administration officials, *id.* Finally, the allegations also include statements from Mr. Kobach that evince a clear intent to exclude immigrants from political representation. *Id*. ¶¶ 174, 177 & 241.

Defendants again attempt to limit the realm of relevant evidence solely to words uttered by Secretary Ross about the citizenship question in particular. However, Plaintiffs have made direct and plausible allegations, most supported by documentation, that the current Administration precipitated the issue, and was joined by others involved with the Administration including Mr. Kobach, former White House advisor Steven Bannon, and officials at the DOJ who assisted by providing the sham motive for the addition of the question. *See* supra section III.A.2. Moreover, the "use of racial slurs, epithets, or other racially charged language. . .can be evidence that official action was motivated by unlawful discriminatory purposes." *Vidal v. Nelson*, 291 F. Supp. 3d 260, 277 (E.D.N.Y. 2018) (statements made by President Trump that allegedly suggest that he is prejudiced against Latinos are found "sufficiently racially charged, recurring, and troubling as to raise a plausible inference that the decision to end the DACA program was substantially motivated by discriminatory animus."); *see also Mullen v. Princess Anne Volunteer Fire Co., Inc.*, 853 F.2d 1130, 1133 (4th Cir. 1988) ("Racial slurs represent the conscious evocation of those stereotypical assumptions that once laid claim to the sanction of our laws. Such language is symbolic of the very attitudes that the civil rights statutes are intended to eradicate.").

Defendants lament that the President's statements, even extreme, despicable, racially invidious statements stirring anti-immigrant sentiment to advance his goal to modify the census in a manner detrimental to immigrants, cannot "without more, render every Cabinet Head's facially neutral decision constitutionally suspect. . . ." Defs.' Mem. at 21. First, Plaintiffs allege

far more than one man's racial agenda. Second, that one man is President, who chooses and directs and demands loyalty from his Cabinet. FAC ¶¶ 255-259. So, yes, the President's statements *do* properly contribute to the *Arlington Heights* inquiry into the evidence and *can* raise an inference of discriminatory motive for related actions by the head of the Department of Commerce and by every other Cabinet member working in concert with the White House. *New York*, 315 F. Supp. 3d at 810 (finding that President Trump's discriminatory statements "help to nudge [plaintiffs'] claim of intentional discrimination across the line from conceivable to plausible") (citing *Batalla*, 291 F. Supp. 3d at 279 (relying on "racially charged" statements by the President where he was alleged to have directed the decision at issue in concluding that the plaintiffs' allegations of discriminatory intent were sufficient to survive a motion to dismiss).

For the proposition that Trump administration statements are irrelevant to an *Arlington Heights* inquiry, and cannot "render facially neutral decisions constitutionally suspect," Defendants rely on *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018). The court in *New York*, rejected Defendants' reliance on that case on the exact same point as "somewhere between facile and frivolous," noting that the deferential review applied by the Supreme Court in *Hawaii* and by every case it cites involved either "immigration or the admission of non-citizens," and most certainly does not "unsettle decades of equal protection jurisprudence regarding the types of evidence a court may look to in determining a government actor's intent." 315 F. Supp. 3d at 810-811. Based on an *Arlington Heights* inquiry and very similar factual allegations, the *New York* court rejected Defendants' motion to dismiss Plaintiffs' equal protection claim. *Id*. at 806-811.

VI. PLAINTIFFS HAVE STATED A CAUSE OF ACTION FOR CONSPIRACY.

To sufficiently state a claim under 42 U.S.C. § 1985(3), a plaintiff must plausibly allege the following: "(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). "Allegations of parallel conduct and a bare assertion of a conspiracy are not enough for a claim to proceed." *Thomas v. The Salvation Army Southern Territory*, 841 F.3d 632, 637 (4th Cir. 2016) (internal quotation marks omitted). Instead, a plaintiff "must show an agreement or a meeting of the minds by defendants to violate the [plaintiff's] constitutional rights." *Simmons*, 47 F.3d at 1377.

