UNITED STATES DISTRICT COURT
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) Hon. Jesse M. Furman United States District Judge

MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFFS' MOTION TO AMEND COMPLAINT

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Introduction

Plaintiffs seek to amend their complaint to name the Department of Justice, the Attorney General, and Acting Assistant Attorney General John Gore as defendants and to assert Administrative Procedure Act and equal protection claims against them. Plaintiffs' purported basis for this amendment is that "senior officials at DOJ helped Secretary Ross concoct a purportedly legally defensible rationale for adding [a citizenship question to the 2020 census] while hiding that the request originated with Secretary Ross." Mot. to Amend Br. at 1, ECF No. 99.[1] Plaintiffs' proposed amendment should be denied as futile, however, for four reasons.

First, the proposed amended complaint seeks no relief against the Department of Justice, the Attorney General, or Acting Assistant Attorney General Gore. Plaintiffs therefore cannot maintain claims against them. Indeed, instead of seeking relief against them, Plaintiffs have indicated that their real reason for naming them as defendants (not mentioned in Plaintiffs' motion) is to circumvent the procedures for obtaining discovery from non-party federal agencies and employees. That is not a permissible basis for haling them into federal court as parties.

Second, Plaintiffs would lack Article III standing to sue the Department of Justice, the Attorney General, and Acting Assistant Attorney General Gore because Plaintiffs' alleged injuries are not fairly traceable to any action taken by them. *They* did not reinstate a citizenship question to the 2020 census. Secretary Ross is the only official with the authority to make that decision and the only official alleged to have made that decision here. Nor are Plaintiffs' alleged injuries fairly traceable to the Justice Department's letter requesting that the Census Bureau reinstate a citizenship question. Plaintiffs do not allege that the letter *coerced* Secretary Ross to reinstate the question. To the contrary, Plaintiffs contend that "Secretary Ross' decision to add the citizenship question was *not* motivated by"

[1] For the Court's convenience, citations to docket entries and legal authorities in the PDF version of this brief are linked to the cited authorities in ECF and Westlaw, respectively.

the letter. Mot. to Amend Br. at 5, ECF No. 99 (emphasis added). Instead, Plaintiffs' alleged injuries result from Secretary Ross's independent decision to reinstate a citizenship question.

Third, Plaintiffs' proposed APA claim would fail as a matter of law. The Justice Department letter is not "final agency action" subject to review under the APA. 5 U.S.C. § 704. The letter imposed no legal consequences and determined no rights or obligations. It merely requested that the Census Bureau reinstate a citizenship question on the census — a request that Secretary Ross had the exclusive authority to grant or deny. Plaintiffs' proposed APA claim would also fail because Plaintiffs have "[an]other adequate remedy in a court," *id.* — namely, their existing claims against the existing Defendants.

Fourth and finally, Plaintiffs' proposed equal protection claim would also fail because the proposed amended complaint does not allege facts plausibly suggesting any discriminatory intent on the part of the Department of Justice, the Attorney General, or Acting Assistant Attorney General Gore.

Plaintiffs also seek to add two Florida organizations as plaintiffs over halfway through the discovery period. They offer no explanation for the delay. Allowing them to join the case now would pose significant prejudice to Defendants, who would not have enough time to propound written discovery requests, conduct depositions based on the responses, and provide that information to Defendants' experts before the expert disclosure deadline.

The motion for leave to amend should be denied.

Argument

I. The Motion to Add the Department of Justice and Its Officials as Defendants Should Be Denied as Futile

Although leave to amend a complaint is "'freely given when justice so requires,'" "'[i]t is well established that leave to amend … need not be granted when amendment would be futile.'" *Purchase Partners, LLC v. Carver Fed. Sav. Bank*, 914 F. Supp. 2d 480, 502 (S.D.N.Y. 2012) (Furman, J.) (quoting

Lucente v. Int'l Bus. Machs. Corp., 310 F.3d 243, 258 (2d Cir. 2002), and *Ellis v. Chao*, 336 F.3d 114, 127 (2d Cir. 2003)). An amendment would be futile if it could not withstand a motion to dismiss. *Branch Family Found., Inc. v. AXA Equitable Life Ins. Co.*, No. 16-cv-740, 2018 WL 1274238, at *1 (S.D.N.Y. Mar. 9, 2018) (Furman, J.) (citing *Anderson News, LLC v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012)). Here, Plaintiffs seek to amend the complaint to add an APA claim and an equal protection claim against the Department of Justice, the Attorney General, and Acting Assistant Attorney General Gore.[2] Proposed Am. Compl. ¶¶ 264–71, 206–10, ECF No. 99-1.[3] That proposed amendment would be futile, however, because those proposed claims would fail as a matter of law for four reasons.

