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

REPLY IN FURTHER SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs oppose Defendants' motion for summary judgment mainly by misconstruing the government's standing arguments and asking the Court to ignore the actual merits claims before it in favor of *de novo* review of the Secretary's policy judgment. As to standing, Plaintiffs suggest that their burden is much lower than it actually is (or, conversely, that the government is suggesting it is much higher), but cannot meet their burden, on the eve of trial, to establish the substantial risk of injury necessary to proceed. Plaintiffs cannot refute the Census Bureau's well-considered position that non-response follow-up operations will address any undercount such that the Bureau will conduct a complete enumeration, nor have Plaintiffs set forth material evidence that any putative differential net undercount would be fairly traceable to the reinstatement of a citizenship question as opposed to the general cultural and political environment. Plaintiffs are left only with speculative concerns and their own budgetary expenditures that rest squarely at the feet of Plaintiffs, not the government.

On the merits, Plaintiffs' contentions that the enumeration clause will be violated by a differential undercount fails for the same reasons that Plaintiffs cannot establish standing; setting aside that Plaintiffs are wrong on what the Constitution requires, they simply have not met their burden to show a differential undercount will occur given the Bureau's preparations to conduct a complete enumeration. Plaintiffs similarly fail to explain why Defendants are not entitled to summary judgment on claims under Equal Protection Clause and 42 U.S.C. § 1985(3). In arguing both that the government violated their civil rights and entered into a conspiracy to do so, Plaintiffs offer up a narrative full of unfounded bureaucratic intrigue and sinister intent but fall short in substantiating these serious charges of egregious government misconduct. Instead, Plaintiffs resort to characterizing benign intragovernmental consultation as unconstitutional discrimination without any tangible evidence. By the same token, the government is entitled to summary judgment on Plaintiffs' claims under the Administrative Procedure Act (APA), 5 U.S.C. § 706. Plaintiffs' claims are rooted in wildly speculative allegations about government malfeasance and purported arbitrary decisionmaking by the

Secretary. But Plaintiffs utterly fail to support these claims, which should be resolved at summary judgment, and instead seek to enlist this Court's aid in reconsidering policy decisions *de novo*, which is far beyond what the APA authorizes. Plaintiffs' claims of statutory and procedural violations similarly rely mainly on rhetoric rather than any actual legal requirement imposed by Congress.

Defendants' motion for summary judgment should be granted.

ARGUMENT

I. Defendants Are Entitled to Summary Judgment Because Plaintiffs' Claims of Injury and Causation are, in 2018, Too Speculative to Establish Standing to Challenge the 2020 Census

In Defendants' opening memorandum, they argued that Plaintiffs lack standing because their purported future injuries are too speculative and also because, in light of the current macro-environment, Plaintiffs cannot establish that any such injuries would be attributable to a citizenship question. In response, Plaintiffs discuss evidence they have developed during discovery concerning the likelihood of a decrease in self-response, predictions regarding the effectiveness of non-response follow-up efforts, and disputes regarding the accuracy of proxy data and imputation calculations. Pls.' Opp'n at 2-13, ECF No. 85.

As Defendants explained in their opening memorandum, ECF No. 82-1 at 8-9 ("Defs.' Mem."), Plaintiffs have the burden of establishing standing. To satisfy the Article III case or controversy requirement, a Plaintiff must demonstrate an "injury in fact," which requires a plaintiff to establish that he or she "has sustained or is immediately in danger of sustaining a direct injury" as a result of the defendant's action. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1552 (2016) (quoting *Ex Parte Levitt*, 302 U.S. 633, 634 (1937) (per curiam)). This injury in fact must be "concrete and particularized," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); an injury that is "merely 'conjectural' or 'hypothetical' or otherwise speculative" will not suffice, *Summers v. Earth Island Inst.*, 555 U.S. 488, 505 (2009) (quoting *Lujan*, 504 U.S. at 560). Any alleged future injury in fact must be "*certainly* impending"; "'[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)

(emphasis added) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). Moreover, "an 'objectively reasonable likelihood' of harm is not enough to create standing, even if it is enough to engender some anxiety." *Chambliss v. Carefirst, Inc.*, 189 F. Supp. 3d 564, 570 (D. Md. 2016) (quoting *Clapper*, 568 U.S. at 410).

While Plaintiffs argue in their opposition that they have established an issue of material fact as to whether there is a "certainly impending" "concrete and particularized" injury in fact as a result of the Secretary's decision to include a citizenship question on the 2020 decennial census, Plaintiffs' discussion just underlines the reasons why Defendants are entitled to summary judgment on the ground of standing. Namely, even if the Court were to hold trial on the issue of standing, the evidence presented would still consist of nothing more than speculation and uncertain predictions as to the results of the census that will not occur until almost two years from now. Regardless of the number of studies conducted beforehand, therefore, it is inherently too uncertain at this stage for the Court to make any definitive conclusions regarding the possibility of future injury attributable solely to the citizenship question and, more specifically, to conclude that there is a "substantial risk" of future injury caused by the question. Even viewed in the light most favorable to Plaintiffs, their evidence is simply not (and will not be at trial) sufficient "to push the threatened injury … beyond the speculative to the sufficiently imminent." *Beck v. McDonald*, 848 F.3d 262, 274 (4th Cir. 2017), *cert. denied*, *Beck v. Shulkin*, 137 S. Ct. 2307 (2017); *see id.* at 275-76 (discussing statistics from up to 33% as "fall[ing] far short of establishing a 'substantial risk' of harm"); *Chambliss*, 189 F. Supp. 3d at 569 ("Where the alleged injury requires a lengthy chain of assumptions, including 'guesswork as to how independent decisionmakers will exercise their judgment,' the injury is too speculative to be 'certainly impending.'" (quoting *Clapper*, 568 U.S. at 413)).

