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)

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

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INTRODUCTION

In opposing Plaintiffs' attempt to invalidate the Secretary's reinstatement of a citizenship question on the decennial census questionnaire, Defendants set forth the multiple reasons this case is not justiciable, and explained why the Court should not second-guess the Secretary's judgment regarding his exercise of authority that was delegated to him by the Constitution through Congress. Plaintiffs' opposition does nothing to dispel the justiciability concerns.

In particular, Plaintiffs fail to show why third parties' illegal choices in failing to respond to the census should be fairly attributed to Defendants so as to satisfy the causation prong of the standing inquiry. Plaintiffs also fail to rebut Defendants' argument that they are improperly manufacturing standing to sue as organizations by "inflicting harms on themselves," *i.e.*, diverting resources, based on mere fears of speculative future harms. Although Plaintiffs have now identified individual members that will allegedly be affected by their posited increased undercount attributable to a citizenship question, Plaintiffs' arguments with regard to injury to those individuals, or to themselves, do nothing more than underscore the speculative and uncertain nature of the claimed increase in the undercount and alleged consequences. And the identification of these individuals does not establish that Plaintiffs now have the necessary prudential, third-party standing to assert constitutional claims.

As for their arguments concerning the existence of an equal protection claim, Plaintiffs have not identified facts in their Complaint, or submitted with their opposition, that show that the Secretary of Commerce, the decisionmaker here, was plausibly motivated by racial discrimination against a protected class. Specifically, plaintiffs have not shown that the statements and actions by others that they rely on as evidence of discriminatory intent, which were made in different and often unofficial contexts, can be imputed to Secretary Ross, so as to plausibly state an inference that *his* decision was made with the intent to discriminate. For these reasons, and those set forth in Defendants' previous memorandum, this case should be dismissed.

ARGUMENT

I. PLAINTIFFS LACK STANDING

A. Plaintiffs Have Not Established That Any Alleged Increased Undercount or Their Plans to Address Such an Eventuality Are "Fairly Attributable" To Defendants' Actions.

Plaintiffs' opposition acknowledges that their theory of causation for Article III purposes is indirect, relying on conclusions about "how the agency's action causes other[] parties to behave." Pls.' Opp'n at 13 [Dkt. No. 49]. As discussed in the government's reply brief in *New York*,[1] in such circumstances, standing "is ordinarily 'substantially more difficult' to establish." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992). In such cases, the inquiry is whether the government's action will have a "determinative or coercive effect upon the action of" those third parties. *Bennett v. Spear*, 520 U.S. 154, 169 (1997)).

Here, far from imposing a "determinative or coercive" effect causing people *not* to respond to the census, the government requires people *to respond to* the census by imposing a legal obligation to do so. *See* 13 U.S.C. § 221. Plaintiffs' theory of standing thus rests on the assumption that people will not comply with that legal obligation. In light of this legal obligation, Plaintiffs have failed to allege facts indicating that any third party's decision not to respond to the census would cease to be that person's "independent action." *See Bennett*, 520 U.S. at 169; *see also United States v. Sanchez-Gomez*, --- U.S. ----, 138 S. Ct. 1532, 1541 (2018) (observing that courts "have consistently refused to 'conclude that the case-or-controversy requirement is satisfied by' the possibility that a party 'will … violat[e] valid criminal laws" (quoting *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974)).

[1] Pursuant to the Court's Order of June 27, 2018 [Dkt. No. 33], Defendants respectfully refer the Court to 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.) [Dkt. No. 190], and incorporate the arguments therein by reference

