IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LA UNIÓN DEL PUEBLO ENTERO, *et al.*,

Plaintiffs,

v.

WILBUR L. ROSS, in his official capacity as U.S. Secretary of Commerce, *et al.*,

Defendants.

No. 8:18-cv-01570-GJH

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

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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 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' claims fail for at least six reasons.

First, Plaintiffs—seven individuals (the "Individual Plaintiffs") and 26 immigrant advocacy organizations (the "Organizational Plaintiffs")—lack standing to challenge the Secretary's decision to reinstate a citizenship question on the decennial census. Plaintiffs' claimed injuries—that the Individual Plaintiffs and the Organizational Plaintiffs' members will lose voting power and federal funding and that the Organizational Plaintiffs will need to divert resources to combat an undercount—are all based on their allegation that reinstating a citizenship question will reduce census response rates and cause a disproportionate undercount in certain areas. Those alleged injuries, which depend on a multi-step causal chain involving numerous third parties, are too attenuated and speculative to confer Article III standing. And even if Plaintiffs' alleged injuries were certainly impending, those injuries would be fairly traceable not to the Secretary's decision, but instead to the independent decisions of individuals who disregard their legal duty to respond to the census. As to the constitutional claims, Plaintiffs lack prudential standing to assert the rights of non-party immigrants, and their alleged funding injuries fall outside the zone of interests protected by the Enumeration Clause.

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 questionnaire. 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 N.Y.*, 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 instrument, *id.* These broad delegations leave the Court with no meaningful standard to apply and accordingly preclude judicial review of the Secretary's decision to include certain demographic questions on the decennial census questionnaire.

Fourth, Plaintiffs cannot state a claim for relief under the Constitution's Enumeration or Apportionment Clauses. 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. 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 not strictly necessary to count the population and that could cause at least some individuals not to respond.

Fifth, Plaintiffs also fail to state a viable Equal Protection claim. They rely almost entirely on unrelated allegedly anti-immigrant statements from officials outside the Commerce Department and the supposed *effects* of reinstating a citizenship question. But they have not alleged facts plausibly suggesting that the sole decisionmaker here—the Secretary—had a discriminatory *purpose* in reinstating a citizenship question.

Finally, Plaintiffs' 42 U.S.C. § 1985(3) claim for conspiracy to violate civil rights against Secretary Ross and Acting Director Jarmin in their official capacities is barred by sovereign immunity.

The claim also fails on the merits. The only "conspiracy" alleged in the complaint is an agreement among federal executive branch officers—which, under the intracorporate-conspiracy doctrine, is not an actionable conspiracy under § 1985(3). Nor have Plaintiffs alleged non-conclusory facts suggesting that Secretary Ross and Acting Director Jarmin participated in any joint plan to deprive anyone of their constitutional rights, as required to state a viable § 1985(3) claim. In any event, § 1985(3) authorizes only damages, not injunctive relief, as Plaintiffs seek.

This case should therefore be dismissed.

BACKGROUND

In accordance with the Court's order of August 22, 2018, ECF No. 52, Defendants respectfully refer the Court to the "Background" section (pp. 2–10) of Defendants' memorandum of law in support of their motion to dismiss in *Kravitz v. U.S. Department of Commerce*, No. 18-cv-1041 (D. Md. June 6, 2018), ECF No. 24-1. That memorandum of law is attached for the Court's convenience.

LEGAL STANDARDS

For the legal standards governing this motion to dismiss, Defendants respectfully refer the Court to the "Legal Standards" section (pp. 11–12) of Defendants' memorandum of law in support of their motion to dismiss in *Kravitz* (attached).

ARGUMENT

In seeking to invalidate the Secretary's decision to reinstate a citizenship question on the decennial census questionnaire, 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. Plaintiffs have not alleged an injury in fact that is certainly impending. Also, their claimed injury is fairly traceable not to the Secretary's decision to reinstate the citizenship question, but instead to the independent actions of third parties

who disregard their legal duty to respond to the census. In addition, Plaintiffs' constitutional claims fail on prudential standing grounds because they cannot assert the rights of non-party immigrants and their alleged funding injuries fall outside the zone of interests protected by the Enumeration Clause.

Besides this 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 thus presents a nonjusticiable political question, and the decision at issue is committed to agency discretion by law and unreviewable under the Administrative Procedure Act.

On the merits, Plaintiffs fail to state a claim under the Constitution's Enumeration and Apportionment Clauses given the Secretary's person-by-person headcount and the historical pedigree of citizenship questions. Plaintiffs also fail to state an Equal Protection claim because they have not alleged facts plausibly suggesting discriminatory intent. Finally, Plaintiffs' official-capacity 42 U.S.C. § 1985(3) claim is barred by sovereign immunity and fails to state a claim. This case should be dismissed.

I. THIS CASE IS NOT JUSTICIABLE

A. Plaintiffs Lack Standing to Maintain This Action.

For the standards governing Article III standing, Defendants respectfully refer the Court to section I(A) (pp. 13–14) of Defendants' memorandum of law in support of their motion to dismiss in *Kravitz* (attached).

1. The Individual Plaintiffs have not alleged sufficient injury in fact.

The future injuries alleged by the seven Individual Plaintiffs are too speculative for Article III standing, for the reasons set forth in section I(A)(1) (pp. 14–20) of Defendants' memorandum of law in support of their motion to dismiss in *Kravitz* (attached) and section I(A) (pp. 1–4) of Defendants' reply in further support of their motion to dismiss in *Kravitz*, ECF No. 40 (also attached).