Plaintiffs have properly plead a claim for conspiracy under § 1985(3) with specificity. FAC ¶¶ 373-77; *see also supra* Section III.A.2. Defendants argue that Plaintiffs have not plausibly alleged that the conspirators had an agreement or a meeting of the minds. Defs.' Mem. at 23-24. Instead, they continue, Plaintiffs only alleged that Defendants received recommendations and requests from the other conspirators, completely ignoring the substance of Plaintiffs' allegations. *Id.* Plaintiffs allege that in January 2017 the Trump Administration drafted an Executive Order directing the Census Bureau to add a citizenship question to the 2020 Census, FAC ¶ 238-39; that Mr. Kobach reported speaking with President Trump about this issue, and President Trump was "absolutely interested in this," *id.* ¶ 241; that Mr. Kobach and Defendant Ross had meetings to discuss this issue, *id.* ¶ 176, and that a few months before that, they had spoken about the issue at the direction of Mr. Bannon, *id.* ¶ 174-75; that Defendant Ross asked Mr. Gore to send him a letter from the DOJ requesting that the Census Bureau add a

citizenship question to the 2020 Census, *id.* ¶ 190; that Mr. Gore agreed to do this, *id*., and drafted a letter on behalf of the DOJ requesting the addition of the citizenship question to the 2020 Census for purposes of enforcing the VRA, *id.* ¶ 178 & 180; that Mr. Gore then sent that letter to Mr. Gary to sign and send to the Census Bureau, *id.*; and that, as planned with his co-conspirators, Defendant Ross did ultimately add a citizenship question to the 2020 Census, using as pretext the DOJ letter, *id.* ¶ 186 &190.

Plaintiffs' allegations are nothing like the allegations in the cases cited by Defendants. As an initial matter, the "high standard" Defendants reference, Defs.' Mem. at 23, applies to whether a plaintiff "has set forth sufficient facts to establish a section 1985 conspiracy, such that the claim can withstand a *summary judgment* motion," not a motion to dismiss. *Simmons*, 47 F.3d at 1377 (emphasis added). 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." *Id*. (quoting *Gooden v. Howard Cnty.*, 954 F.2d 960, 969-70 (4th Cir. 1992)) (alteration omitted). As for the facts in *Simmons*, there it was uncontested that one of the alleged conspirators had acted on his own. *Id*. at 1377-78. In *Scott v. Greenville County*, 716 F.2d 1409, 1424 (4th Cir. 1983), also cited by Defendants, the Fourth Circuit found that there was no alleged conspiracy where the alleged conspirators did not formulate a joint plan. Here, however, Plaintiffs alleged with specificity that the conspirators actively engaged and met with each other, resulting in a joint plan to add a citizenship question to the 2020 Census justified by a pretextual request from one of the conspirators, and these allegations are more than sufficient to survive a motion to dismiss. Defendants' other arguments attacking Plaintiffs § 1985(3) claim also fail.

A. 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. U.S. Dep't of Housing and Urban Dev.*, 594 F.2d 1060, 1062 (5th Cir. 1979) (same). In 1976, Congress followed the Supreme Court's lead, amending the APA to permit suits for injunctive relief against federal agencies, officers, and employees. *See* 5 U.S.C. § 702; *see also Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1981) (noting that the amendments to the APA were intended to eliminate "the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity") (internal quotation marks omitted). 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. FAC ¶¶ 373-77. Because Plaintiffs seek only injunctive relief, not damages, Plaintiffs' § 1985(3) claim is not barred on sovereign immunity grounds.[16] *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1853, 1869 (2017)

[16] The cases cited by Defendants in support of their sovereign immunity arguments are either inapposite or not persuasive. *United States v. Testan*, 424 U.S. 392, 392 (1976), *Davis v. U.S. 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* the powers conferred to them by statute, e.g., unconstitutionally, 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 Defendant Ross here, they behave in violation of the Constitution or to prevent them from enforcing an unconstitutional statute, or where the grant of power they have is unconstitutional itself. *Id.* Finally, while the plaintiffs in *Affiliated Professional Home Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999), sought both monetary damages and injunctive relief, the Fifth Circuit in *Shalala* rested only on *Unimex* for its holding that sovereign immunity bars relief under § 1985(3), and did not grapple with the plaintiffs' request for injunctive relief.

(entertaining § 1985(3) claim against federal administration officials acting in the official capacities, but holding that § 1985(3) claims were improper on qualified immunity grounds).

B. Congress Did Not Intend to Deprive Courts of Their Equitable Power to Issue an Injunction.

Defendants erroneously argue that § 1985(3) prohibits the issuance of injunctive relief. Defs.' Mem. at 24. 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 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 authorization" from Congress); *Plata v. Schwarzenegger*, 603 F.3d 1088, 1094 (9th Cir. 2010) (holding that "a statute should not be construed to displace a courts' traditional equitable powers absent the clearest command to the contrary") (alteration and internal quotation marks omitted). Congress made no such command to divest district courts of their equitable powers when it enacted § 1985(3), and this Court thus retains the power to enjoin Defendants from continuing their § 1985(3) violation. *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 "jurisdiction of the federal courts to issue injunction to protect rights safeguarded by the Constitution is well established . . . . [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").

