UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBYN KRAVITZ, *et al.*, *Plaintiffs*, v. U.S. DEPARTMENT OF COMMERCE, *et al.*, *Defendants.*	Civil Action No. 8:18-cv-01041-GJH Hon. George J. Hazel
LA UNIÓN DEL PUEBLO ENTERO, *et al.*, *Plaintiffs*, v. WILBUR L. ROSS, sued in his official capacity as U.S. Secretary of Commerce, *et al.*, *Defendants*.	Civil Action No. 8:18-cv-01570-GJH Hon. George J. Hazel

MEMORANDUM IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION AND INJUNCTION PENDING APPEAL

This Court should preliminarily enjoin Defendants from adding a citizenship question to the 2020 Census form pending this Court's determination pursuant to Rule 60(b) and the Fourth Circuit's review of Plaintiffs' equal protection and Section 1985 claims. Plaintiffs file this motion in an abundance of caution before the Supreme Court's decision in *Department of Commerce v. New York*, No. 18-966 (the "New York case"). Depending on the outcome in that case, Defendants could attempt to seize upon the absence of an injunction to begin printing Census forms with a citizenship question before Plaintiffs' surviving constitutional claims have

been fully adjudicated, in an effort to produce an irreversible *fait accompli* and thereby prevent the courts from ruling on the merits of the claims. This Court should prevent that irreparable injury by issuing an injunction because Plaintiffs are likely to succeed on the merits of their equal protection and Section 1985 claims, Defendants would not be substantially harmed by the injunction, and the injunction will promote the public interest.

PROCEDURAL HISTORY

This Court entered its judgment in this case on April 5, 2019. Dkt. No. 155 at 2. The Court ruled in Plaintiffs' favor on their claims under the Administrative Procedure Act ("APA") and the Enumeration Clause of the U.S. Constitution, and permanently enjoined Defendants from adding a citizenship question to the 2020 Census. The Court ruled against all Plaintiffs on their equal protection claims, and against the *LUPE* Plaintiffs on their claim under 42 U.S.C. § 1985(3). *Id.*

Defendants appealed the Court's judgment on the APA and Enumeration Clause claims, and the *LUPE* Plaintiffs filed a cross-appeal of the Court's judgment on their equal protection claim. The Fourth Circuit set an expedited briefing schedule on the *LUPE* Plaintiffs' equal protection cross-appeal, and held Defendants' appeal in abeyance until the Supreme Court issued its opinion in the New York case. Order at 2, *LUPE v. Ross*, No. 19-1382 ("*LUPE* Appeal"), Dkt. No. 26 (4th Cir. May 29, 2019). Expedited briefing on the *LUPE* Plaintiffs' cross-appeal is scheduled to be completed today, and oral argument is scheduled for July 2, 2019. *Id.*; *LUPE* Appeal, Dkt. No. 33 (4th Cir. June 19, 2019).

On June 19, 2019, this Court granted Plaintiffs' Request for Indicative Ruling Under Rule 62.1 and concluded that Plaintiffs' Rule 60(b)(2) motion "raises a substantial issue." Dkt. No. 174. The next day, Plaintiffs notified the Fourth Circuit and moved to remand the cases to

this Court so that this Court may decide Plaintiffs' Rule 60(b)(2) motion. *LUPE* Appeal, Dkt. No. 38. On June 24, this Court issued a memorandum opinion explaining its June 19 order. Dkt. No. 175.

Yesterday, on June 25, the Fourth Circuit remanded the cases to this Court "for further proceedings on the Fifth Amendment equal protection claim and the 42 U.S.C. § 1985 claim, so that the district court may address and resolve the matters identified in its Indicative Ruling of June 19, 2019, and its related Memorandum Opinion of June 24, 2019." Order, *LUPE* Appeal, Dkt. No. 45 at 3. In a concurring opinion, Judge Wynn stated that "[i]t may be prudent upon remand, for the district court to consider whether it is appropriate for the district court to preliminarily enjoin the Government from placing the citizenship question on the 2020 Census questionnaire pending the district court's and this Court's final review of Plaintiffs' equal protection and Section 1985 claims." *Id*. at 5.

