U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
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November 28, 2018

By ECF
The Honorable George J. Hazel
United States District Judge
District of Maryland
6500 Cherrywood Lane
Greenbelt, Maryland 20770

Re: Defendants' Response in Opposition to Plaintiffs' Letter Brief Requesting Reconsideration of Order Denying Plaintiffs' Motion for Discovery, and Defendants' Request for Reconsideration of Order Denying Motion to Dismiss Conspiracy Claim in *La Unión del Pueblo Entero v. Ross*, No. 18-cv-01570-GJH

Dear Judge Hazel,

Defendants submit this letter brief in opposition to Plaintiffs' letter brief (ECF No. 83) seeking reconsideration of the part of this Court's November 9, 2018, order (ECF Nos. 80 & 81) denying Plaintiffs' request for leave to depose former Kansas Secretary of State Kris Kobach. A similar request to depose Mr. Kobach was denied in the parallel census cases in the Southern District of New York ("SDNY") and, in those cases, the Supreme Court has granted certiorari to review whether *any* extra-record discovery is proper in the first place. This pending matter should give this Court pause before ordering even further discovery beyond what already has been granted. In the alternative, to the extent the Court reconsiders the order challenged by Plaintiffs, it should also reconsider the viability of the claim for which Plaintiffs seek Mr. Kobach's testimony, that is, their claim under 42 U.S.C. § 1985(3), and should conclude on reconsideration that Plaintiffs' claim for injunctive relief fails to state a valid claim under this section. The Court should additionally re-review the record evidence and conclude that, despite the fact that Plaintiffs have had the full benefit of extensive discovery, they have failed to adduce sufficient evidence to justify third-party discovery into whether there was a "meeting of the minds" between Mr. Kobach and Secretary Ross. For these reasons, Plaintiffs' request for reconsideration should be denied.

I. The Court Should Not Grant Further Extra-Record Discovery in Light of the Supreme Court's Grant of Certiorari on This Exact Issue.

The Court should deny Plaintiffs' request for reconsideration of its order denying Plaintiffs further discovery in this matter because the propriety of all extra-record discovery ordered in the parallel New York cases currently is pending before the Supreme Court.

The Court authorized extra-record discovery in this case to the same extent authorized in *Kravitz v. Department of Commerce*, No. 18-1041 (D. Md.) ("*Kravitz*"), which in turn was coextensive with the discovery authorized in the challenges to the Secretary of Commerce's decision filed in the Southern District of New York, *see Kravitz*, 2018 WL 4005229, at *17 (Aug.

22, 2018), unless there is a demonstration of factual necessity in this case different from the New York cases. Pls.' Ltr. Br. Regarding Disc. Issues, ECF No. 70, at 1. On July 3, 2018, the SDNY court authorized limited fact discovery, including ten depositions of fact witnesses, and expert discovery. *See id.* at *16; Tr. of July 3, 2018 Hearing, No. 18-1829 (S.D.N.Y.) ECF No. 71-2, at 85. Importantly, the SDNY court explained that its intent was to limit the scope of such discovery consistent with the principles of the Administrative Procedure Act ("APA"). *See* Tr. of July 3, 2018 Hearing, at 85 ("'[T]he Court must permit only that discovery necessary to effectuate the Court's judicial review; i.e., review the decision of the agency under Section 706.'" *Id*. (quoting *Ali v. Pompeo*, 2018 WL 2058152 at *4 (E.D.N.Y. May 2, 2018)).

On October 22, 2018, the government filed a petition for a writ of mandamus (or in the alternative a writ of certiorari) in the Supreme Court, seeking review of the SDNY court's July 3 order authorizing extra-record discovery and two additional orders authorizing the deposition of then-Acting Assistant Attorney General John Gore and Secretary of Commerce Wilbur L. Ross, Jr., dated August 17 and September 21, respectively. *See* Petition for a Writ of Mandamus, *In re United States Department of Commerce*, No. 18-557 (U.S. Oct. 22, 2018). The Supreme Court treated the government's submission as a petition for a writ of certiorari and granted the petition on November 16. The question presented is:

> Whether, in an action seeking to set aside agency action under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, a district court may order discovery outside the administrative record to probe the mental processes of the agency decisionmaker—including by compelling the testimony of high-ranking Executive Branch officials—when there is no evidence that the decisionmaker disbelieved the objective reasons in the administrative record, irreversibly prejudged the issue, or acted on a legally forbidden basis.

