IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

Defendants.

No. 1:18-cv-5025 (JMF)

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

U.S. CONSTITUTION

OTHER AUTHORITIES

INTRODUCTION

The relief sought in this suit—an order barring the Secretary of Commerce from collecting demographic information through the decennial census—is as extraordinary as it is unprecedented. The Constitution vests in the political branches of government discretion to decide the manner in which the census is conducted. In the exercise of that discretion, the Secretary decided to reinstate a question about U.S. citizenship on the 2020 decennial census. Not only has citizenship information historically been collected as far back as 1820, but citizenship information also forms an important component of enforcing the Voting Rights Act of 1965. Plaintiffs' claim that the Constitution precludes the Secretary from simply asking a question fails for at least five reasons.

First, Plaintiffs lack standing to challenge the Secretary's decision to reinstate a citizenship question to the decennial census. Plaintiffs' claims—that their members face a loss of funding and representation and that they, as organizations, will need to divert resources—are all premised on their allegation that reinstating a citizenship question will reduce census response rates. These claims are too attenuated and speculative to confer Article III standing. And even if Plaintiffs could allege injuries that are concrete and non-speculative, those injuries would be not be fairly traceable to the Secretary's decision, but to the independent decisions of individuals who disregard their legal duty to respond to the census. As to the constitutional claims, Plaintiffs have not even attempted to plead facts establishing they have third-party standing to assert claims based on the constitutional rights of immigrants.

Second, Plaintiffs' challenge is unreviewable under the political question doctrine. The Constitution textually commits the "[m]anner" of conducting the census to Congress, and it contains no judicially discoverable or manageable standards for determining which demographic questions may be included on the census form. That question involves policy determinations that are ill-suited for judicial resolution and that the Constitution expressly commits to the political branches. Plaintiffs'

challenge elides the serious separation-of-powers concerns that would be implicated by a court order dictating the census questionnaire's content.

Third, Plaintiffs are similarly barred from proceeding under the Administrative Procedure Act because the content of the census is committed to the Secretary's discretion by law. "Congress has delegated its broad authority over the census to the Secretary [of Commerce]," *Wisconsin v. City of NY*, 517 U.S. 1, 19 (1996), and it has done so in broad terms: Congress authorized the Secretary to conduct the decennial census "in such form and content as he may determine," 13 U.S.C. § 141(a), and to obtain other demographic information through that device, *id.* These broad delegations leave a court with no meaningful standard to apply and accordingly preclude judicial review of which demographic questions the Secretary decides to include on the decennial census form.

Fourth, Plaintiffs cannot state a claim for relief under the Constitution's Enumeration Clause. U.S. Const. art. I, § 2, cl. 3. The Secretary has developed comprehensive plans to conduct a person-by-person headcount of the population, all of whom are under a legal obligation to answer. The Secretary's decision to reinstate a citizenship question is consistent with the longstanding historical practice of asking about citizenship and other demographic information, whereas Plaintiffs' theory would call into question the constitutionality of asking *any* demographic questions—*e.g.*, about sex, Hispanic origin, race, or relationship status—that are unnecessary to count the population and that could cause at least some individuals not to respond for any reason, such as discomfort with the question or increased time needed to answer.

Finally, Plaintiffs also fail to state a claim for relief under the Equal Protection Clause. To do so, they must plausibly allege that the Secretary had a discriminatory purpose in reinstating a citizenship question. But they have not alleged any facts sufficient to support such a claim, pointing only to *other* allegedly anti-immigrant actions and statements besides the decision to reinstate the citizenship question, statements about the likely *effects* of reinstating a citizenship question, and

purported departures from past practice. None of these allegations state a claim under the Equal Protection Clause.

For all of these reasons, this action should be dismissed.

BACKGROUND

Pursuant to the Court's Order, ECF No. 33, Defendants respectfully refer the Court to the Background Section of Defendants' memorandum of law in support of their motion to dismiss in *New York v. Department of Commerce*, Dkt. No. 18-cv-2921 (S.D.N.Y.), ECF. No. 155.

ARGUMENT

In seeking to invalidate the Secretary's decision to reinstate a question about citizenship on the decennial census form, Plaintiffs ask the Court to second-guess the Secretary's judgment about how to exercise authority that has been delegated to him by the Constitution through Congress—a particularly troublesome request because the relief requested would intrude deeply into matters textually committed to the discretion of the political branches of government.

Plaintiffs' request is not justiciable for multiple reasons. As an initial matter, Plaintiffs, which are all organizations, have not alleged that the Secretary's decision has caused sufficient concrete, non-speculative injuries-in-fact either to their members or to their organizational activities. Further, any injury would not be fairly traceable to the challenged decision, but instead would be attributable to the independent, unlawful actions of third parties. As to Plaintiffs' constitutional claims, they have not established that they have third-party standing to assert claims based on the constitutional rights of individuals.