STANDARD

This Court may grant a preliminary injunction and an injunction pending the outcome of an appeal. Fed. R. App. P. 8(a)(1); Fed. R. Civ. P. 62(d). "In order to receive a preliminary injunction, a plaintiff must establish that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm without the preliminary injunction; (3) the balance of equities tips in its favor; and (4) the injunction is in the public interest." *Mountain Valley Pipeline, LLC v. W. Pocahontas Props. Ltd. P'ship*, 918 F.3d 353, 366 (4th Cir. 2019) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The standard for an injunction pending appeal is similar to the standard for a preliminary injunction. *See, e.g., Mayor & City Council of Baltimore v. Azar*, No. RDB-19-1103, 2019 WL 2525421, at *1 (D. Md. June 19, 2019); *see also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (holding that, when considering whether to grant injunctive

relief pending an appeal under Rule 62(d), courts consider: "(1) whether the [ ] applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the [ ] applicant will be irreparably injured absent [injunctive relief]; (3) whether issuance of the [relief] will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies") (citing cases); *cf. Nken v. Holder*, 556 U.S. 418, 434 (2009).

"Because preliminary injunction proceedings are informal ones designed to prevent irreparable harm before a later trial governed by the full rigor of usual evidentiary standards, district courts may look to, and indeed in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted." *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 725–26 (4th Cir. 2016) (collecting cases), *vacated and remanded on other grounds*, 137 S. Ct. 1239 (2017).

ARGUMENT

Plaintiffs meet all four requirements for a preliminary injunction and an injunction pending appeal. Plaintiffs are likely to succeed on their Rule 60(b)(2) motion for the reasons stated in the Court's opinion on Plaintiffs' Rule 62.1 motion. *See* Dkt. No. 175 at 13. The newly discovered evidence concerning Mark Neuman, Thomas Hofeller, Kris Kobach, and others, taken together with the trial record, demonstrates that Plaintiffs are likely to succeed in establishing that Defendants acted with a discriminatory intent to deprive Latinos and noncitizens of equal representation. *See id.* at 4–10.

Plaintiffs would suffer irreparable harm absent injunctive relief. If the Supreme Court were to vacate a permanent injunction that is based on claims other than the Fifth Amendment or 42 U.S.C. § 1985, Defendants could move forward immediately with finalization and printing of the forms including the citizenship question. June 18, 2019 Hr'g Tr. at 106:10-19. This Court

has already found that Plaintiffs will be harmed should the citizenship question be on the 2020 Census, and new studies by the Bureau itself reveal that the negative impact will be much larger than originally understood during trial.[1] In contrast, Defendants will suffer little, if any, harm if they are required either to proceed with printing forms without the citizenship question or to forgo printing forms for a few weeks or months. Indeed, Defendants will suffer no harm if the form is finalized without the citizenship question, since the Census Bureau intends to produce block level citizen voting age population (CVAP) data, based on more accurate and less costly methods that the Census Bureau recommends, regardless of whether the question appears on the final Census questionnaire. Finally, the public has strong interests in a full and fair adjudication of whether the citizenship question was motivated by discriminatory animus, and in an accurate count of the population untainted by intentional discrimination.

I. Plaintiffs Likely Will Succeed on Their Equal Protection and Section 1985 Claims.

The trial record, together with the newly discovered evidence, demonstrates that Plaintiffs are likely to prevail on their equal protection claims and on the *LUPE* Plaintiffs' civil conspiracy claim. As this Court found, "it is becoming difficult to avoid seeing that which is increasingly clear. As more puzzle pieces are placed on the mat, a disturbing picture of the decisionmakers' motives takes shape." Dkt. No. 175 at 13. Those "puzzle pieces" establish that the decisionmakers' motives were likely discriminatory. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977); Order at 4-5 (Wynn, J., concurring),

[1] *See* J. David Brown et al., Abstract to *Predicting the Effect of Adding a Citizenship Question to the 2020 Census*, CENTER FOR ECONOMIC STUDIES (June 2019), https://assets.documentcloud.org/documents/6165808/U-S-Census-Bureau-Working-Paper-Understanding.pdf (estimating that "the addition of a citizenship question will have an 8.0 percentage point larger effect on self-response rates in households that may have noncitizens relative to those with only U.S. citizens"—significantly higher than the 5.8 percentage point estimate presented at trial).

LUPE Appeal, Dkt. No. 45 ("[W]hen deciding whether discriminatory intent motivates a facially neutral law, courts undertake a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' . . . Therefore, 'necessarily,' an 'invidious discriminatory purpose may often be *inferred* from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.'") (quoting *Arlington Heights*, 429 U.S. at 266, and *Washington v. Davis*, 426 U.S. 229, 242 (1976), and citing *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 221 (4th Cir. 2016); *Veasey v. Abbott*, 830 F.3d 216, 235 (5th Cir. 2016) (en banc); *United States v. Yonkers Bd. of Ed.*, 837 F.2d 1181, 1229-30 (2d Cir. 1987)).