Id. at I. The government's merits brief is due December 17, the respondents' brief is due January 17, 2019, and oral argument is scheduled for February 19.

The Supreme Court's decision to review Judge Furman's interlocutory order authorizing extra-record discovery, which served as the basis for this Court's order authorizing extra-record discovery, and *both* of Judge Furman's orders authorizing depositions of officials *beyond* that initial grant—in other words, all extra-record discovery in the New York cases—counsels strongly against authorizing even further extra-record discovery here. In taking the unusual step of granting certiorari to review discovery orders, the Supreme Court signaled that there is reason to doubt the propriety of extra-record discovery in these related matters. *See, e.g.*, Sup. Ct. R. 10 (explaining that review of a federal court's decision on a writ of certiorari generally indicates a conflict among courts, an important question of federal law, or a need for the Court to exercise its supervisory authority); *Hollingsworth v. Perry*, 558 U.S. 183, 203 (2010) (Breyer, J., dissenting) (describing the considerations governing certiorari review); *Thomas v. Am. Home Prods., Inc.*, 519 U.S. 913, 916 (1996) (Rehnquist, C.J., dissenting) (same). Plaintiffs already have had the benefit of extensive extra-record discovery into the factual issues that underlie all of their claims, and given the possibility the Supreme Court may conclude that extra-record discovery is improper in these matters, this Court should go no further.

Although Plaintiffs seek to depose Mr. Kobach in support of their conspiracy claim rather than their APA claim, this Court authorized discovery on *all* claims—including the conspiracy claim—only to the extent discovery was authorized in the New York cases, which include an equal protection claim that rests on fundamentally the same facts as Plaintiffs' conspiracy claim. Thus, the Supreme Court's decision as to the proper scope of discovery in the New York cases will be relevant to the proper scope of discovery in this case given that the same factual issues are presented.

II. The Court Should Conclude on Reconsideration That Plaintiffs' Claim Under 42 U.S.C. § 1985(3) is Not Viable or Based on Sufficient Evidence and Should Uphold its Denial of Plaintiffs' Request to Depose Mr. Kobach For this Reason.

Plaintiffs seek to depose Mr. Kobach in support of their conspiracy claim under 42 U.S.C. § 1985(3), arguing that Mr. Kobach's testimony is "relevant and necessary" to the question of whether there was a sufficient "meeting of minds" to establish such a claim. ECF No. 83, at 2. They contend that the Court should reconsider its ruling as to the necessity of Mr. Kobach's testimony because Plaintiffs have not, as yet, been able to depose Secretary Ross himself and therefore have no witness to the details of any conversations between Secretary Ross and Mr. Kobach. *Id.* Plaintiffs' argument is flawed for two reasons. First, the Court should take this opportunity to reconsider its ruling that Plaintiffs have stated a viable section 1985(3) claim against the federal government and conclude that they have not. Therefore, any discovery to advance this claim should be rejected. Second, the Court should also reconsider the allegations concerning Mr. Kobach's contact with the federal government and conclude that Plaintiffs have not adduced sufficient facts to justify third-party discovery into whether there was a meeting of the minds between Mr. Kobach and anyone in the federal government because Mr. Kobach's preferences were not, in fact, adopted.