After Defendants briefed their motion to dismiss in *Kravitz*, Judge Furman of the Southern District of New York and Judge Seeborg of the Northern District of California found that states, cities, and organizations had standing in the census-citizenship cases before them. *New York, et al. v. Dep't of Commerce, et al.*, 18-cv-2921 (S.D.N.Y. July 26, 2018), ECF No. 215 at 16–32; *NYIC, et al. v. Dep't of Commerce, et al.*, 18-cv-5025 (S.D.N.Y. July 26, 2018), ECF No. 70 at 16–32; *California, et al. v. Ross, et al.*, 18-cv-1865 (N.D. Cal. Aug. 17, 2018), ECF No. 75 at 9–16. But Judge Furman found that he was, at least in part, bound by Second Circuit precedent, which does not bind this Court. *See New York, et al. v. Dep't of Commerce, et al.*, 18-cv-2921 (S.D.N.Y. July 26, 2018), ECF No. 215 at 21–25; *NYIC, et al. v. Dep't of Commerce, et al.*, 18-cv-5025 (S.D.N.Y. July 26, 2018), ECF No. 70 at 21–25. And Judge Seeborg improperly conflated the alleged decline in initial self-response rate with the possibility of an *ultimate* undercount in concluding that certain states, cities, and organizations will sustain a non-speculative injury in fact. *See California, et al. v. Ross, et al.*, 18-cv-1865 (N.D. Cal. Aug. 17, 2018), ECF No. 75 at 11–12.

More fundamentally, none of the cases before Judge Furman or Judge Seeborg deal with whether individuals—as opposed to states, cities, and organizations—have standing. This difference is critical because individuals on the ground would only be impacted by a loss of federal funds after several additional steps in a chain of speculative events.[1] Indeed, not only does their standing rely on the federal government not changing funding formulas, but their states or localities must not make up the difference in funds themselves, stretch funds they already receive, or reallocate funds from some programs to the Plaintiffs' programs. And whatever shortfall in funding occurs after that additional step must actually impact the day-to-day use of roads, schools, or programs that Plaintiffs themselves

[1] Five individual Plaintiffs are state legislators. *See* First Am. Compl., ECF No. 42 [hereinafter "FAC"] ¶ 125 (Gene Wu), ¶ 126 (Mia Su-Ling Gregerson), ¶ 127 (Cindy Ryu), ¶ 128 (Sharon Tomiko Santos), ¶ 129 (Raj Mukherji). To the extent they bring this suit in their capacity as legislators, they lack standing under well-settled Supreme Court precedent. *See*, *infra*, Section I.A.3.C.

use and not other roads, schools, or programs. Medicaid is the paragon. Under the relevant funding statutes, Medicaid is 100% jointly funded by the federal and state governments, with the federal share not less than 50%. *See* 42 U.S.C. 1396d(b). Thus, while a differential undercount and corresponding loss of Medicaid funds may injure the state, individuals would be unaffected because the state, by law, is required to offset any shortfall (with a ceiling of 50%). *See, e.g.*, FAC ¶ 5 ("LUPE's members receive and rely on funds from Medicaid . . ."), ¶ 10 ("Some of the individuals that DHF serves receive and rely on funds from Medicaid . . ."), ¶ 15 ("SVREP serves individuals who receive and rely on funds from Medicaid . . ."), ¶ 20 ("Some of the individuals that MFV serves receive and rely on Medicaid . . ."). The standing analyses performed by Judge Furman and Judge Seeborg therefore materially differ from this case and *Kravitz*, and those opinions should not persuade this Court.[2]

2. The Individual Plaintiffs' alleged injuries are not fairly traceable to the reinstated citizenship question.

As required for Article III standing, the Individual Plaintiffs' supposed injuries are also not fairly traceable to the reinstatement of a citizenship question, as set forth in section I(A)(2) (pp. 21–22) of Defendants' memorandum of law in support of their motion to dismiss in *Kravitz* (attached) and section I(A) (pp. 1–4) of Defendants' reply in further support of their motion to dismiss in *Kravitz*, ECF No. 40 (also attached).[3]

[2] For the reasons set forth above, Defendants respectfully disagree with the Court's standing analysis in *Kravitz, et al. v. Dep't of Commerce, et al.*, 18-cv-1041 (D. Md. Aug. 22, 2018), ECF No. 48 at 11–14.

[3] For the reasons set forth above, Defendants respectfully disagree with the Court's traceability analysis in *Kravitz, et al. v. Dep't of Commerce, et al.*, 18-cv-1041 (D. Md. Aug. 22, 2018), ECF No. 48 at 14–17.

3. The Organizational Plaintiffs lack standing.

In addition to the Article III injury in fact principles limiting *individuals'* standing set forth in Defendants' *Kravitz* motion to dismiss, Article III also imposes limits on *organizations*' standing. The 26 Organizational Plaintiffs do not fall within those limits, as explained below.

a. The Organizational Plaintiffs have failed to allege sufficient facts to establish standing to sue on behalf of their members.

An organization does not have Article III standing to sue on behalf of its members unless "its members would otherwise have standing to sue in their own right." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). This associational standing requirement demands that the organization identify a particular affected member, not merely a "statistical probability that some of [its] members are threatened with concrete injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). A general reference to unidentified members is insufficient to confer standing on an organization. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.23 (1982); *see also 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.").

Here, 25 of the Organizational Plaintiffs—DHF, SVREP, MVF, CHIRLA, GALEO, LCLAA, Somos, SHC, MALC, CLLC, CLBC, API Legislative Caucus, PAZ, CPLC, AZLLC, El Pueblo, MLLC, LCF, Advancing Justice-Chicago, ASIA, MinKwon, Chelsea Collaborative, OCA-GH, Friendly House, and Four Directions—have not identified a single member who has suffered or will suffer an injury. *See* FAC ¶¶ 8–12 (DHF), ¶¶ 13–17 (SVREP), ¶¶ 18–21 (MVF), ¶¶ 22–25 (CHIRLA), ¶¶ 26–30 (GALEO), ¶¶ 31–35 (LCLAA), ¶¶ 36–40 (Somos), ¶¶ 41–44 (SHC), ¶¶ 45–50 (MALC), ¶¶ 51–54 (CLLC), ¶¶ 55–58 (CLBC), ¶¶ 59–63 (API Legislative Caucus), ¶¶ 64–68 (PAZ), ¶¶ 69–73 (CPLC), ¶¶ 74–77 (AZLLC), ¶¶ 78–82 (El Pueblo), ¶¶ 83–86 (MLLC), ¶¶ 87–90 (LCF), ¶¶ 91–94

(Advancing Justice-Chicago), ¶¶ 95–99 (ASIA), ¶¶ 100–05 (MinKwon), ¶¶ 106–10 (Chelsea Collaborative), ¶¶ 111–14 (OCA-GH), ¶¶ 115–19 (Friendly House), ¶¶ 120–23 (Four Directions). Those Organizational Plaintiffs have therefore failed to allege facts necessary to show standing to sue on behalf of their members.