First, the proposed amended complaint seeks no relief against the Department of Justice, the Attorney General, or Acting Assistant Attorney General Gore. Proposed Am. Compl., prayer for relief, ECF No. 99-1. The relief sought in the proposed amended complaint is identical to the relief sought in the original complaint. *Compare* Proposed Am. Compl., prayer for relief, ECF No. 99-1, *with* Compl., prayer for relief, ECF No. 1. With no relief sought against the Department of Justice, the Attorney General, or Acting Assistant Attorney General Gore, Plaintiffs cannot maintain a claim against them. *See, e.g.*, *Hartford Accident & Indem. Co. v. Hop-On Int'l Corp.*, 568 F. Supp. 1568, 1569 (S.D.N.Y. 1983) (defendant properly dismissed because complaint sought no relief against that defendant); *RKO-Stanley Warner Theatres, Inc. v. Mellon Nat'l Bank & Trust Co.*, 436 F.2d 1297, 1304 (3d Cir. 1970) (same); *Plant Process Equip., Inc. v. Cont'l Carbonic Prods., Inc.*, No. 87-cv-193, 1990 WL 43536, at *2 (N.D. Ill. Mar. 30, 1990) (same).

[2] The Court has dismissed the Enumeration Clause claim. *See State of New York v. U.S. Dep't of Commerce*, --- F. Supp. 3d ---, No. 18-cv-5025, 2018 WL 3581350, at *19–24 (S.D.N.Y. July 26, 2018).

[3] The paragraph numbering in the proposed amended complaint goes from ¶ 271 back to ¶ 197, resulting in two sets of paragraphs numbered ¶¶ 197–210.

Far from seeking any relief against the Department of Justice, the Attorney General, or Acting Assistant Attorney General Gore, Plaintiffs have indicated their real reason for seeking to add them as defendants: to circumvent the procedures for obtaining discovery from non-party federal agencies and employees. When Plaintiffs raised the issue of seeking discovery from the Department of Justice, government counsel advised Plaintiffs of the Department's *Touhy* regulations, which govern the production and disclosure of information in cases in which the Department is not a party. Kate Bailey Decl. Ex. 1; 28 C.F.R. §§ 16.21 et seq.; *see generally United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). Instead of following those regulations, Plaintiffs served a Rule 45 subpoena on the Department seeking documents and a deposition on 26 separate matters (including subparts).[4] Bailey Decl. Ex. 2. With the subpoena, Plaintiffs stated:

> [T]o the extent the [Justice] Department's position on this request is premised on the fact that the Department has not been formally named as a Defendant in this litigation, I can represent that both the State of New York Plaintiffs and the NYIC Plaintiffs are prepared to amend their complaints to name the Department and the relevant officials (Attorney General Sessions and Acting Assistant Attorney General Gore) in their official capacity as Defendants in this action.

Bailey Decl. Ex. 2. Just as the fraudulent joinder rule prohibits a plaintiff from manipulating federal jurisdiction by suing a defendant against whom no relief is sought, so too should the Court reject Plaintiffs' attempted end-run around the *Touhy* regulations by suing the Department and its officials despite seeking no relief against them. *Cf. Pac. Legwear, Inc. v. Sizemore*, No. 16-cv-2064, 2016 WL 2766664, at *2 (S.D.N.Y. May 11, 2016) (Furman, J.) (citing *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 460–61 (2d Cir. 1998)).

Second, Plaintiffs cannot show that their alleged injuries are "fairly traceable" to any action by the Department of Justice, the Attorney General, or Acting Assistant Attorney General Gore, as

[4] Notwithstanding Plaintiffs' refusal to follow the *Touhy* regulations, the Department of Justice has begun processing documents responsive to the subpoena for production.

required for Article III standing. "[S]tanding is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Instead, a plaintiff must separately demonstrate standing with respect to each claim and against each defendant. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62–63, 65–66 (2d Cir. 2012). The plaintiff must therefore show, in addition to the other standing elements, that its injury is "'fairly … trace[able] to the challenged action'" of each defendant. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (ellipsis and alteration in original).