But even if Plaintiffs could clear the standing hurdle, the Constitution commits the "[m]anner" of conducting the census to Congress, and Congress has delegated that authority to the Secretary in such broad terms that there is no judicially discernible standard against which to measure the Secretary's exercise of his discretion. Plaintiffs' challenge to the Secretary's decision thus presents

a nonjusticiable political question, and the decision at issue is committed to agency discretion by law and unreviewable under the APA. And Plaintiffs fail to state a claim under the Enumeration Clause of the Constitution because the Secretary has wide discretion to control the content of the census, and to determine the method to count every person. Lastly, they have also failed to state a claim under the Equal Protection Clause because they have not alleged facts to support a finding of discriminatory intent. This case should be dismissed.

I. THIS CASE IS NOT JUSTICIABLE

A. Plaintiffs Lack Standing to Maintain this Action.

In addition to the limitations on standing imposed by Article III's case-or-controversy requirement—the standards for which are set forth in Defendants' prior memorandum of law and incorporated herein by reference, *see New York v. Department of Commerce*, Dkt. No. 18-cv-2921 (S.D.N.Y.), ECF. No. 155—there are prudential considerations that limit challenges courts are willing to hear. *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *see also Am. Psych. Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 358 (2d Cir. 2016). One example of such a consideration is the doctrine of third-party standing. *Am. Psych. Ass'n*, 821 F.3d at 358. Under this doctrine, "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499.

1. Plaintiffs have not alleged sufficient injury-in-fact.

Plaintiffs are five organizations, four of which sue on behalf of themselves and their members (New York Immigration Coalition, whose members are other organizations ("NYIC"); CASA de Maryland, Inc. ("CASA"); American-Arab Discrimination Committee ("ADC"); and Make the Road New York ("MtRNY")), and one of which sues only on its behalf (ADC Research Institute ("ADCRI")). As discussed below, Plaintiffs fail to meet their burden of plausibly alleging any injuries-in-fact for which they purport to sue.

a. Plaintiffs NYIC, CASA, and ADC have failed to allege sufficient facts to establish their standing to sue on behalf of their members.

For an organization to establish standing to sue on its own behalf, it must demonstrate 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 v. Wash. State Apple Advert. Comm'n,* 432 U.S. 333, 343 (1977); *see also N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 295 (2d Cir. 2012). In satisfying the first prong of this inquiry, an organizational plaintiff must identify a particular affected member, rather than merely rely on a "statistical probability that some of [its] members are threatened with concrete injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). Thus, a vague reference to unidentified members does not confer associational standing on an organization. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 487 n.23 (1982).

Here, Plaintiffs NYIC, CASA, and ADC have not identified a single member who has suffered or will suffer an injury. *See* Compl. ¶¶ 14-43. Accordingly, they have failed to allege facts necessary to show that they have standing to sue on behalf of their members. *See Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 820 (D.C. Cir. 2006) ("[A]n organization bringing a claim based on associational standing must show that at least one specifically-identified member has suffered an injury-in-fact. … At the very least, the identity of the party suffering an injury in fact must be firmly established.").[1]

[1] Even if, on amending the Complaint, Plaintiffs were able to identify individual members, any claim of injury by them would likely be too abstract and speculative to satisfy Article III's requirements, for the reasons addressed in the next section.

b. Plaintiff MtRNY has failed to allege sufficient facts with regard to its one identified member to establish that that member has standing.

In contrast to Plaintiffs NYIC, CASA, and ADC, Plaintiff MtRNY *has* identified one member, Perla Lopez, who the Complaint alleges has suffered sufficient injury to constitute injury-in-fact. Compl. ¶ 53. Specifically, the Complaint alleges that Ms. Lopez is a member of MtRNY and a resident of Queens County. *Id.* She claims that the reinstatement of the citizenship question and alleged ensuing differential undercount will cause her, and other MtRNY members in Queens, to "lose out on political power and funding that will instead go to other areas of New York State." *Id.* However, this vague, generalized allegation is insufficient to establish the necessary injury-in-fact requisite to her standing as an individual and, accordingly, MtRNY has failed to show that it has associational standing to sue on behalf of members like Ms. Lopez.