Only one Organizational Plaintiff (LUPE) identifies a particular member (Plaintiff Juanita Valdez-Cox) who will allegedly suffer an injury. FAC ¶ 124. Ms. Valdez-Cox lives in a part of Texas that allegedly has higher proportions of Latino and non-citizen populations than the general state or national population. *Id.* ¶ 124, 353. She alleges that the undercount from reinstating the citizenship question will harm her because (a) it will deprive her of representation in the U.S. House of Representatives and state and local elected bodies, and (b) she regularly drives on roads in Texas. *Id.* ¶ 354, 363. Those claimed harms, however, are too attenuated to establish the injury in fact required for Article III standing, as set forth in section I.A.1, *supra*. Ms. Valdez-Cox has thus not shown a cognizable injury in fact. Besides Ms. Valdez-Cox, LUPE has not identified any other member who allegedly has suffered or will suffer an injury in fact. LUPE therefore lacks standing to sue on behalf of its members. *See Hunt*, 432 U.S. at 343; *Am. Chemistry Council*, 468 F.3d at 820.

b. The Organizational Plaintiffs have not established standing to sue on their own behalf.

When an organization sues on its own behalf (as opposed to on behalf of its members), it must satisfy the same Article III standing requirements that apply to individuals. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982). The injury in fact requirement demands that the organization allege facts plausibly showing that it has suffered a "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitut[ing] . . . more than simply a setback to the organization's abstract social interests." *Id.* at 379. An "injury to organizational purpose, without more, does not provide a basis for standing." *S. Walk at Broadlands Homeowner's Ass'n v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 183 (4th Cir. 2013). The

Organizational Plaintiffs' allegations that a citizenship question will "frustrate their organizational missions" are therefore insufficient to confer standing. FAC ¶¶ 273, 278–80, 284, 287–88, 293, 299, 302, 307, 313, 317, 320, 324, 327, 330, 332–34, 342, 345, 351.

Nor is standing conferred by allegations that a citizenship question will cause the Organizational Plaintiffs to expend more resources teaching their members, constituents, and clients how to respond to the question to prevent a disproportionate undercount. FAC ¶¶ 273, 278–81, 284, 286, 289, 293, 299, 302, 307, 313, 317, 320, 324, 327, 330, 332–34, 342, 347, 352. Organizations "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."[4] *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013); *see also Lane v. Holder*, 703 F.3d 668, 675 (4th Cir. 2012) (organization's diversion of resources in response to defendant's action "'results not from any actions taken by [the defendant], but rather from the [organization's] own budgetary choices'") (alterations in original). The Organizational Plaintiffs' purported fears of a disproportionate undercount from a citizenship question are speculative and not certainly impending, as explained above and in Defendants' motion to dismiss in *Kravitz*. Their decisions to expend more resources in response to those speculative future events therefore cannot provide standing.

In any event, the allegations about diverted resources are fatally deficient in specifics. The Organizational Plaintiffs give no details about the size of the supposed resource diversion or about the the effect of that diversion on their other activities. FAC ¶¶ 273, 278–81, 284, 286, 289, 293, 299, 302, 307, 313, 317, 320, 324, 327, 330, 332–34, 342, 347, 352. These conclusory allegations fail to show the requisite "concrete and demonstrable injury to the organization's activities—with the

[4] In some circumstances, the Fourth Circuit has interpreted a footnote in *Clapper* to allow standing where there is "a 'substantial risk' that the harm will occur, which in turn may prompt a party to reasonably incur costs to mitigate or avoid that harm." *Beck v. McDonald*, 848 F.3d 262, 275 (4th Cir. 2017), *cert. denied*, 137 S. Ct. 2307 (2017). Even if the "substantial risk" standard applies here, the Organizational Plaintiffs have failed to meet that standard for the reasons set forth herein.

consequent drain on the organization's resources." *Havens Realty Corp.*, 455 U.S. at 379; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) ("[B]are assertions . . . are conclusory and not entitled to be assumed true.").

Finally, for the same reasons, standing is not conferred by the allegations that some Organizational Plaintiffs provide services that use census data and such services will be harmed because a citizenship question will make that data less reliable. FAC ¶¶ 292, 299, 307, 313, 317, 324, 333–34, 345–46, 351. The prospect of less reliable census data is not certainly impending, and in any event the Organizational Plaintiffs' allegations about how they might be harmed by less reliable census data are conclusory.

The Organizational Plaintiffs therefore lack standing to sue on their own behalf.

c. The Legislative Caucus Organizational Plaintiffs and individual state legislators lack standing to sue.

Seven Organizational Plaintiffs are legislative caucuses whose members are state *legislators* with immigrant *constituents*, and five individual Plaintiffs are state legislators. FAC ¶¶ 41–43 (SHC), ¶¶ 45–48 (MALC), ¶¶ 51–53 (CLLC), ¶¶ 55–57 (CLBC), ¶¶ 59–61 (API Legislative Caucus), ¶¶ 74–76 (AZLLC), ¶¶ 83–85 (MLLC), ¶ 125 (Gene Wu), ¶ 126 (Mia Su-Ling Gregerson), ¶ 127 (Cindy Ryu), ¶ 128 (Sharon Tomiko Santos), ¶ 129 (Raj Mukherji). To the extent these legislative caucuses and individuals bring this suit in their capacity as legislators, they lack standing under settled Supreme Court precedent.