Separate and apart from the standing arguments advanced in Defendants' motion to dismiss the original complaint, *see* ECF No. 39 at 4–15, Plaintiffs cannot show Article III causation for their proposed new claims because the Department of Justice, the Attorney General, and Acting Assistant Attorney General Gore have no authority to add questions to the census. A plaintiff cannot show that an injury is fairly traceable to a defendant when that defendant neither took nor had the authority to take the complained-of action. "A common variety of the public-official defendant cases [in which courts have found no Article III causation] involves actions brought by mistake or miscalculation against an official who lacks authority to enforce a challenged statute or to accord desired relief." 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3531.5 & nn.75–76 (3d ed. 2008) (citing cases); *see also, e.g.*, *Northside Sanitary Landfill, Inc. v. Thomas*, 804 F.2d 371, 381–82 (7th Cir. 1986) (no Article III causation to sue EPA for closure of facility because state agency had sole authority to determine closure requirements); *Pritikin v. Dep't of Energy*, 254 F.3d 791, 797–99 (9th Cir. 2001) (no Article III causation to sue Department of Energy because another agency was "the party with the statutory power and duty to act"); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004) ("Where an attorney general cannot direct, in a binding fashion, the prosecutorial activities of the officers who actually enforce the law or bring his own prosecution, he may not be a proper defendant.").

Here, Plaintiffs allege that their injuries will result from reinstating a citizenship question on the 2020 census. Proposed Am. Compl. ¶¶ 20, 25–39, 42–47, 51–54, 60–63, 67–71, 74–75, 80–85, 89–96, 103–08, 114–17, 173–212, ECF No. 99-1. But Plaintiffs do not allege that that question was reinstated by the Department of Justice, the Attorney General, or Acting Assistant Attorney General Gore. Proposed Am. Compl. ¶¶ 122–24, ECF No. 99-1. Secretary Ross is the only official with the statutory authority to make that decision, 13 U.S.C. § 141(a), and the only official alleged to have made that decision here. Proposed Am. Compl. ¶¶ 1, 126–27, 233, ECF No. 99-1. The Department of Justice has no authority to add census questions. Plaintiffs therefore lack Article III standing to sue the Department of Justice or its officials over the reinstatement of a citizenship question.

Nor does the Justice Department's letter requesting that the Census Bureau reinstate a citizenship question give Plaintiffs standing to sue the Department of Justice, the Attorney General, or Acting Assistant Attorney General Gore. *See* Proposed Am. Compl. ¶¶ 8, 252, ECF No. 99-1. A plaintiff's injury is not fairly traceable to a defendant's action if the injury was "th[e] result [of] the independent action of some third party" and the defendant's action did not have a "determinative or coercive effect upon the action of" that third party. *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (alterations in original; emphasis deleted); *see also Nat'l Ass'n of Mfrs. v. U.S. Dep't of Interior*, 134 F.3d 1095, 1120–21 (D.C. Cir. 1998) (no Article III causation to sue Department of Interior for issuing non-binding guidelines because another federal agency then incorporated those guidelines into its binding regulations).

Here, Plaintiffs' alleged injuries result from Secretary Ross's independent decision to reinstate a citizenship question. Proposed Am. Compl. ¶¶ 1, 126–27, 233, ECF No. 99-1. Notably, Plaintiffs do not allege that the Justice Department letter requesting a citizenship question coerced Secretary Ross to reinstate it. Indeed, Plaintiffs contend that Secretary Ross's decision to reinstate a citizenship question was not even "motivated by" the Justice Department letter, Mot. to Amend Br. at 5, ECF

No. 99, and that Secretary Ross had already decided to reinstate a citizenship question "months *before* the DOJ request." Proposed Am. Compl. ¶¶ 8, 245–53, ECF No. 99-1 (emphasis added). Thus, under Plaintiffs own theory of the case, their alleged injuries are not fairly traceable to the Department of Justice, the Attorney General, and Acting Assistant Attorney General Gore. And even putting aside Plaintiffs' allegations about *when* Secretary Ross made his decision, it is undisputed that the decision to reinstate a citizenship question was made by the *Secretary*, not the Department of Justice. Under any theory of the case, therefore, Plaintiffs would lack standing to sue the Department of Justice and its officials.