The standing requirement of "injury in fact" requires an allegation that the plaintiff "has sustained or is immediately in danger of sustaining a direct injury" as a result of the challenged action. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1552 (2016) (citations omitted). The injury or threat of injury must be "concrete and particularized," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted), and not "merely 'conjectural' or 'hypothetical' or otherwise speculative." *Summers*, 555 U.S. at 505 (quoting *Defs. of Wildlife*, 504 U.S. at 560). Thus, an alleged future injury must be "*certainly impending*"; "'[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990), emphasis in *Clapper*).

Ms. Lopez's claimed injuries—resulting from the hypothesized consequences of conjectural events starting with a speculative increase in non-responses to the census—are too abstract and attenuated to demonstrate the necessary concrete injury-in-fact. At the outset, Ms. Lopez's claims of injury are premised on Plaintiffs' belief that the addition of the citizenship question (but not the presence of other questions touching on sex, Hispanic origin, race, or relationship status that some respondents might prefer not to answer) will ultimately cause a net *decrease* in the response rate for the

2020 Census, at least in certain areas, such as where Ms. Lopez lives. *See, e.g.,* Compl. ¶¶ 4, 15, 111-12, 140-41. This assertion is entirely speculative, however. As Secretary Ross points out, there is little "definitive, empirical" evidence regarding the effect of reinstating a citizenship question on the decennial census. A.R. 1316; *see also id.* 1315-18. Indeed, as the Secretary confirmed with the Census Bureau, non-response rates for the citizenship question on the 2013-2016 ACS surveys were comparable to non-response rates for other questions on those same surveys. *Id.* 1315. As Plaintiffs themselves recognize, a fairly large number of households historically have failed to respond to the short-form questionnaire for a variety of reasons, even when no citizenship question was included. *See* Compl. ¶ 77 (citing undercount numbers for the 1990 and 2010 censuses). Plaintiffs do not provide any reason to conclude that households who otherwise would respond in 2020 would now choose not to do so because of the citizenship question and even admit that there already are anxieties in the population that will "[n]egatively [i]mpact [c]ensus [p]articipation by Latinos and [i]mmigrants of [c]olor." Compl. at 41. As the Secretary noted, there are many individuals who would decline to participate regardless of whether the census included a citizenship question, and "no one provided evidence that there are residents who would respond accurately to a decennial census that did not contain a citizenship question but would not respond if it did." A.R. 1317.

Thus, Plaintiffs speculate that the reinstatement of a citizenship question alone will reduce self-response rates. Moreover, Plaintiffs ignore that the Census Bureau has extensive procedures in place to address non-response and to obtain accurate data for those households that decline to respond. Indeed, the Census Bureau plans to increase outreach to address the potential for non-responses (whatever the reason), and is investing in extensive procedures to meet any non-response challenge.[2] It is entirely unknown (and unknowable) at present whether any initial decrease in self-

[2] Self-response rates to the decennial census have consistently declined over the past decades. *See 2020 Census Life-cycle Cost Estimate Executive Summary* ("LCCE"), Dec. 21, 2017,

response rates will result in an undercount at the close of the 2020 Census, after the Census Bureau has completed all its processes for enumerating.[3] In sum, Plaintiffs' allegations that the reinstatement of the citizenship question will lower response rates is nothing more than speculation. *Cf. Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (finding standing where plaintiffs "*have made a showing*," through a survey conducted by an independent research organization, *see Carey v. Klutznick*, 508 F. Supp. 416, 418 (S.D.N.Y. 1980), *aff'd*, 637 F.2d 834 (2d Cir. 1980), "that Census Bureau actions in New York State *have caused* a disproportionate undercount which will result in loss of representation in Congress" (emphasis added)).

Second, even to the extent there may be a chance of a greater undercount because of the citizenship question, Ms. Lopez's allegations that she will "lose out on political power and funding that will instead go to other areas of New York State" also are too abstract and attenuated to satisfy Article III. Compl. ¶ 53. Ms. Lopez fails to allege with any specificity how she will lose "political power" or what type of funding under what federal or state program is at issue. *Id.* Such vague and amorphous allegations are devoid of the concreteness and particularization necessary for standing. *See Baur v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003) ("[A] plaintiff cannot rely solely on conclusory

---

https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-cost-estimate1.pdf, at 5. In anticipation of this continued decline, the Census Bureau has taken steps to ensure that its 2020 non-response follow-up operations will be sufficiently robust. *2020 Census Detailed Operational Plan for: 18. Nonresponse Followup Operation (NRFU)*, Apr. 16, 2018, https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/NRFU-detailed-operational-plan.pdf; *see also 2020 Census Research and Testing Management Plan*, Dec. 28, 2015, https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/research-testing-plan.pdf, at 7.