Generally, legislators "do not have standing to vindicate the institutional interests of the house in which they serve." *Cummings v. Murpy*, --- F. Supp. 3d ---, 2018 WL 3869132, at *9 (D.D.C. Aug. 14, 2018). Indeed, legislative standing has been recognized in only two instances: "(1) when the [legislators] have been individually deprived of something they are personally entitled to, as in *Powell v. McCormack,* 395 U.S. 486 (1969)," or "(2) when the [legislators'] votes would have been sufficient to defeat (or enact) a bill which has gone into effect (or not been given effect) and 'their votes have been

completely nullified,' as in *Coleman v. Miller*, 307 U.S. 433 (1939)." *Common Cause v. Biden*, 909 F. Supp. 2d 9, 24 (D.D.C. 2012) (some citations omitted) (citing *Raines v. Byrd*, 521 U.S. 811, 821-23 (1997)), *aff'd,* 748 F.3d 1280 (D.C. Cir. 2014); *Cummings*, 2018 WL 3869132, at *9.

The Plaintiff legislative caucuses and state legislators satisfy neither exception. First, no individual legislators have alleged that they have been "been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies," or that "they have been deprived of something to which they *personally* are entitled—such as their seats as [state legislators] after their constituents had elected *them*." *See Raines*, 521 U.S. at 821. To the extent these Plaintiffs have alleged injury "not [ ] in any private capacity but solely because they are" legislators, they fail to satisfy the first exception for legislative standing. *See id.* Second, Plaintiff legislative caucuses and state legislators have not alleged that their or their members' votes "would have been sufficient to defeat (or enact) a specific legislative Act". *Id.* at 823; *Baird v. Norton*, 266 F.3d 408, 412 (6th Cir. 2001). Instead, their alleged injuries are based on cursory allegations of diverted funding, *see, e.g.*, FAC ¶ 278 ("Plaintiff AZLLC will devote significant resources to counteract the negative effects of the addition of the citizenship question."), ¶ 289 ("Plaintiffs CLBC and CLLC will devote significant resources to counteract the negative effect of the addition of the citizenship question."), ¶ 334 ("SHC will devote significant resources to counteract the negative effects of the addition of the citizenship question."), or speculative injuries of constituents, *see, e.g.*, FAC ¶ 337 ("An undercount in Texas will result in loss of federal funds for programs on which . . . MALC . . . members, clients, constituents, and individuals within the communities they serve rely."). These alleged injuries do not satisfy the second exception for legislative standing. Accordingly, the legislative caucuses and state legislators lack standing to the extent they bring this suit in their capacity as legislators.

d. The Organizational Plaintiffs also lack prudential standing to assert the Equal Protection claim.

In addition to the Article III limitations on standing, prudential considerations also limit what challenges federal courts will hear. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). One such consideration is that 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). 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).

Here, Plaintiffs' second claim is for an alleged violation of the Equal Protection Clause. FAC ¶¶ 369–72. But the operative complaint does not allege that the Secretary intentionally discriminated against any of the *Organizational Plaintiffs*. Instead, it alleges that the Secretary intentionally discriminated against *particular people*. *See* FAC ¶ 371 ("The inclusion of a citizenship question in the decennial Census . . . is motivated by racial animus towards Latinos, Asian Americans, and animus towards non-U.S. citizens and foreign-born persons.").

Nor do the Organizational 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. 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. *Singleton v. Wulff*, 428 U.S. 106, 115 (1976). 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 "sufficient obstacles" preventing the third party from asserting his or her own right. *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 215 (4th Cir. 2002).

Neither of these requirements is satisfied here. First, the operative complaint does not allege facts indicating a sufficiently close relation with the immigrants whose rights the Organizational Plaintiffs are asserting. In fact, the complaint alleges no formal relationship at all between the Organizational Plaintiffs and the immigrants allegedly discriminated against by the Secretary's decision. Eleven of the Organizational Plaintiffs are not membership organizations at all; they merely provide services to immigrants. FAC ¶¶ 8–10 (DHF), ¶¶ 13–15 (SVREP), ¶¶ 18–20 (MFV), ¶¶ 69–71 (CPLC), ¶¶ 78–80 (El Pueblo), ¶¶ 87–89 (LCF), ¶¶ 91–92 (Advancing Justice-Chicago), ¶¶ 95–97 (ASIA), ¶¶ 100–02 (MinKwon), ¶¶ 115–17 (Friendly House), ¶¶ 120–22 (Four Directions). And although the remaining 15 Organizational Plaintiffs claim immigrants as members or constituents, the complaint does not allege any facts about the nature of those relationships—like whether those individuals have consented for the Organizational Plaintiff to sue in federal court to assert their rights, or whether the individuals have any recourse if the Organizational Plaintiff fail to adequately represent their interests here. FAC ¶¶ 3–5 (LUPE), ¶¶ 22–23 (CHIRLA), ¶¶ 26–27 (GALEO), ¶¶ 31–33 (LCLAA), ¶¶ 36–38 (Somos), FAC ¶¶ 41–43 (SHC), ¶¶ 45–48 (MALC), ¶¶ 51–53 (CLLC), ¶¶ 55–57 (CLBC), ¶¶ 59–61 (API Legislative Caucus), ¶¶ 64–65 (PAZ), ¶¶ 74–76 (AZLLC), ¶¶ 83–85 (MLLC), ¶¶ 106–07 (Chelsea Collaborative), ¶¶ 111–12 (OCA-GH).

Second, the operative complaint does not allege any facts suggesting a genuine obstacle preventing individuals from asserting their own rights. It alleges merely that the Organizational Plaintiffs collectively have over 20,000 immigrant members and that reinstating a citizenship question will deter certain people from participating in the census. FAC ¶¶ 4, 23, 37, 65, 112, 269, 271–72. The complaint does not, however, show how any individual is hindered from asserting their rights, including by initiating or otherwise participating in a lawsuit to assert such rights.

The rule against third-party standing therefore bars the Organizational Plaintiffs from asserting the Equal Protection claim.