Third, Plaintiffs' proposed APA claim against the Department of Justice, the Attorney General, and Acting Assistant Attorney General Gore would also fail both because the Justice Department letter is not "final agency action" subject to review under the APA and because Plaintiffs have "[an]other adequate remedy in a court" — namely, their existing APA claim against the existing Defendants.[5] 5 U.S.C. § 704; *see also* 5 U.S.C. § 551(13) (defining "agency action").

To be reviewable under the APA, an agency action "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 177–78. Mere requests or recommendations to another official authorized to make the final decision are not final agency action subject to review under the APA. *See Dalton v. Specter*, 511 U.S. 462, 469–71 (1994) (Defense Secretary's report recommending base closure to President was not "final agency action" under APA because President could accept or reject recommendation); *Franklin v. Massachusetts*, 505 U.S. 788, 796–800 (1992) (Commerce Secretary's census tabulation report to President was not "final agency action" under APA because President could amend report before

[5] These defects in Plaintiffs' proposed APA claim are also fatal to Plaintiffs' proposed equal protection claim because the APA is the sole waiver of sovereign immunity under which Plaintiffs could bring that claim. 5 U.S.C. § 706(2)(B) (courts shall set aside agency action that is "contrary to constitutional right, power, privilege, or immunity").

submitting it to Congress); *Paskar v. U.S. Dep't of Transp.*, 714 F.3d 90, 97 (2d Cir. 2013) (agency letter is not "final agency action" under APA unless it "imposes tangible, definite, and immediate legal consequences").

Here, the Justice Department letter to the Census Bureau merely "*request[ed]* that the Census Bureau reinstate on the 2020 Census questionnaire a question regarding citizenship." AR at 663 (emphasis added); *accord* AR at 665. But Secretary Ross retained the exclusive authority to grant or deny that request. 13 U.S.C. § 141(a). No citizenship question could be reinstated unless and until Secretary Ross decided to reinstate it. The Justice Department letter imposed no legal consequences and determined no rights or obligations. It was therefore not final agency action subject to review under the APA.

Plaintiffs' proposed APA claim would also fail because Plaintiffs have another adequate judicial remedy — their existing APA claim against the existing Defendants. An agency action is not reviewable under the APA unless the plaintiff has "no other adequate remedy in a court." 5 U.S.C. § 704. A claim is not subject to review under the APA when a plaintiff has an adequate alternative remedy against another defendant in the same case. *See Niagara Mohawk Power Corp. v. Fed. Energy Regulatory Comm'n*, 306 F.3d 1264, 1268–69 (2d Cir. 2002) (plaintiff could not maintain APA claim against FERC because plaintiff's claims against state agency in same lawsuit provided adequate alternative legal remedy); *Jones v. U.S. Dep't of Hous. & Urban Dev.*, No. 11-cv-846, 2012 WL 1940845, at *6 (E.D.N.Y. May 29, 2012) (plaintiff could not maintain APA claim against HUD because plaintiff's claims against local agency and non-profit in same lawsuit provided adequate alternative legal remedy); *Idaho Aids Found. Inc. v. Idaho Hous. & Fin. Ass'n*, No. 04-cv-155, 2008 WL 660178, at *2 (D. Idaho Feb. 29, 2008) (plaintiff could not maintain APA claim against HUD because plaintiff's claims against state agency in same lawsuit provided adequate alternative legal remedy).

Here, Plaintiffs' existing claims against the existing Defendants — the Commerce Department, Secretary Ross, the Census Bureau, and Acting Director Jarmin — provide Plaintiffs with an adequate alternative legal remedy. Plaintiffs do not contend that their claims against the existing Defendants, if successful, would be in any way inadequate to remedy their alleged injuries. That alternative legal remedy therefore precludes Plaintiffs from asserting their proposed APA claim against the Department of Justice, the Attorney General, and Acting Assistant Attorney General Gore.