[3] This conclusion is confirmed by recent testimony by Dr. Ron Jarmin, performing the nonexclusive duties of the Director of the Census Bureau, who stated that there is no "definitive answer" as to whether a citizenship question could produce a differential increase in the non-response rate and could offer only that the impact in some communities "*might* be important." *See* Testimony, https://appropriations.house.gov/calendar/eventsingle.aspx?EventID=395239, at 1:41:36, 1:44:20; Compl. ¶ 145.

allegations of injury or ask the court to draw unwarranted inferences in order to find standing."); *see also Defs. of Wildlife,* 504 U.S. at 573-74 ("We have consistently held that a plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy."); *Treiber v. Aspen Dental Mgmt., Inc.*, 635 F. App'x 1, 3 (2d Cir. 2016) ("[B]ecause the allegation [of injury] is wholly conclusory and unsupported by any facts, it is insufficient to support standing."); *Butler v. Obama*, 814 F. Supp. 2d 230, 232 (E.D.N.Y. 2011) ("[C]onclusory assertions about the cause of the[] increased premiums are insufficient to satisfy the particularized injury requirement of Article III.").

Moreover, Ms. Lopez's allegations suffer the same defect as Plaintiffs' broader allegations; that is, none of Plaintiffs' allegations regarding loss of representation or funding acknowledges that the allocation of representation and funding is not generally directly proportional to population but is a function of multiple factors including, often, the populations of *other* states. *See, e.g.*, 2 U.S.C. § 2a(a) (apportionment of existing number of Representatives to occur "by the method known as the method of equal proportions"); https://www.census.gov/population/apportionment/about/computing.html; *see generally U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 461 (1992)[4]; 42 U.S.C. § 1301(a)(8)(A) (Medicaid formula measuring a state's per capita income against the national average per capita income); 42 U.S.C. § 5306 (allocating Community Development Block Grant funds to cities under a complex formula that includes, *inter alia*, the ratio between "the population of that city and the population of all metropolitan areas"). Given the complexity of these calculations, Plaintiffs' generalized, non-specific allegations regarding anticipated effect (*i.e.*, "undercount" leads directly to "loss of funding or representation") are too conclusory and speculative to satisfy Article III's requirements. *See Nat'l Law Ctr. on Homelessness & Poverty v. Kantor*, 91 F.3d 178, 185 (D.C. Cir. 1996)

[4] As demonstrated by the cited authorities, apportionment is a complex process that is determined by ranking states in order of priority for seats, based on their populations (multiplied by a multiplier). Each state's likelihood of gaining or losing seats will be affected by its own total population as well as the population of *other* states, which may also be moving up or down in the priority listing.

(finding lack of standing where court could not determine "what effect any methodology for counting the homeless would have on the federal funding of any particular appellant," noting that "if a more accurate count would have enlarged some communities' shares, it likely would have reduced the shares of other communities")[5]; *id.* at 186 ("interstate vote dilution injury is difficult to establish"); *Strunk v. U.S. Dep't of Commerce*, Civ. A. No 09-1295 (RJL), 2010 WL 960428, at *3 (D.D.C. Mar. 15, 2010) (rejecting vote dilution claims for lack of standing where plaintiff was "but one citizen of New York and one voter in New York's 11th Congressional District"); *Ridge v. Verity*, 715 F. Supp. 1308, 1318 (W.D. Pa. 1989) (finding no standing to bring an apportionment claim when "none of the plaintiffs in this case can show which states would gain and which would lose representation in Congress"); *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 570 (D.D.C. 1980) (holding "none of the plaintiffs are able to allege that the weight of his or her vote in the next decade will be affected" where plaintiffs "can do no more than speculate as to which states might gain and which might lose representation" which depends, *inter alia,* on "the interplay of all the other population factors which affect apportionment"); *see also Sharrow v. Brown*, 447 F.2d 94, 97 (2d Cir. 1971) (noting that plaintiff's claim of standing to challenge method of apportionment "presents difficulty" because plaintiff "would have to show, at least approximately, the apportionment his interpretation . . . would yield, not only for New York *but for every other State as well*" (emphasis added)).

[5] Defendants acknowledge that the court in *National Law Center on Homelessness and Poverty* was ruling on a motion for summary judgment and that a number of courts have found allegations of lost funding to be sufficient to survive motions to dismiss. *See* 91 F.3d at 185 (citing cases). But most of those cases involved post-census challenges to counting methodologies, and none of them involved a challenge to the mere inclusion of a *question* on the census form. Defendants also recognize that the Second Circuit in *Carey,* in upholding a preliminary injunction requiring the Census Bureau to take certain actions while the census was ongoing, held that allegations of lost funding were sufficient to establish standing. 637 F.2d at 838. *Carey* did not involve allegations of injuries from the mere inclusion of a question. Moreover, the court cited New York City's "present financial condition," *id.*, in finding that the city and the state had standing as recipients of federal funds. Defendants respectfully contend that the layers of speculation required here to conclude that Plaintiffs will be injured by the addition of one question on the census questionnaire distinguishes this case from these prior decisions.

c. Plaintiffs fail to establish standing to sue on their own behalf.