Plaintiffs cite *Natural Resources Defense Council v. National Highway Traffic Safety Administration ("NRDC v. NHTSA")*, --- F.3d ---, 2018 WL 3189321, at *5 (2d Cir. 2018), and *Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013), both of which are distinguishable. In *NRDC v. NHTSA*, the Court found a sufficient causal link between the size of government penalties (the governmental action at issue) and the likelihood of increased pollution because the government penalties acted coercively on the automakers to control the level of pollution, which was what produced plaintiffs' injury. 2018 WL 3189321, at *5. Here, in contrast, the governmental action in question, the addition of the citizenship question, does not have a coercive effect on responders to the census. *See Simon v. E. Ky. Welfare Rights Org.,* 426 U.S. 26, 42 (1976) (mere "encouragement" not enough for traceability). And in *Rothstein,* the chain of causation involved illegal acts *both* by third parties (Iran/Hezbollah/Hamas) and also *by the defendant*, which had admitted its illegal conduct. *See* 708 F.3d at 93 (complaint alleged that defendant bank "in violation of United States laws, … provided Iran with hundreds of millions of dollars in cash—transactions that UBS has publicly acknowledged"). Moreover, the very purpose of the laws violated by the bank was to prevent the acts of terrorism that ultimately ensued. Here, in contrast, there is nothing illegal or even inherently wrongful about asking a question on the census form, so third parties' illegal choices not to respond are simply that, individual choices, and not consequences fairly attributable to the government.

Plaintiffs also fail to address *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), which rejects theories of injury based on costs a plaintiff anticipates incurring to address a speculative future event. *See* Pls.' Opp'n at 3-5. *Clapper* emphasized that plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." 568 U.S. at 416. Here, Plaintiffs have done just that—Plaintiff associations' claims to standing on their own behalf is based on precisely such an erroneous theory. They claim that they will have to divert resources because of their "fears of a hypothetical future" increased nonresponse.

But, as shown in Defendants' opening memorandum and below, the hypothetical future increase nonresponse is not "certainly impending." For this reason, Plaintiffs have therefore also failed to establish that their associational harm (their decisions to divert resources) is "fairly traceable" to the government's actions.

B. Plaintiffs Have Not Established That the Claimed Increase in the Undercount and the Alleged Consequences Therefrom Are "Certainly Impending"

Plaintiffs' opposition also does not cure the defects in their attempt to establish the injury-in-fact prong of the standing inquiry. To be sure, Plaintiffs have now identified individual members of their organizations that will allegedly be affected by an increased undercount. *See* Pls.' Opp'n at 9. But Plaintiffs' arguments with regard to injury to those individuals, or to themselves, do nothing more than underscore the speculative and uncertain nature of the claimed increase in the undercount and alleged consequences.

First, Plaintiffs still have not alleged or pointed to sufficient facts demonstrating that a differential increase in the undercount resulting from the addition of a citizenship question is anything more than speculative. In response to Defendants' contentions in this regard, Plaintiffs assert only that the question of whether there will be a differential undercount is a factual issue to be resolved at the merits stage and is "irrelevant to the threshold question of standing at the pleading stage." Pls.' Opp'n at 11-12. But Plaintiffs' suggestion that they need do nothing more than allege a speculative outcome at the pleading stage to establish standing is incorrect. Even at the pleading stage, a plaintiff must "clearly … allege facts demonstrating" how it will suffer a "concrete and particularized" injury caused by the challenged conduct. *Spokeo, Inc. v. Robins*, --- U.S. ---, 136 S. Ct. 1540, 1547 (2016) (citations omitted). "[U]nadorned speculation will not suffice to invoke the judicial power." *Simon*, 426 U.S. at 44. Thus, even at the pleading stage, a plaintiff cannot rely on "conclusory statements and untethered assertions" to establish the necessary injury-in-fact. *Parker Madison Partners v. Airbnb, Inc.*, 283 F. Supp. 3d 174, 180 (S.D.N.Y. 2017); *see also Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152,

1159 (D.C. Cir. 2005) (dismissing case at pleading stage where plaintiff "offered this Court no actual demonstration of increased risk"). "[J]urisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003) (citation omitted).