Plaintiffs seek to avoid the problem with the speculative nature of their claims of injury and causation by arguing that, at the very least, the evidence they cite establishes genuine issues of material fact for trial. But, even taking Plaintiffs' evidence as undisputed, it does not establish that a differential

net undercount or less accurate census is "substantially" likely to occur due to the inclusion of a citizenship question on the 2020 Decennial Census. Decl. of Dr. John Abowd ¶¶ 13, 24, 53, 56, 78, ECF No. 82-2 ("Abowd Decl."). Plaintiffs' claims are particularly speculative because the 2020 Decennial Census will feature several features that have not been used in previous decennial censuses: (1) as Plaintiffs concede, Pls.' Opp'n at 12, the 2020 Decennial Census will allow all persons living in the United States to respond to the census questionnaire via the Internet, instead of responding via mail; and (2) for respondents who do not self-respond and cannot be enumerated by the in-person enumerators, the Census Bureau will use high-quality administrative records to enumerate that household. Census Operational Plan at 22, 114, 117; Abowd Decl. ¶ 53. Both of these measures are designed to assist the Census Bureau in enumerating the entire population in an accurate and cost-effective manner, and Plaintiffs do not and cannot establish the impact of these measures. Furthermore, the Census Bureau will coordinate aggressive and targeted advertising and outreach campaigns designed to educate the public and increase the accuracy of the final enumeration. However, the plans for these campaigns and outreach efforts have not been finalized or announced yet, so any allegations Plaintiffs make about them is nothing more than pure speculation.

Moreover, the Census Bureau is readying itself to do everything in its power to forestall an undercount. *Id.* ¶¶ 24, 59-67, 74-78, 82. In denying Defendant's motion to dismiss, this Court held that while at that stage Plaintiffs "sufficiently alleged that [the Census Bureau's NRFU] measures would not be effective," "[d]iscovery, and potential expert testimony, may later make it clear that these efforts will suffice to eliminate any potential undercount." *Kravitz* MTD Op. at 14, ECF No. 48. That is precisely what has happened. Despite undertaking substantial discovery and putting forth a number of proposed experts, Plaintiffs have been unable to produce any non-speculative evidence that NRFU will not remedy any decline in initial self-response rates due to the inclusion of a citizenship question, and have thus failed to meet their burden of establishing standing. As the undisputed evidence in the record shows, the planned NRFU process is extensive, involving up to six in-person visits from an

enumerator, and, if in-person enumeration is not possible, the Census Bureau will use administrative records, proxies, and, if all else fails, imputation to enumerate a household. *See* Defs.' Mem. at 12-13 (discussing NRFU procedures in more detail). There will be an additional $1.7 billion appropriated to the Census Bureau in contingency funding for fiscal year 2020 that may be spent on NRFU. Abowd Decl. ¶ 59. Plaintiffs' arguments about the insufficiency of NRFU are based on no empirical evidence and constitute nothing more than speculation. For example, Plaintiffs argue that the Census Bureau's use of proxies and the imputation process will cause a differential undercount. *See, e.g.*, Pls.' Opp'n at 9. Of course, proxies and the imputation process will only be used if a household has (a) declined to self-respond; (b) cannot be enumerated by an in-person enumerator after numerous attempts; and (c) insufficient administrative records exist. Furthermore, however, Plaintiffs' allegations concerning proxies and imputation at most establish a material fact as to whether these measures are *accurate*, but they have not produced any evidence that such measures lead to a systemic undercount. As set forth in Dr. Abowd's declaration, the Census Bureau is not aware of any credible quantitative evidence that the use of proxies or imputation leads to a greater differential net undercount. Abowd Decl. ¶¶ 53, 56. Having a trial so that Plaintiffs can present their speculative opinions and studies concerning one possible, but not inevitable or even likely, outcome of the 2020 census, would be of no benefit to the Court.