To establish that Plaintiff organizations have standing to sue on their own behalf (rather than on behalf of their members), Plaintiffs must allege that the organizations have suffered a "concrete and demonstrable injury to [their] activities—with a consequent drain on [their] resources—constitut[ing] . . . more than simply a setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). The Second Circuit has held that, to meet this burden, an organization must demonstrate at least "a 'perceptible impairment' of an organization's activities" constituting a "real" economic effect. *Nnebe v. Daus*, 644 F.3d 147, 156-57 (2d Cir. 2011) (citation omitted). Here, Plaintiffs have failed to sufficiently allege such a concrete, non-speculative "perceptible impairment" to their organizations' activities such that they have standing to sue.

Plaintiffs allege primarily that, as a result of the Secretary's decision to reinstate a citizenship question, they "will be forced to expend more resources on their outreach efforts," Compl. ¶ 22 (NYIC); *see also id.* ¶ 30 (CASA); *id.* ¶¶ 41-42 (ADC); *id.* ¶ 46 (ADCRI); *id.* ¶ 57 (MtRNY), and "ha[ve] already, and will continue to, divert resources from [their] other organization priorities." *Id.* ¶ 22 (NYIC); *see also id.* ¶ 32 (CASA); *id.* ¶ 43 (ADC); *id.* ¶ 47 (ADCRI); *id.* ¶ 59 (MtRNY). These allegations describe Plaintiffs' responses to their conjectures that the question will cause individuals not to respond to the census in greater, and differentially distributed, numbers than previously. But, as explained above, this belief is based on an event (an increased undercount) that is speculative and not "certainly impending." And Plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416; *Fero v. Excellus Health Plain, Inc.*, 236 F. Supp. 3d 735, 754 (W.D.N.Y. 2017) ("plaintiffs' mitigation efforts against that [non-imminent] future harm cannot confer standing"); *see also Katz v.*

Pershing, LLC, 672 F.3d 64, 79 (1st Cir. 2012) ("When an individual alleges that her injury is having to take or forebear from some action, that choice must be premised on a reasonably impending threat.").

In addition, these allegations are notably deficient in specifics—Plaintiffs do not specify the size of this resource diversion or the specific tasks they have been or will be undertaking. Most of the Plaintiffs use very similar language to assert that they have "had to divert resources from other areas in order to address concerns from its constituents stemming from the announcement of the citizenship question." Compl. ¶ 59 (MtRNY); *compare id.* ¶ 32 (CASA); *id.* ¶ 43 (ADC); *id.* ¶ 47 (ADCRI). These obviously boilerplate allegations do not meet even the minimal standard of alleging at least a "perceptible" diversion of an organization's resources producing a "real" economic effect—boilerplate language does not reflect a "real" world. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[B]are assertions . . . are conclusory and not entitled to be assumed true."); *N.Y. Civil Liberties Union*, 684 F.3d at 295 (organization must allege "a concrete injury as a result of the policy"); *Fullwood v. Wolfgang's Steakhouse, Inc.*, 2017 WL 377931, at *6 (S.D.N.Y. Jan. 26, 2017) ("[C]onclusory allegation that Plaintiff was 'damaged' by Defendants' conduct [is] plainly insufficient to plead plausibly that Plaintiff suffered a concrete and particularized injury." (citation omitted)); *but see Nnebe*, 644 F.3d at 157 (finding standing based on evidence that organization "provid[ed] initial counseling, explain[ed] the suspension rules to drivers, and assist[ed] the drivers in obtaining attorneys").

Finally, some Plaintiffs allege that they face the possible loss of funding, specifically, Community Development Block Grant funds. Compl. ¶¶ 27, 54. For the reasons set forth above, however, these generalized allegations are not particularized enough to satisfy the injury-in-fact requirement, particularly in light of the complex nature of these funding determinations and uncertainty as to how the community grantees (cities or other jurisdiction) will distribute its funds to organizations within its area.

2. Plaintiffs' alleged injuries are not fairly traceable to the challenged action.

Pursuant to the Court's Order, ECF No. 33, Defendants respectfully refer the Court to Argument Section I.A.2. of Defendants' memorandum of law in support of their motion to dismiss and Section I.A. of Defendants' reply memorandum of law in further support of their motion to dismiss in *New York v. Department of Commerce*, Dkt. No. 18-cv-2921 (S.D.N.Y.), ECF. Nos. 155, 190.