4. Plaintiffs' funding-related injuries are outside the zone of interests protected by the Enumeration Clause.

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 state or local projects. *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 [C]omplaint.") (citation omitted). Plaintiffs' claimed funding-related injuries under the Enumeration Clause should therefore be dismissed for lack of prudential standing.

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

Plaintiffs' claims are also barred by the political question doctrine for the reasons set forth in section I(B) (pp. 22–27) of Defendants' memorandum of law in support of their motion to dismiss in *Kravitz* (attached) and section I(B) (pp. 4–9) of Defendants' reply in further support of their motion to dismiss in *Kravitz*, ECF No. 40 (also attached).

After Defendants briefed their motion to dismiss in *Kravitz*, this Court, Judge Furman, and Judge Seeborg rejected Defendants' political-question argument in the cases before them. In doing so, all courts similarly concluded that "*every* challenge to the conduct of the census is, in some sense, a challenge to the 'manner' in which the government conducts the 'actual Enumeration.'"[5] *New York,*

[5] Judge Furman also found that he was bound by Second Circuit precedent on this issue, which does not bind this Court. *New York, et al. v. Dep't of Commerce, et al.*, 18-cv-2921 (S.D.N.Y. July 26, 2018), ECF No. 215 at 34–35; *NYIC, et al. v. Dep't of Commerce, et al.*, 18-cv-5025 (S.D.N.Y. July 26, 2018), ECF No. 70 at 34–35 (citing *Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980)). To the extent Judge Furman relied on other cases challenging the content of a census questionnaire, those cases are also not binding on this Court, there is no indication defendants sought to dismiss those cases on political question grounds, and those cases dealt with constitutional challenges beyond simply the

et al. v. Dep't of Commerce, et al., 18-cv-2921 (S.D.N.Y. July 26, 2018), ECF No. 215 at 32–38; *NYIC, et al. v. Dep't of Commerce, et al.*, 18-cv-5025 (S.D.N.Y. July 26, 2018), ECF No. 70 at 32–38; *California, et al. v. Ross, et al.*, 18-cv-1865 (N.D. Cal. Aug. 17, 2018), ECF No. 75 at 18–19; *Kravitz, et al. v. Dep't of Commerce, et al.*, 18-cv-1041 (D. Md. Aug. 22, 2018), ECF No. 48 at 21–22 ("[R]eviewing the 'actual Enumeration' necessarily involves looking into the 'Manner' in which the count is conducted."). Defendants agree. But, as used in the Enumeration Clause, the umbrella-term "[m]anner" includes both a core set of activities that are justiciable (calculation methodologies) and a broader set of activities that are not (pre-census information-gathering procedures). Thus, courts have misinterpreted Defendants' arguments as a false dichotomy rather than a natural reading of the Enumeration Clause consistent with its text, history, and Supreme Court precedent.

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

Plaintiffs' APA claim should be dismissed for the reasons set forth in section I(C) (pp. 27–30) of Defendants' memorandum of law in support of their motion to dismiss in *Kravitz* (attached) and section I(C) (pp. 9–12) of Defendants' reply in further support of their motion to dismiss in *Kravitz*, ECF No. 40 (also attached).[6]

II. PLAINTIFFS FAIL TO STATE AN ENUMERATION OR APPORTIONMENT CLAUSE CLAIM

Plaintiffs have also failed to state a claim for violation of the Enumeration Clause for the reasons set forth in section II (pp. 30–35) of Defendants' memorandum of law in support of their motion to dismiss in *Kravitz* (attached) and section II (pp. 12–15) of Defendants' reply in further

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Enumeration Clause. *See Morales v. Daley*, 116 F. Supp. 2d 801 (S.D. Tex. 2000); *see also Prieto v. Stans*, 321 F. Supp. 420, 423 (N.D. Cal. 1970).

[6] For the reasons set forth above, Defendants respectfully disagree with the Court's APA analysis in *Kravitz, et al. v. Dep't of Commerce, et al.*, 18-cv-1041 (D. Md. Aug. 22, 2018), ECF No. 48 at 26–32.

support of their motion to dismiss in *Kravitz*, ECF No. 40 (also attached).[7] After Defendants briefed their motion to dismiss in *Kravitz*, Judge Furman dismissed this claim in the two cases before him. *New York, et al. v. Dep't of Commerce, et al.*, 18-cv-2921 (S.D.N.Y. July 26, 2018), ECF No. 215 at 46–60; *NYIC, et al. v. Dep't of Commerce, et al.*, 18-cv-5025 (S.D.N.Y. July 26, 2018), ECF No. 70 at 46–60. Judge Seeborg did not do so in the two cases before him. *See California, et al. v. Ross, et al.*, 18-cv-1865 (N.D. Cal. Aug. 17, 2018), ECF No. 75 at 25–29.

This Court previously concluded that the Secretary's decision to reinstate a citizenship question plausibly violated the Constitution because "[p]laintiffs have alleged that the citizenship question unreasonably compromises the distributive accuracy of the census." *Kravitz, et al. v. Dep't of Commerce, et al.*, 18-cv-1041 (D. Md. Aug. 22, 2018), ECF No. 48 at 25. The Court's analysis, however, was misguided.

This theory, taken to its logical conclusion, would mean that the Enumeration Clause prohibits any demographic questions that may theoretically reduce response rates and cause some differential undercount.[8] But the census has, from the beginning, asked demographic questions that may

[7] Although Plaintiffs also assert a claim under the Apportionment Clause, FAC ¶¶ 379–81, this claim merely duplicates Plaintiffs' claim under the Enumeration Clause; both claims argue that reinstatement of a citizenship question on the 2020 Census may have some impact on congressional apportionment. *Compare* FAC ¶ 368 *with* ¶ 380. Indeed, Judge Seeborg recognized that these claims "rise and fall together." *California, et al. v. Ross, et al.*, 18-cv-1865 (N.D. Cal. Aug. 17, 2018), ECF No. 75 at 2 n.2. Plaintiffs' Apportionment Clause claim should therefore be dismissed for the same reasons as Plaintiffs' Enumeration Clause claim.