Accordingly, where, as here, plaintiffs allege only a highly speculative theory of injury, dismissal is warranted. *See Taylor v. Bernanke*, No. 13-CV-1013 (ARR), 2013 WL 4811222, at *7 (E.D.N.Y. Sept. 9, 2013) (granting motion to dismiss where plaintiffs' allegation that they faced "increasing risk of loss of their bank deposits" "is too speculative to confer standing"); *Butler v. Obama*, 814 F. Supp. 2d 230, 238 (E.D.N.Y. 2011) (granting motion to dismiss where plaintiff "has failed to demonstrate a concrete injury based on the possibility that, in 2014, he may have to purchase insurance under the individual mandate or pay a fine"). Plaintiffs' allegations must rise above the level of the purely hypothetical or guesswork. "[W]ere all purely speculative 'increased risks' deemed injurious, the entire requirement of 'actual or imminent injury' would be rendered moot, because all hypothesized, non-imminent 'injuries' could be dressed up as 'increased risk of future injury.'" *Ctr. for Law & Educ.*, 396 F.3d at 1161.

Moreover, it is not sufficient for Plaintiffs to plead merely a sufficiently nonspeculative disproportionate undercount; they must allege facts indicating that the level of the disproportionate undercount will be *material to* their claimed injury. Plaintiffs do not dispute that there would be no effect on representation or funding merely if there were some levels of undercount somewhere. Yet their only allegations connecting the level of the purported undercount to changes in their representation and funding are entirely conclusory. *See* Compl. ¶ 197.

Finally, Plaintiffs have failed to tie any funding decreases resulting from a hypothetical undercount to material changes in the particular public services that they use. *See* Compl. ¶¶ 25, 36-37, 54, 197. The mere fact of a decrease in federal funding to Plaintiffs' states and localities says

nothing about how those states and localities will respond to that decrease. Plaintiffs have alleged no facts indicating that their states and localities will reduce spending on the particular roads, schools, and health insurance coverage that Plaintiffs use—as opposed to replacing any lost federal funding with other sources or reducing spending on other roads, schools, and health insurance coverage besides those used by Plaintiffs.

In sum, Plaintiffs have not alleged facts sufficient to show that reinstating the citizenship question will "certainly" result in material and detrimental changes to Plaintiffs' legislative representation or to the roads, schools, and health insurance coverage that they use. *See Clapper*, 568 U.S. at 409. This case should therefore be dismissed for lack of standing.

C. Plaintiffs Have Not Alleged Sufficient Facts to Establish that They or Their Members Have Standing to Bring an Equal Protection Claim.

In their opening memorandum (pages 13-15), Defendants argued that the Plaintiff organizations lacked prudential standing to assert the constitutional rights of individual immigrants, who are the ones possessing the constitutional right (equal protection) at issue, because (1) there was not a sufficiently "a close relation" between Plaintiffs and such individuals, and (2) Plaintiffs had identified no "hindrance to the third party's ability to protect his or her own interests." Plaintiffs' identification of individual members of their organizations does not close these gaps. First, the declarations submitted by Plaintiffs do not identify a sufficiently close relationship, comparable to those in the cases cited in Defendants' memorandum (page 14), between themselves and their individual members. *See, e.g.*, Escobar Decl. ¶ 8 (describing individuals only as "CASA member[s]") [Dkt. No. 49-2]; Ayoub Decl. ¶ 18 (describing individual as "an active member" but not elaborating further) [Dkt. No. 49-1]. Moreover, the declarations do not describe these individual members as belonging to any protected class. Second, Plaintiffs' declarations do not state that there is any hindrance to the identified individuals' ability to bring their own suits to protect their interests.

Plaintiffs' claims that their organizations have an equal protection claim in their own right under either a "class-of-one" or an "imputed racial identity" theory simply do not fit. Pls.' Opp'n at 15. Plaintiffs have not alleged that they have been treated differently from other similarly situated organizations, *see Wasatch Equal. v. Alta Ski Lifts Co.*, 55 F. Supp. 3d 1351, 1361 (D. Utah 2014), *aff'd*, 820 F.3d 381 (10th Cir. 2016), or that they possess an "imputed racial identity." *See Carnell Const. Corp. v. Danville Redevelopment & Hous. Auth.*, 745 F.3d 703, 715 (4th Cir. 2014). And the other, more recent cases cited by plaintiffs are not applicable here as they do not address the prudential doctrine of third-party standing and, in any event, in both cases the government conceded that at least one plaintiff had standing, unlike here, where the government makes no such concession.[2] *See Casa De Maryland v. U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758, 771 (D. Md. 2018), *appeal filed*, No. 18-1522 (4th Cir. May 8, 2018); *Batalla Vidal v. Nielsen,* 291 F. Supp. 3d 260, 282 n.12 (E.D.N.Y. 2018).