C. The Intracorporate-Conspiracy Doctrine Does Not Preclude Plaintiffs' 1985(3) Claim.

The intracorporate-conspiracy doctrine is 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 (emphasis added). Even if the doctrine applied in the civil rights context, Plaintiffs here allege a conspiracy that involved individuals from different state and federal government bodies. FAC ¶ 375; *see also Ziglar*, 137 S. Ct. at 1867 (when 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).[17]

Setting aside the fact that Plaintiffs' conspiracy claim involves actors from different state and federal government bodies, "[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, 1251-52 (4th Cir. 1985) (same).

[17] While Mr. Kobach eventually became a member of the Voter Fraud Commission, an advisory commission to the President, his inclusion in the Commission did not make him a member of the federal government, much less a member of the Department of Commerce or the DOJ. What's more, Mr. Kobach did not join the Voter Fraud Commission until it was created on May 11, 2017. Mr. Kobach met with President Trump to begin formulating a plan to add a citizenship question in January 2017, however, FAC ¶ 241, and emails from Mr. Kobach to Defendant Ross and Ms. Teramoto indicate that Mr. Kobach may have started having conversations about adding a citizenship question to the 2020 Census with Defendant Ross before May 11, 2017, FAC ¶¶ 174-175. To the extent there is a question of fact as to whether Mr. Kobach was part of the same governmental entity as President Trump, and to the extent there is a question of fact as to whether members of the Department of Commerce and the DOJ are part of the same governmental entity, 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).

Here, the conspirators have taken steps to disadvantage immigrants and communities of color in violation of federal statutes and their right to equal protection, and their acts were therefore unauthorized. To the extent there is a question as to whether an exception to the intracorporate-conspiracy doctrine applies, 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").

Further, the Supreme Court has explicitly declined to decide whether the intracorporate-conspiracy doctrine applies to civil rights conspiracies generally, much less to conspiracies involving public officials specifically. In *Ziglar*, a 2017 case cited by Defendants, the Supreme Court acknowledged 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." *Id*. at 1868; *see also id*. at 1868-69 (application intracorporate-conspiracy doctrine to § 1985(3) is an open question). The Court should thus further decline to dismiss Plaintiffs' § 1985(3) claim based on the fact the law is unsettled in this area. *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"). Indeed, Plaintiffs here "should be given an opportunity to develop evidence before the merits are resolved." *Id.* (alteration and internal quotation marks omitted).[18]

[18] Defendants noted that the law is unsettled with respect to the availability injunctive relief under § 1985(3). Defs.' Mem. at 24 n. 17 (acknowledging that neither the Supreme Court nor the Fourth Circuit

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied in its entirety.

Dated: September 7, 2018

Respectfully submitted,

By */s/ Burth G. Lopez*

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
Burth G. Lopez (Bar No. 20461)
Thomas A. Saenz (CA Bar No. 159430)*
Nina Perales (TX Bar No. 24005046)*
Denise Hulett (CA Bar No. 121553)
Andrea Senteno (NY Bar No. 5285341)
Tanya G. Pellegrini (CA Bar No. 285186)
Julia A. Gomez (CA Bar No. 316270)

1016 16th Street NW, Suite 100
Washington, DC 20036
Phone: (202) 293-2828
Facsimile: (202) 293-2849

ASIAN AMERICANS ADVANCING JUSTICE | AAJC
John C. Yang (IL Bar No. 6210478)
Niyati Shah[º] (NJ Bar No. 026622005)
Terry Ao Minnis (MD Bar No. 0212170024)
1620 L Street, NW, Suite 1050
Washington, DC 20036
Phone: (202) 815-1098
Facsimile: (202) 296-2318
[º] Admitted in New Jersey and New York only. DC practice limited to federal courts.

**Pending pro hac vice Admission*

---

have dealt with whether § 1985(3) authorizes injunctive relief). This, too, makes dismissal of Plaintiffs' cause of action "especially disfavored." *Wright*, 787 F.3d at 263.

CERTIFICATE OF SERVICE

I certify that on this 7th day of September, 2018, I caused a copy of the foregoing document to be sent to all parties receiving CM/ECF notices in this case.

/s/
Burth Lopez (Bar Number: 20461)