[8] The *Wisconsin* standard—cited by the Court for this proposition—is inapposite here. As Judge Furman recognized:

> To read *Wisconsin* as Plaintiffs suggest would, therefore, lead ineluctably to the conclusion that each and every census—from the Founding through the present—has been conducted in violation of the Enumeration Clause. That would, of course, be absurd, and leads the Court to conclude instead that the *Wisconsin* standard applies only to decisions that bear directly on the actual population count. Notably, the Supreme Court's own language supports that limitation, as it held only that "the Secretary's decision *not to adjust*" the census count "need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population." [*Wisconsin*,] 517 U.S. at

disproportionately deter respondents in certain areas of the country.[9] *See* Census Act of 1790, § 1, 1 Stat. 101 (1790) (specifying six questions, including the number of slaves). This includes citizenship-related questions—as early as 1820—that may have had a disproportionately deterrent effect similar to the alleged 2020 Census citizenship question; certainly the "[n]umber of foreigners not naturalized" has never been equally distributed across the United States. *See, e.g.*, Census Act of 1820, 3 Stat. 548 (1820) (question on the "[n]umber of foreigners not naturalized); Census Act of 1830, 4 Stat. 383 (1830) (question on "[t]he number of White persons who were foreigners not naturalized"); Census Act of 1850, 9 Stat. 428 (1850) (governing the censuses of 1850–1870 and asking place of birth); Act Providing for the Fourteenth Census, 40 Stat. 1291 (1919) (questions on place of birth and parents' places of birth; if foreign-born, what year the person immigrated and the person's naturalization status).

The "*current* political climate", cited by the Court, does not alter this analysis. There is no support for the proposition that an otherwise constitutional census question becomes unconstitutional due to the political climate at a particular time. Quite the opposite, citizenship-related questions have been asked to some or all of the population, in varying political climates, for nearly two hundred years. *See Kravitz v. U.S. Department of Commerce*, No. 18-cv-1041 (D. Md. June 6, 2018), ECF No. 24-1 at 3–6. And no one contends that citizenship questions—asked since 1820—and race-related questions—

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20 (emphasis added). That is, the Court did not purport to announce a standard that would apply to a case such as this one.

New York, et al. v. Dep't of Commerce, et al., 18-cv-2921 (S.D.N.Y. July 26, 2018), ECF No. 215 at 58; *NYIC, et al. v. Dep't of Commerce, et al.*, 18-cv-5025 (S.D.N.Y. July 26, 2018), ECF No. 70 at 58. This Court should likewise reject *Wisconsin*.

[9] As Judge Furman noted, "the longstanding practice of asking questions about the populace of the United States without a direct relationship to the constitutional goal of an 'actual Enumeration' has been blessed by all three branches of the federal government." *New York, et al. v. Dep't of Commerce, et al.*, 18-cv-2921 (S.D.N.Y. July 26, 2018), ECF No. 215 at 51; *NYIC, et al. v. Dep't of Commerce, et al.*, 18-cv-5025 (S.D.N.Y. July 26, 2018), ECF No. 70 at 51.

asked in every census since 1790—were unconstitutional prior to the Civil War,[10] during World War II,[11] or during the Cold War,[12] all turbulent political times when census "demographic questions [ ] would, allegedly, be viewed by a specific segment of the population as an attempt to further [ ] law enforcement objectives related to that population." *Kravitz, et al. v. Dep't of Commerce, et al.*, 18-cv-1041 (D. Md. Aug. 22, 2018), ECF No. 48 at 25.

Dismissal of Plaintiffs' Enumeration Clause claim says nothing about the merits of Plaintiffs' APA, Equal Protection, and § 1985(3) claims.[13] All it says is that the text and history of the Enumeration Clause itself neither *requires* nor *prohibits* asking a citizenship question in the census. For the reasons set forth by Defendants and Judge Furman, therefore, Plaintiffs' Enumeration Clause and Apportionment Clause claims should be dismissed.

III. PLAINTIFFS FAIL TO STATE AN EQUAL PROTECTION CLAIM

Plaintiffs' Equal Protection claim alleges that reinstating a citizenship question impermissibly discriminates against certain people.[14] FAC ¶¶ 219–59. But where, as here, there is "a facially neutral statute or policy that is neutrally applied," the Equal Protection Clause requires both an "adverse effect

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[10] Census Act of 1850, 9 Stat. 428 (1850) (1850 Census questions); *see also* James Oliver Horton & Lois E. Horton, A Federal Assault: African Americans and the Impact of the Fugitive Slave Law of 1850, 68 Chi.-Kent L. Rev. 1179, 1183 (1993) ("Blacks who grew to maturity under the shadow of the eighteenth-century law, even if they themselves had not been threatened with capture, were aware that both fugitive slaves and free blacks were in danger.").

[11] U.S. Census Bureau, Measuring America: The Decennial Censuses From 1790 to 2000, at 62, https://www2.census.gov/library/publications/2002/dec/pol_02-ma.pdf ("Measuring America") (1940 census questions).

[12] Measuring America at 66-69 (1950 Census questions), 72-73 (1960 Census questions).

[13] For the reasons set forth herein, those claims should be dismissed as well.

[14] "Although the Fourteenth Amendment's Equal Protection Clause does not apply to the federal government, the Fifth Amendment's Due Process Clause contains an equal protection component." *Stop Reckless Econ. Instability Caused by Democrats v. Fed. Election Comm'n*, 814 F.3d 221, 233 (4th Cir. 2016), *cert. denied,* 137 S. Ct. 374 (2016).

on a protected group, and that the adoption of the statute or policy was motivated by discriminatory animus." *Williams v. Hansen*, 326 F.3d 569, 584 (4th Cir. 2003). Even if Plaintiffs have adequately alleged an adverse *effect* from the Secretary's decision, they fail to allege facts plausibly suggesting discriminatory *intent*. *Pers. Admin'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979). Put simply, Plaintiffs have not met their burden[15] of plausibly alleging that the Secretary "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.* at 279.