3. Plaintiffs lack standing to assert the constitutional rights of others.

The Complaint's first claim is for an alleged violation of the Equal Protection Clause. Compl. ¶¶ 193-200. Specifically, the Complaint alleges that the Secretary's decision to reinstate the citizenship question was made with "discriminatory intent toward Latinos, Asian-Americans, Arab-Americans, and immigrant communities of color generally." *Id.* ¶ 195. However, Plaintiffs—immigrant advocacy organizations—lack standing to assert the constitutional rights of the individual immigrants allegedly discriminated against.

A plaintiff generally "must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (citation omitted). This principle of prudential standing recognizes that "third parties themselves usually will be the best proponents of their rights" and thus protects third parties who "may not, in fact, wish to assert the claim in question." *Miller v. Albright*, 523 U.S. 420, 446 (1998) (O'Connor, J., concurring in judgment) (citation omitted).

Here, the Complaint does not allege that the Secretary intentionally discriminated against any of the *plaintiff advocacy organizations*. Instead, it alleges that the Secretary intentionally discriminated against *immigrants*. *See* Compl. ¶ 1 ("[T]he addition of the citizenship question is a naked act of intentional discrimination directed at immigrant communities of color …."); *id.* ¶ 195 ("Defendants acted with discriminatory intent toward Latinos, Asian-Americans, Arab-Americans, and immigrant communities of color generally in adding the citizenship question to the Decennial Census.").

Nor do the plaintiffs satisfy the third-party standing exception to the general rule against asserting the rights of others. That exception requires a plaintiff to show both (1) "a close relation to the third party" whose rights the plaintiff is asserting, and (2) "some hindrance to the third party's ability to protect his or her own interests." *Powers*, 499 U.S. at 411 (citation omitted). The "close relation" must be "such that the [plaintiff] is fully, or very nearly, as effective a proponent of the right as" the third party. *Fensternmaker v. Obama*, 354 F. App'x 452, 455 (2d Cir. 2009). The types of relationships that have been held to be sufficiently close are trustee-trust, guardian ad litem-ward, receiver-receivership, bankruptcy assignee-estate, executor-testator estate, attorney-client, and foster parent-foster child. *See W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 109–10 (2d Cir. 2008) (citing cases). The "hindrance" element requires a "genuine obstacle" preventing the third party from asserting his or her own right. *Nat'l Union of Hosp. & Health Care Emps. v. Carey*, 557 F.2d 278, 281 (2d Cir. 1977).

Neither of these requirements is satisfied by the Complaint's allegations. First, the Complaint clearly does not allege facts indicating a sufficiently close relation with the immigrants whose rights Plaintiffs are asserting. In fact, the Complaint alleges no formal relationship at all between Plaintiffs and those immigrants. Plaintiff New York Immigration Coalition is an "umbrella policy and advocacy organization" whose members are other nonprofit organizations; it claims no direct relationship with the immigrants allegedly discriminated against by the Secretary's decision. Compl. ¶¶ 14, 16. Plaintiff ADC Research Institute "sponsors public programs and initiatives" for Arab-Americans' rights; it claims no formal relationship with individual Arab-Americans. *Id.* ¶ 44. And although the remaining three Plaintiffs claim immigrants as members, *id.* ¶¶ 25, 35, 50, the Complaint does not allege any facts about the nature of those membership relationships, such as whether the members have consented for Plaintiff organizations to sue in federal court to assert their rights, or whether the members have any recourse if Plaintiff organizations fail to adequately represent their interests here.

Second, the Complaint does not allege any facts suggesting a genuine obstacle preventing immigrants from asserting their own rights. The Complaint alleges merely that the plaintiff organizations collectively have over 100,000 immigrant members and that reinstating the citizenship question will deter millions of immigrants from participating in the census. Compl. ¶¶ 2, 25, 35, 50. The Complaint, however, does not demonstrate how any immigrants are hindered from asserting their rights, including by initiating or otherwise participating in a lawsuit to assert such rights.

Finally, 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, which has no relation, and was not intended, to provide *funding* to states. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990) ("[A] plaintiff must establish that the injury he complains of … falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his Complaint." (citation omitted)); *Montesa v. Schwartz*, 836 F.3d 176, 195 (2d Cir. 2016). In order for Plaintiffs to fall within the zone of interests of the Enumeration Clause, they would have to adequately plead an injury relating to *apportionment*. As discussed above, they have not.

The Equal Protection and Enumeration Clause claims should therefore be dismissed for lack of prudential standing.