Finally, Plaintiffs' proposed equal protection claim against the Department of Justice, the Attorney General, and Acting Assistant Attorney General Gore would also fail because the proposed amended complaint does not allege facts plausibly suggesting that they acted with discriminatory intent. As the Court has explained, to state a viable equal protection claim, a plaintiff must plausibly allege a "racially discriminatory intent or purpose." *State of New York*, --- F. Supp. 3d ---, 2018 WL 3581350, at *24 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977)). This discriminatory intent element requires the plaintiff to allege facts plausibly suggesting that "'the decisionmaker … selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.'" *Id.* (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

Here, the proposed amended complaint fails to allege facts suggesting any discriminatory intent on the part of the Department of Justice, the Attorney General, or Acting Assistant Attorney General Gore. The proposed amended complaint contains no factual allegations indicating any *overt* discriminatory intent on their part; the letter does not discriminate based on any suspect classification. AR at 663–65. Indeed, according to the proposed amended complaint, the Justice Department was an unwitting pawn in the Commerce Department's efforts to reinstate a citizenship question. The proposed amended complaint alleges that Secretary Ross had already decided to reinstate a citizenship question "months before the DOJ request" and that Commerce Department officials then "'work[ed]

with Justice to get them to request that citizenship be added.'" Proposed Am. Compl. ¶¶ 245–46, ECF No. 99-1. The proposed amended complaint never alleges that any Department of Justice officials learned of any discriminatory intent by the Commerce Department or anyone else in reinstating a citizenship question — let alone that they internalized that supposed discriminatory intent when sending the letter requesting that the question be reinstated. The proposed amended complaint thus fails to state a viable equal protection claim against the Department of Justice, the Attorney General, and Acting Assistant Attorney General Gore.

Plaintiffs' proposed amendment of the complaint to add claims against the Department of Justice, the Attorney General, and Acting Assistant Attorney General Gore would therefore be futile and should be denied.

II. The Motion to Add the Florida Organizations as Plaintiffs Should Also Be Denied

Besides futility, leave to amend is also properly denied when the amendment would cause "undue delay." *Dobbins v. Ponte*, No. 15-cv-3091, 2017 WL 3309726, at *7 (S.D.N.Y. Aug. 2, 2017) (Furman, J.); *see also MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc.*, 157 F.3d 956, 962 (2d Cir. 1998) (denying leave to amend is proper "where the motion is made after an inordinate delay, no satisfactory explanation is made for the delay, and the amendment would prejudice the defendant"). The burden is on Plaintiffs, as the party seeking leave to amend, to explain the delay. *MacDraw*, 157 F.3d at 962.

Here, the proposed amended complaint seeks to add two new plaintiffs: the Family Action Network Movement, Inc. and the Florida Immigrant Coalition. Mot. to Amend Br. at 2, ECF No. 99. But the proposed new plaintiffs offer no explanation for their decision to wait until the discovery period is halfway over to seek to join this litigation. Their only contention is that they are based in Florida, and the citizenship question is important to Florida residents. Mot. to Amend Br. at 6, ECF No. 99.

This delay, moreover, threatens significant prejudice to Defendants. Allowing the proposed new plaintiffs to join the case now would not give Defendants enough time to propound written discovery requests on them (about, for example, their standing to sue), conduct depositions based on their responses, and provide that information to Defendants' experts before the defense expert report disclosure deadline of September 21, 2018. *See* Order, ECF No. 48. Indeed, even if Defendants propounded written discovery requests on the proposed new plaintiffs today, their responses would not be due until *after* the defense expert report disclosure deadline.

Allowing the proposed new plaintiffs to join the case now would therefore require extensions of the expert disclosure deadlines and the discovery deadline to allow Defendants to fully conduct discovery and prepare expert testimony. But modifying the scheduling order in that way requires a showing of "good cause" under Rule 16(b)(4). *In re: Gen. Motors LLC Ignition Switch Litig.*, No. 14-md-2543, 2016 WL 2766654, at *1 (S.D.N.Y. May 12, 2016) (Furman, J.). The "'primary consideration' in determining whether such good cause exists is 'whether the moving party can demonstrate diligence.'" *Id.* (quoting *Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 244 (2d Cir. 2007)). Here, the proposed new plaintiffs have not shown any diligence. The request to amend the complaint to add the new plaintiffs should therefore be denied.

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Conclusion

The motion should be denied.

Dated: August 28, 2018

Respectfully submitted,

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