First, Plaintiffs have failed to state a viable claim under 42 U.S.C. § 1985(3), and Defendants request that the Court reconsider its holding in this regard. *See* ECF No. 80, at 19-21. The Court held that sovereign immunity did not apply to bar this claim because that doctrine "typically restrict[s]" damages suits against government officials but, "here, the Plaintiffs seek only injunctive relief." ECF No. 80, at 20. But the fact that Plaintiffs seek only injunctive relief means that they have not stated a valid claim under 42 U.S.C. § 1985(3) for reasons apart from sovereign immunity issues. Specifically, 42 U.S.C. § 1985(3) does not provide a cause of action for injunctive relief but only for damages. *Id.* (stating that the injured party "may have an action for the recovery of damages"); *see* Defs.' Mem. Supp. M. Dism. 24. By comparison, its companion statute, 42 U.S.C. § 1983, does provide for a "suit in equity, or other proper proceeding for redress" and specifies that "injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." In light of § 1985(3)'s language affirmatively providing for damages and making no reference to injunctive relief, and the contrast between § 1985(3) and 42 U.S.C. § 1983 with respect to the discussion of injunctive relief, it is unlikely that Congress intended to authorize the courts to award injunctive relief in 1985(3) suits. *See Cyan, Inc. v. Beaver Cty. Emps. Retirement Fund*, 138 S. Ct. 1061, 1078 (2018) ("[T]his Court has no license to 'disregard clear language' based on an intuition that 'Congress must have intended something broader.'"); *Dean v. United States*, 556 U.S. 568, 572 (2009) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face."); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but

omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

This Court should therefore conclude that "the statutory relief available under § 1985 'is limited to the recovery of damages'" and that, in requesting only injunctive relief here, Plaintiffs have failed to state a claim under that statute. *Tufano v. One Toms Point Lane Corp*., 64 F. Supp. 2d 119, 133 (E.D.N.Y. 1999), *aff'd* 229 F.3d 1136 (2d Cir. 2000); *see generally Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 n.16 (1993) (noting that the Court "need not address whether the District Court erred by issuing an injunction, despite the language in § 1985(3) authorizing only 'an action for the recovery of damages occasioned by such injury or deprivation'" but that the impropriety of injunctive relief "was asserted by the United States as amicus"); Defs.' Mem. Supp. M. Dism. 24 n.17 (noting that *Bray* did not decide the issue and discussing pre-*Bray* case law).

Alternatively, if Plaintiffs intended to seek damages for this claim, the other impediments addressed in the Court's decision would apply. Namely, the United States has not waived sovereign immunity generally as to section 1985(3) suits, *see* Defs.' Mem. Supp. Mot. Dism. at 21 (ECF No. 54-1), and the exceptions, *see Dugan v. Rank*, 372 U.S. 609, 621-22 (1963), do not apply here. Those exceptions only apply where the suit is one "for specific relief against the officer as an individual," *id.* at 622 (citation omitted), that is, a suit where the federal officer is sued *in his or her individual capacity*, and Plaintiffs do not purport to sue any of the federal defendants in their individual capacities.

Second, the allegations of a potential "meeting of the minds" between Mr. Kobach and Secretary Ross are substantially weaker than assessed in the Court's opinion. The Court should reconsider the allegations in paragraphs 174-175 of the First Amended Complaint (cited on p. 23 of ECF No. 80) and the document they incorporate, namely, the email from Kris Kobach that appears at pages 763-764 of the Administrative Record ("AR"). In that email, Mr. Kobach spoke about his concerns that "aliens who do not actually 'reside' in the United States are counted for congressional apportionment purposes" and his proposal that a question be added to the census that asked whether the respondent was a lawful permanent resident (after first inquiring about citizenship). That is not the question Secretary Ross reinstated. In fact, Secretary Ross selected the well-tested citizenship question from the American Community Survey, which does not inquire about non-citizens' legal status and therefore fails to address Mr. Kobach's apparent concerns. Plaintiffs' allegations positing that the Secretary and Mr. Kobach had an "agreement to add a citizenship question to the decennial census," ECF 83 at 2, find no support in this record, and ignore the dozens of other opinions the Secretary obtained from other members of the public and their elected representatives. *See generally* AR 765-1276 (letters and call summaries reflecting extensive stakeholder communications). Plaintiffs' allegations do not provide any evidence that there was any "meeting of the minds" between Secretary Ross and Mr. Kobach, and therefore do not justify extra-record discovery. A deposition of Mr. Kobach would serve no purpose except to waste his and the parties' time.

Conclusion

For the foregoing reasons, Defendants request that this Court deny Plaintiffs' letter motion requesting reconsideration of the Court's denial of leave to depose Kansas Secretary of State Kris Kobach and reconsider its prior ruling that Plaintiffs have stated a viable claim under § 1985(3).

Respectfully submitted,

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