B. Plaintiffs' Suit is Barred by the Political Question Doctrine.

Pursuant to the Court's Order, ECF No. 33, Defendants respectfully refer the Court to Argument Section I.B. of Defendants' memorandum of law in support of their motion to dismiss and Section I.B. of Defendants' reply memorandum of law in further support of their motion to dismiss in *New York v. Department of Commerce*, Dkt. No. 18-cv-2921 (S.D.N.Y.), ECF. Nos. 155, 190.

C. The Secretary's Decision Is Not Subject to Judicial Review Under the Administrative Procedure Act.

Pursuant to the Court's Order, ECF No. 33, Defendants respectfully refer the Court to Argument Section I.C. of Defendants' memorandum of law in support of their motion to dismiss and

Section I.C. of Defendants' reply memorandum of law in further support of their motion to dismiss in *New York v. Department of Commerce*, Dkt. No. 18-cv-2921 (S.D.N.Y.), ECF. Nos. 155, 190.

II. PLAINTIFFS FAIL TO STATE AN ENUMERATION CLAUSE CLAIM

Pursuant to the Court's Order, ECF No. 33, Defendants respectfully refer the Court to Argument Section II. of Defendants' memorandum of law in support of their motion to dismiss and Section II. of Defendants' reply memorandum of law in further support of their motion to dismiss in *New York v. Department of Commerce*, Dkt. No. 18-cv-2921 (S.D.N.Y.), ECF. Nos. 155, 190.[6]

III. PLAINTIFFS FAIL TO STATE AN EQUAL PROTECTION CLAIM

Plaintiffs' Equal Protection claim alleges that reinstating the citizenship question impermissibly discriminates against immigrants. Compl. ¶¶ 193–200. Yet although the Complaint alleges discriminatory *effects* from that decision, it fails to allege facts plausibly suggesting discriminatory *intent*, as required to state a viable Equal Protection claim. *Pers. Admin'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979). Under Supreme Court precedent, a facially neutral policy such as this "is unconstitutional . . . *only* if [a disparate] impact can be traced to a discriminatory purpose," *Id.* at 274 (emphasis added).

An intentional discrimination Equal Protection claim requires allegations of both discriminatory effect and discriminatory intent. *See Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 204 (2d Cir. 2006). Discriminatory intent "implies more than intent as volition or intent as awareness of consequences." *Hayden v. Paterson*, 594 F.3d 150, 163 (2d Cir. 2010) (citing *Feeney*, 442 U.S. at 279). Instead, it implies that the decisionmaker "selected or reaffirmed a particular course

[6] While Plaintiffs obliquely attempt to cast doubt on the Secretary's established census operations, Compl. ¶¶ 147-50, the only allegation that even touches on 2020 census procedures is Plaintiffs' contention that the Census Bureau "would not hire census enumerators who are not U.S. citizens for the 2020 Decennial Census, despite shortfalls in workers," *id.* ¶ 149. But Plaintiffs fail to allege, for example, that other non-response follow-up procedures, including enumerators (whether or not they are U.S. citizens) are not in place to reach persons who have failed to answer the census. Without such an allegation, Plaintiffs have failed to challenge any of the Secretary's procedures for conducting a person-by-person headcount.

of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* (quoting *Feeney*, 442 U.S. at 279). Thus, where a plaintiff challenging a facially neutral law "fail[s] to demonstrate that the law in any way reflects a *purpose to discriminate*," there is no equal protection violation. *Feeney,* 442 U.S. at 279 (emphasis added).

Following the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), Plaintiffs cannot, without more, simply declare that Defendants must have reinstated a citizenship question on the decennial census with the purpose of discriminating against immigrants. Instead, "[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." *Iqbal*, 556 U.S. at 678. Thus, to adequately plead an equal protection challenge to a facially neutral policy like the one at issue here, it is Plaintiffs' burden to identify facts rendering it plausible that Defendants acted with the purpose of discriminating against immigrants: "[T]o state a claim, . . . respondent must plead sufficient *factual matter* to show that petitioners adopted and implemented the detention policies at issue not for a neutral . . . reason *but for the purpose of discriminating* . . . ." *Id.* 677 (emphasis added and citation omitted).[7] Bare allegations of intent—for example, that a decision was made "with the intent to" harm a protected class—are conclusory and must be disregarded. *Hayden*, 594 F.3d at 162.