The Supreme Court and the Fourth Circuit have identified various factors that may be probative of whether a decisionmaker was motivated by discriminatory intent:

> (1) evidence of a "consistent pattern" of actions by the [decisionmaker] disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the [decisionmaker] . . . ; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by [the decisionmaker] on the record or in minutes of [ ] meetings.

Cent. Radio Co. v. City of Norfolk, 811 F.3d 625, 635 (4th Cir. 2016) (quoting *Sylvia Dev. Corp.*, 48 F.3d at 819. Given that Secretary Ross, as the sole decisionmaker, directed reinstatement of a citizenship question on the 2020 Census,[16] none of these factors weigh in Plaintiffs' favor.

First, Plaintiffs have not plausibly alleged a "consistent pattern" of actions by *anyone* that disparately impacted Latinos, Asian Americans, or noncitizens, let alone any actions by Secretary Ross.

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[15] "In the end, the plaintiff has the burden of establishing that a classification introduced through administrative action was 'clear and intentional.'" *Sylvia Dev. Corp. v. Calvert Cty.*, 48 F.3d 810, 819 (4th Cir. 1995) (quoting *Snowden v. Hughes*, 321 U.S. 1, 8 (1944)).

[16] *See* FAC ¶ 1 ("On March 26, 2018, U.S. Department of Commerce Secretary Wilbur Ross directed the Census Bureau to add a citizenship question to the 2020 decennial Census questionnaire."); ¶ 131 ("Defendant Ross issued a memorandum on March 26, 2018, which directed the U.S. Census Bureau to add a question on citizenship to the decennial Census."); ¶ 186 ("On March 26, 2018, Defendant Ross directed the Census Bureau to add a citizenship question to the 2020 Census."); *see generally* ¶¶ 1-392 (no mention of a decisionmaker other than Secretary Ross).

See FAC ¶ 371. Instead, Plaintiffs cite numerous purportedly discriminatory *statements* by the President, the Attorney General, and others. These statements by current and former government officials—none of whom are alleged to have participated in the decision to reinstate a citizenship question—shed no light on "the decisionmaker's purposes." *Id.* ¶¶ 219–54; *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). The FAC is simply devoid of any allegations that *Secretary Ross's* previous actions or statements remotely implicated or impacted Latinos, Asian Americans, or noncitizens.

Second and relatedly, the FAC says nothing about a discriminatory historical background surrounding the Secretary's decision, or any history of discrimination by the Secretary. Again, the FAC's Equal Protection claim rests solely on statements by individuals divorced from the decision to reinstate a citizenship question and without power make such a decision. *See* 13 U.S.C. § 141(f)(2) ("[T]he Secretary shall submit . . . not later than 2 years before the appropriate census date, a report containing *the Secretary's determination* of the questions proposed to be included in such census." (emphasis added)).

Third, Plaintiffs fail to plausibly allege significant departures from normal procedures leading to the Secretary's decision such that discriminatory intent could be inferred. For example, although Plaintiffs allege that the "Census Bureau did not test the addition of a citizenship question in any of the tests it ran in preparation for the 2020 Census," FAC ¶ 191, they set forth no allegations regarding either the "normal procedures" for reinstating a question on the census or explaining how the Secretary departed from such procedures. Further, Plaintiffs fail to acknowledge that the citizenship question that will be asked on the 2020 Census is identical to the one that was extensively tested before being added to the ACS, and which has been asked of over 40 million households 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 Aug. 24, 2018). And the FAC 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. The FAC thus fails to credibly allege any departure from analogous past practice.

Fourth, the FAC has no allegations regarding discriminatory statements by Secretary Ross, let alone contemporary discriminatory statements on the record or in meeting minutes. As noted above, Plaintiffs cite numerous purportedly discriminatory statements by the President, the Attorney General, and others officials. But the FAC contains no supposedly discriminatory statements from the decisionmaker—Secretary Ross—nor any discriminatory statements concerning a citizenship question. *See* FAC ¶¶ 219–54. Instead, Plaintiffs cite campaign emails, FAC ¶¶ 185, 189, and the President's supposed demand for "[e]xacting [l]oyalty [f]rom Cabinet Heads and Department Secretaries," FAC ¶¶ 255-59, in a seeming attempt to tie the Secretary's decision to the President's purportedly discriminatory remarks. But nothing in the FAC plausibly establishes a nexus between those remarks and the Secretary's decision. And it simply cannot be the case that broad and unrelated statements by the President, without more, render every Cabinet Head's facially neutral decision constitutionally suspect under the Equal Protection Clause. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018) (upholding a facially neutral Presidential directive despite the President's prior statements regarding the precise decision at issue). It is undisputed that the Secretary decided to reinstate a citizenship question on the 2020 Census pursuant to his exclusive statutory authority; it is his statements and actions, and his alone, under the constitutional microscope.

Applying the factors identified by the Supreme Court and the Fourth Circuit, the FAC 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.

IV. PLAINTIFFS' CONSPIRACY CLAIM UNDER 42 U.S.C. § 1985(3) SHOULD BE DISMISSED

Finally, Plaintiffs assert a claim under 42 U.S.C. § 1985(3) (conspiracy to violate civil rights) against Secretary Ross and Acting Director Jarmin in their official capacities, seeking declaratory and injunctive relief. *See* FAC ¶¶ 373–77, prayer for relief. That official-capacity claim, however, is barred by sovereign immunity and fails to state a claim.