Based on the trial record, the Court found that the addition of the citizenship question "bears more heavily" on non-citizens and Latinos; that the historical background of the decision included manipulation and suspect motives; that there were significant departures from the "normal procedural sequence" that usually dictates when a new question may be added, including the refusal of the Secretary to take into account the unanimous recommendations of the Census Bureau's Chief Scientist and other expert personnel, recommendations that are "usually considered important"; and that governmental actors, including President Trump and Kobach, directly pressed the Secretary to move forward with the citizenship question for discriminatory reasons. In short, Secretary Ross "did not act alone." Dkt. No. 154 at 8-42, 45-49, 96-111, 116.

The newly discovered evidence links the Secretary's pretextual rationale for the decision with an overtly discriminatory political scheme designed to harm Latinos. In his 2015 study, Hofeller concluded that using CVAP data in redistricting would dilute Latino political representation and would benefit "Republicans and Non-Hispanic Whites." *See* Dkt. No. 162-3 at Ex. D at 9. In order to achieve that goal, Hofeller pressed the Commerce Department to add a

citizenship question to the 2020 Census. *See* Dkt. No. 162-4 (Neuman Dep.) at 51:15-16; Dkt. No. 162-3 at Ex. H. Hofeller first raised the issue of a citizenship question with Neuman, Secretary Ross's "trusted advisor." Neuman then had multiple discussions about the issue with Secretary Ross and his advisors early in the administration, at the very time that Secretary Ross decided that he wanted to add the question. *See* Dkt. No. 154 at 9-10, 31-32; Dkt. No. 162-4 at 33:2-10, 36:19- 37:22, 51:7-52:2, 128:4-130:9, 248:21-249:22; PX-87, PX-145, PX-188, PX-190. Neuman continued to serve as the key advisor to Secretary Ross and the agency on the citizenship question throughout 2017, *see* Dkt. No. 154 at 9; PX-83, including when Secretary Ross's advisers turned to Neuman to present DOJ with the pretextual rationale that would justify inclusion of the citizenship question, *see* Dkt. No. 162-1 at 7 (describing Commerce's role in orchestrating the meeting between Neuman and John Gore, and Secretary Ross's knowledge of the meeting). Hofeller and Neuman collaborated on developing a pretextual justification to conceal that discriminatory intent—a pretext that Secretary Ross adopted and, through Neuman, presented to DOJ. *Compare* Dkt. No. 162-3 at Ex. G, with *id.* at Ex. D, Ex. H.

The newly discovered evidence, when combined with the evidence already in the trial record, confirms that it is more likely than not that the decisionmakers' motive for adding the citizenship question was discriminatory. *See McCrory*, 831 F.3d at 233 ("Any individual piece of evidence can seem innocuous when viewed alone, but gains an entirely different meaning when considered in context."). Moreover, although the Court has found that much of the newly discovered evidence is admissible, at this preliminary stage the Court may rely on evidence to make factual findings without deciding whether that evidence ultimately would be admissible. *See Grimm*, 822 F.3d at 725–26.

Because there is a substantial likelihood that Plaintiffs will succeed on the merits of their equal protection claim, there is also a substantial likelihood that the *LUPE* Plaintiffs will succeed on the merits of their civil conspiracy claim. *See LUPE v. Ross*, 353 F. Supp. 3d 381, 397 (D. Md. 2018) (noting that Plaintiffs pled most of the elements necessary to establish a conspiracy by successfully pleading their Equal Protection Claims). If the Court finds that the decision to add the citizenship question was motivated by racial animus, Plaintiffs may prove their Section 1985 claim merely by "com[ing] forward with specific circumstantial evidence" that reasonably leads to the *inference* "that each member of the alleged conspiracy shared the same conspiratorial objective." *Penley v. McDowell Cty. Bd. of Educ.*, 876 F.3d 646, 660 (4th Cir. 2017) (internal quotations and citation omitted). The trial record, taken together with the newly discovered evidence, directly ties Commerce Department officials, Neuman, and Gore to the same conspiratorial objective expressed by Kobach in his February and July 2017 communications to Secretary Ross—to deprive Latinos and noncitizens of constitutionally guaranteed rights to equal representation. *See Simmons v. Poe*, 47 F.3d 1370, 1377-78 (4th Cir. 1995) (to prove a Section 1985 conspiracy, a plaintiff "must show an agreement or a 'meeting of the minds' by defendants to violate the [plaintiff's] constitutional rights," but need not show an express agreement among all the conspiracy) (citations omitted); *see also Penley*, 876 F.3d at 658 (holding that a plaintiff need not produce direct evidence of a meeting of the minds).