The recent decision in *Trump v. Hawaii*, 585 U.S. ---, 2018 WL 3116337 (June 26, 2018), further underscores the deficiencies in Plaintiffs' Complaint. There, the Supreme Court reaffirmed that facially neutral policies are subject to only limited, deferential review and may not lightly be held unconstitutional. *Id.* at *19-25. Indeed, although the proclamation under review in *Trump v. Hawaii*

[7] Finally, a "presumption of regularity" attaches to all federal officials' actions, *United States v. Chem. Found.*, 272 U.S. 1, 14 (1926), and that presumption further increases Plaintiffs' burden to plead facts rendering their discrimination claim plausible. *Cf. United States v. Armstrong*, 517 U.S. 456, 464–65 (1996) (applying the presumption of regularity to selective prosecution claims).

concerned the admission of aliens from abroad and was thus reviewed at most for rational basis, the Court recognized that deferential review may apply "across different contexts and constitutional claims," *Id.* at *20.

Here, the Complaint does not allege facts plausibly suggesting that discriminatory intent prompted the decision to reinstate a citizenship question. The Complaint contains no factual allegations indicating any *direct* discriminatory intent. The Complaint's bare allegations that the decision was "a naked act of intentional discrimination" prompted by "discriminatory goals," "illicit motives," "invidious discrimination," and "discriminatory intent" are conclusory and should be disregarded. Compl. ¶¶ 1, 5, 6, 7, 10, 195. Further, statements by government officials not alleged to have participated in the decision to reinstate a citizenship question—and, *a fortiori*, people outside government—shed no light on "the decisionmaker's purposes." *Id.* ¶¶ 98-109, 177-82; *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

With no factual allegations directly indicating discriminatory intent, the Complaint instead merely pleads speculative discriminatory effects and alleges that they suggest discriminatory intent. Compl. ¶¶ 111-50. This approach fails for three reasons. First, the Complaint cites effects of *other* allegedly anti-immigrant actions and statements besides the decision to reinstate the citizenship question—like actions by ICE and DHS. *Id.* ¶¶ 113-26, 147-50. But the Complaint alleges no connection between those actions/statements and the decision to reinstate a citizenship question.

Second, the Complaint relies on statements by the Census Bureau and outside commentators about the likely effects of reinstating a citizenship question. Compl. ¶¶ 81-90, 127-46. Effects alone, however, do not suggest that the decision was made "'because of,' not merely 'in spite of,'" those

effects.[8] *See Hayden*, 594 F.3d at 163. The Complaint does not allege facts "trac[ing]" those effects to a discriminatory purpose. *See id.*

Third, the Complaint alleges that the process leading to the reinstatement of a citizenship question departed from past practice—specifically, the fact that the citizenship question did not undergo the years-long testing regimen traditionally applied to changes in census questions. Compl. ¶¶ 151–77. But the Complaint acknowledges an "obvious alternative explanation" for that fact: a citizenship question has long been used in other census surveys. Compl. ¶¶ 92–95, 175, *see Hayden*, 594 F.3d at 167. For example, the citizenship question that will be asked on the 2020 Census is identical to the one that has been asked of over 40 million households in the American Community Survey since 2005. *American Community Survey Sample Size: Initial Addresses and Sample Selected and Final Interviews*, United States Census Bureau, https://www.census.gov/acs/www/methodology/sample-size-and-data-quality/sample-size/ (last visited Jun. 29, 2018). The Complaint alleges that the American Community Survey is unlike the decennial census, but it fails to acknowledge that a citizenship question was on the census's long-form questionnaire as recently as 2000. Moreover, the Complaint fails to identify any other questions from Census Bureau surveys that were added to the decennial census only after undergoing the extensive testing regimen traditionally applied to new questions. Given these differences, the Complaint fails to credibly allege any departure from analogous past practice.

The Complaint does not allege facts plausibly suggesting that discriminatory intent motivated reinstating a citizenship question. The Equal Protection claim should therefore be dismissed for failure to state a claim.

---

[8] In addition, several of those statements occurred months *after* the Secretary decided to reinstate the citizenship question, so they fail to suggest that the decision was made *because of* the effects predicted by the statements. *E.g.*, Compl. ¶ 142 & n. 77 (congressional testimony on May 8, 2018), ¶ 144 & n.79 (congressional testimony on May 10, 2018).

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion and dismiss this case.

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
86 Chambers St., 3rd Floor
New York, NY 10007

CHAD A. READLER
Acting Assistant Attorney General

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Director, Federal Programs Branch

CARLOTTA P. WELLS
Assistant Director, Federal Programs Branch

/s/ Stephen Ehrlich
KATE BAILEY
GARRETT COYLE
STEPHEN EHRLICH
CAROL FEDERIGHI
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, DC 20530
Tel.: (202) 305-9803
Fax: (202) 616-8470
Email: Stephen.ehrlich@usdoj.gov

Counsel for Defendants