A. The Official-Capacity § 1985(3) Claim Is Barred by Sovereign Immunity.

Sovereign immunity bars cases against the federal government unless Congress has unequivocally consented to suit. *United States v. Testan*, 424 U.S. 392, 399 (1976). Sovereign immunity is not limited to cases naming the United States as a defendant; it also generally bars cases against federal officials in their official capacities because the relief requested would run against the federal government. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). Civil rights statutes like 42 U.S.C. § 1985(3) do not waive the federal government's sovereign immunity. *See Unimex, Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 594 F.2d 1060, 1061 (5th Cir. 1979). Sovereign immunity thus "bars []§ 1985(3) … suits brought against the United States and its officers acting in their official capacity." *Davis v. U.S. Dep't of Justice*, 204 F.3d 723, 726 (7th Cir. 2000); *accord Affiliated Prof'l Home Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999). Here, because Plaintiffs have sued Secretary Ross and Acting Director Jarmin in their official capacities only, FAC ¶¶ 131–32, the § 1985(3) conspiracy claim is barred by sovereign immunity.

B. Plaintiffs Also Fail to State a Viable § 1985(3) Claim.

Even if the § 1985(3) conspiracy claim were not barred by sovereign immunity, it should be dismissed for three reasons.

First, the sole basis for Plaintiffs' conspiracy claim is that Secretary Ross and Acting Director Jarmin allegedly conspired to reinstate a citizenship question with other federal officials—the President, the Attorney General, and other officials from the White House, Justice Department, and

Voter Fraud Commission. *See* FAC ¶¶ 375–76. But an agreement among federal executive branch officers is not an actionable conspiracy under § 1985(3). Indeed, the Fourth Circuit has held that the intracorporate-conspiracy doctrine applies to § 1985(3) claims. *Buschi v. Kirven*, 775 F.2d 1240, 1251–52 (4th Cir. 1985). Under the intracorporate-conspiracy doctrine, "there is no unlawful conspiracy when officers within a single corporate entity consult among themselves and then adopt a policy for the entity." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017). The rationale for this doctrine is that "[c]onspiracy requires an agreement . . . between or among two or more separate persons," but "[w]hen two agents of the same legal entity make an agreement in the course of their official duties . . . their acts are attributed to [the] principal," so "there has not been an agreement between two or more separate people." *Id.* Because Plaintiffs' alleged conspiracy was among federal officials within the executive branch, it cannot provide a basis for liability under § 1985(3).

Second, even if the intracorporate-conspiracy doctrine did not apply, Plaintiffs have not adequately alleged a "meeting of the minds" as required by § 1985(3). To state an actionable conspiracy under § 1985(3), a plaintiff must allege non-conclusory facts plausibly showing "an agreement or a 'meeting of the minds' by defendants to violate the claimant's constitutional rights"—that is, a "joint plan[] to deprive [the plaintiff] of his constitutional rights." *Simmons v. Poe*, 47 F.3d 1370, 1377 (4th Cir. 1995). In applying that "very high" standard, *Brissett v. Paul*, 141 F.3d 1157 (4th Cir. 1998) (unpublished), the Fourth Circuit "has rarely, if ever, found that a plaintiff has set forth sufficient facts to establish a section 1985 conspiracy," *Simmons*, 47 F.3d at 1377. Here, Plaintiffs' "meeting of the minds" allegations are wholly conclusory. The entirety of their allegations are that other federal officials "recommended" and "requested" that Secretary Ross and Acting Director Jarmin reinstate a citizenship question on the decennial census and that Secretary Ross then decided to reinstate the question. FAC ¶¶ 174, 177–79, 182, 185, 189, 241, 375–76. But alleging that public officials *received recommendations* on an issue falls far short of alleging that those officials "participated in any joint plan[] to deprive" anyone of their constitutional rights under § 1985(3). *See Simmons*, 47 F.3d

at 1377–78; *see also Scott v. Greenville Cty.*, 716 F.2d 1409, 1424 (4th Cir. 1983) ("[E]ven overtly biased citizens who write letters, speak up at public meetings, or even express their prejudices in private meetings with public officials without formulating a joint plan of action are not 'conspiring' with those officials . . . .").

Finally, Plaintiffs' § 1985(3) claim seeks only injunctive relief, but § 1985(3) authorizes courts to award damages, not injunctive relief. By its terms, § 1985(3) provides only that a plaintiff "may have an action *for the recovery of damages* . . . against any one or more of the conspirators." 42 U.S.C. § 1985(3) (emphasis added). The statute says nothing about injunctive relief. In this regard, § 1985(3) differs from 42 U.S.C. § 1983, which also derives from the Ku Klux Klan Act of 1871. In contrast to § 1985(3), § 1983 authorizes "action[s] at law, *suit[s] in equity*, or other proper proceeding[s] for redress." 42 U.S.C. § 1983 (emphasis added). The affirmative provision for damages in § 1985(3), the absence of any reference to injunctive relief in that statute, and the contrast between § 1983 and § 1985(3) with respect to the authorized relief all demonstrate that Congress did not authorize courts to award injunctive relief when it adopted what is now § 1985(3) in 1871. *See 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."). Moreover, § 1985(3) provides no substantive rights itself, and is only remedial. *See United Bhd. of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 833 (1983).[17] Because injunctive relief is unavailable under § 1985(3), Plaintiffs' claim for such relief under § 1985(3) should be dismissed.

[17] Neither the Supreme Court nor the Fourth Circuit have decided whether § 1985(3) authorizes injunctive relief. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 n.16 (1993). Two other circuits have indicated that injunctive relief is available under § 1985(3). *See Mizell v. North Broward Hosp. Dist.*, 427 F.2d 468, 473 (5th Cir. 1970); *Action v. Gannon*, 450 F.2d 1227, 1237–38 (8th Cir. 1971) (en banc). Neither case, however, is persuasive. *Action* simply relied on *Mizell*. *Mizell* relied on dicta in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 414 (1968), and on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238–40 (1969), both of which interpreted a statute (42 U.S.C. § 1982) that—unlike § 1985(3)—confers substantive rights without also authorizing a specific remedy. By contrast,

CONCLUSION

Defendants' motion should be granted and this case should be dismissed.

Dated: August 24, 2018

Respectfully submitted,

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
Email: stephen.ehrlich@usdoj.gov

Counsel for Defendants

§ 1985(3)'s only purpose is to provide a remedy, and that remedy by its terms is limited to damages, as explained above.