II. Plaintiffs Will Be Irreparably Injured Absent Injunctive Relief.

Without an injunction, Defendants would likely attempt to moot this case by printing the 2020 Census forms with the citizenship question, thereby irreparably harming Plaintiffs by preventing them from obtaining any relief at all. Defendants have repeatedly insisted that the

deadline for submission of the 2020 Census forms is June 30, 2019.[2] Although the evidence is clear that Defendants could postpone that deadline, Census Bureau 30(b)(6) Dep. Vol. II at 436:13-437:8, Dkt. No. 103-9, if there were no injunction, Defendants would be free to accelerate the deadline and begin printing forms with the citizenship question immediately.

This Court has already found that if the 2020 Census forms are printed with the citizenship question, Plaintiffs will be injured. Plaintiffs' injuries would include intrastate vote dilution, loss of congressional seats, loss of federal funding, and lower quality Census data. *See* Dkt. No. 154 at 65-80. These injuries would be irreparable. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 343-44 (1999) (holding that the prospective loss of representation in Congress warrants injunctive relief); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("[O]nce the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin this law").

III. Defendants Will Not Be Substantially Injured if the Court Orders Injunctive Relief, and an Injunction Is in the Public Interest.

A temporary injunction of a few weeks or months would not substantially harm Defendants. If the Census forms were printed without the citizenship question, Defendants would suffer no injury. The Census Bureau itself has concluded that using "reliable federal administrative records"—which are "verified" based on legal documents concerning citizenship status—"best meets DOJ's stated uses, is comparatively far less costly than [adding a citizenship question], and does not harm the quality of the census count." Dkt. No. 154 at 21. This Court

[2] *See* June 18, 2019 Hr'g Tr. at 106:10-19; Defs.' Opp'n to Pls.' Rule 60(b)(2) Mot., Dkt. No. 166 at 10, 32; Defs.' Surreply to Pls,' Rule 60(b)(2) Mot., Dkt. No. 168-1 at 3, 13-14; *see also LUPE v. Ross*, Nos. 19-1382, 19-1387, 19-1425, Defs.' Opp'n to Pls.' Mot. to Expedite, Dkt. No. 21 at 4 (4th Cir. May 20, 2019); Defs.' Opp'n to Pls.' Mot. to Remand, Dkt. No. 44 at 8-9 (4th Cir. June 24, 2019).

has already found that "the addition of the citizenship question will result in *less* accurate and *less* complete citizenship data." *Id.* at 101. The only potential injury to Defendants from a temporary injunction would be the incremental cost, if any, of printing the 2020 Census forms on an expedited basis at a later date. That cost is vanishingly small in comparison to the irreparable harm absent an injunction: a decade-long intentionally discriminatory distortion of our democracy. Accordingly, the balance of equities strongly favors Plaintiffs. *See Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 284 (4th Cir. 2002).

Because the government is a party, and "the government's interest is the public interest," these two factors merge and further favor injunctive relief. *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016); *accord Nken*, 556 U.S. at 435. An accurate census count is in the public interest, and as this Court has already found, inclusion of the citizenship question will harm the quality of Census data and add costs. *See, e.g.*, Dkt. No. 154 at ¶¶ 31, 37-39, 42. An inaccurate census count will have a negative impact on the whole of the United States, not just Latinos, Asian Americans, and non-citizens. The public also has an interest in a full and fair adjudication on the merits of whether the decision to add a citizenship question to the Census was motivated by discriminatory animus. An injunction is essential to protect the public's paramount interest in ensuring that the Census is untainted by invidious unconstitutional discrimination, in violation of Plaintiffs' fundamental Fifth Amendment right to equal protection.

CONCLUSION

Plaintiffs satisfy all four requirements for the Court to issue a preliminary injunction and an injunction pending appeal: (1) Plaintiffs are likely to succeed on the merits of their equal protection and Section 1985 claims; (2) Plaintiffs will be irreparably harmed if Defendants print the 2020 Census forms with the citizenship question; (3) Defendants will not be harmed by a

temporary injunction; and (4) it is in the public interest that Defendants be enjoined from adding a question to the 2020 Census that will lead to an inaccurate count of the population. Plaintiffs thus respectfully request that the Court enjoin Defendants from printing 2020 Census forms with a citizenship question.

Dated: June 26, 2019

Respectfully Submitted,

/s/ Daniel Grant (Bar. No. 19659)
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