II. PLAINTIFFS FAIL TO STATE AN EQUAL PROTECTION CLAIM

Plaintiffs' opposition also confirms that they have not alleged sufficient facts in their Complaint to demonstrate a plausible equal protection claim. Specifically, plaintiffs have not demonstrated that they have sufficient facts to establish that the reinstatement of a citizenship question on the census questionnaire was plausibly motivated by racial discrimination against "immigrant communities of color." *See Hayden v. Paterson*, 594 F.3d 150, 163 (2d Cir. 2010) (to survive a motion to dismiss, plaintiff must plead "facts sufficient to support a finding of racially discriminatory intent or purpose that would plausibly give rise to an entitlement to relief") (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

[2] Defendants do not concede that individual members who are immigrants of color would have standing to bring the constitutional claims individually, as plaintiffs assert. Pls.' Opp'n at 14. Those individuals would still have to satisfy the constitutional requirements of standing (injury-in-fact, causation, and redressability) and for the reasons detailed in this and in defendants' opening memorandum, they cannot satisfy the injury-in-fact and causation requirements.

In their attempt to demonstrate animus with what they characterize as "anti-immigrant" statements, Plaintiffs do not cite any alleged discriminatory statements or actions by the actual decisionmaker—Secretary Ross. *See* Compl. ¶¶ 98-110, 114-120. Statements made by others outside the Commerce Department, however construed, simply cannot be imputed to the Secretary. *See, e.g., Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 70-71 (1986) (directing the lower courts to draw from traditional agency principles to decide when employee's discriminatory conduct should be imputed to employer). In any event, none of the alleged discriminatory statements are "reasonably contemporaneous with the challenged decision," *Hayden*, 594 F.3d at 165 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987)), because they were made in different and often unofficial contexts. They are not so closely tied to decision regarding what questions to put on the census questionnaire as to plausibly state an inference that the latter decision was reached with the intent to discriminate.

In addition, the historical and procedural background does not plausibly show discriminatory intent. Plaintiffs' view of the relevant history (Pls.' Opp'n at 20-22) is too narrow, giving insufficient weight to decades of consistent practice asking for citizenship on the long-form questionnaire. The question at issue is therefore far from new and has been asked of millions of people in connection with the decennial census for decades. The fact of its reinstatement alone therefore cannot be said to be evidence of racial bias. Neither does the process used for the present census questionnaire suggest improper motivation. Although the question was added close to the deadline for submitting the proposed questions to Congress, context is important. Although there is no established process, and the Secretary enjoys broad, nearly unfettered discretion under the Census Act, the Secretary followed a thorough process that included an identified need and time-sensitive request by a federal agency, a comprehensive consideration of the issues involved, and a detailed articulation of the bases for the decision. This reasoned approach, which went over and above what the Census Act requires, is a far cry from Plaintiffs' characterization of the process as a "rushed … trampling over normal Census

Bureau practices and safeguards." Pls.' Opp'n. at 21; *see Trump v. Hawaii*, --- U.S. ---, 138 S. Ct. 2392, 2421 (2018) (upholding Presidential proclamation imposing entry restrictions on nationals from certain counties which "is expressly premised on legitimate purposes" and "reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies").

CONCLUSION

For the foregoing reasons and the reasons stated in Defendants' opening memorandum [Dkt. No. 39] and in the memoranda filed in *New York v. U.S. Department of Commerce*, Dkt. No. 18-cv-2921 (S.D.N.Y.) [Dkt. Nos. 155 & 190], the Court should grant Defendants' motion and dismiss this case.

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Respectfully submitted,

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