Plaintiffs' response that Defendants are requiring them to establish the exact, precise magnitude of any net differential undercount attributable to the inclusion of a citizenship question, Pls.' Opp'n at 2-4, misunderstands and misconstrues Defendants' argument. Defendants argument is not that they must pinpoint the exact extent of any net differential undercount; Defendants' argument is that Plaintiffs must demonstrate a non-speculative "substantial risk" that there will be a net differential undercount *as a result of the inclusion of a citizenship question*, separate and distinct from other possible factors which may impact the Census Bureau's enumeration efforts. Much of Plaintiffs' evidence, and even arguments, in this case, revolve around the general cultural and political

environment in which the 2020 decennial census will occur. For example, Plaintiffs state in their opposition that "[p]ublic concerns over privacy and fear of repercussion are shown to relate to a lower likelihood of response to the 2020 Census." Pls.' Opp'n at 4. However, those concerns pre-date the Secretary's decision to include a citizenship question – indeed, the Census Barriers, Attitudes and Motivators Study (CBAMS) cited by Plaintiffs in support of that statement did not include any question about the citizenship question. To the extent Plaintiffs' allegations, such as the ones contained in their complaint, First Am. Compl. ¶¶ 196-201, ECF No. 42-1 ("FAC"), relate to other concerns and reasons respondents may have for not responding to the census, those allegations only show that Plaintiffs have failed to show that any net differential undercount will be traceable directly to the Secretary's decision to include a citizenship question on the 2020 decennial census, as opposed to any number of other cultural or political factors.

Even if Plaintiffs have established the existence of a material fact as to whether the inclusion of a citizenship question on the 2020 decennial census will cause a differential net undercount, Plaintiffs have failed to show how that would put them at imminent risk of any concrete, particularized harm. While Plaintiffs rely upon the expert opinion of Mr. Kimball Brace, by their own admission, Mr. Brace only "concluded that there is *a risk*" that certain states may lose a Congressional representative in the post-2020 Census apportionment process. Pls.' Opp'n at 10 (emphasis added). However, as the Supreme Court in *Clapper* recognized, even an "objectively reasonable likelihood" of harm, let alone "a risk," is not sufficient to create standing. *Clapper*, 568 U.S. at 410. Dr. Gurrea's expert opinion, which is uncontested, also shows that if the NRFU efforts in 2020 are of comparable success in enumerating the population as the NRFU efforts in previous decennial censuses, there will be no loss of representation or vote dilution as a result of the inclusion of a citizenship question. Rule 26(a)(2)(B) Expert Report and Declaration of Stuart D. Gurrea, Ph.D., ¶¶ 12, 65-67, ECF No. 82-3 ("Gurrea Decl."). Plaintiffs' argument that there will be a loss of apportionment and vote dilution at the state and local level fails to meet their burden on standing because it is vague, conclusory, and

entirely speculative. Plaintiffs again rely on the opinion of Mr. Brace for the proposition that a net differential undercount "will shift political representation in counties with higher percentages of those populations from those counties to the rest of the state." Pls.' Opp'n at 10. However, beyond this vague proposition, Plaintiffs have not produced evidence as to (a) which counties or localities actually contain a higher percentage of the populations they assert will be impacted by a net differential undercount; (b) what the actual impact of any net differential undercount will be on those precincts/areas; and (c) most importantly, whether their individual members specifically reside in those precinct areas such that they would be impacted.[1]

Similarly, Plaintiffs have failed to establish anything beyond self-serving speculation that they will be harmed by any change in federal funding that accompanies a differential net undercount caused by the inclusion of a citizenship question. While Plaintiffs rely upon the expert opinion of Dr. Andrew Reamer for the proposition that a differential net undercount would have caused some states to have lost federal funding in 2016 had there been a greater net differential undercount in the 2010 Decennial Census, Plaintiffs have failed to provide anything other than broad speculation for the proposition that Plaintiffs themselves, as opposed to the states in which they reside, would be injured in the event of a relatively small impact on the funding of a few federally funded programs. In deposition

[1] Plaintiffs' citation to *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) for this point, Pls.' Opp'n at 10, is instructive. While the Supreme Court in that case did find standing to challenge census procedures based on vote dilution related to the post-census apportionment, the Court cited specific individuals who had demonstrated an imminent risk of vote dilution. *See U.S. House of Representatives*, 525 U.S. at 331 ("*Appellee Hofmeister's* expected loss of a Representative to the United States Congress undoubtedly satisfies the injury-in-fact requirement of Article III standing.") (emphasis added); *id.* at 333 (finding standing for intrastate vote dilution based on a demonstration that "*[s]everal of the appellees* reside in the[] counties" that Appellees' expert had specifically identified as counties that would lose intrastate apportionment) (emphasis added). Here, Plaintiffs have only produced opinion testimony that some areas would likely suffer a loss of apportionment in the event of a differential undercount, but have failed to specifically identify which areas, counties, or precincts fall into that category, or identify any individual Plaintiffs who live in such areas, counties, or precincts who would suffer any form of vote dilution.

testimony, Dr. Reamer was clear that (a) none of the federally-funded programs he examines provide funding to any individuals or nonprofit organizations and (b) the eligibility for such programs is determined by the states themselves. Reamer Dep. 86:24-87:9 (Medicaid), 94:23-95:23 (CHIP), 110:9-111:3 (WIC), 124:8-125:4 (social services block grants), Federighi Decl., Ex. A. To establish standing on the basis of a change in federal funding to state governments, Plaintiffs would have to demonstrate that there was an imminent risk that states would cut benefits to individual Plaintiffs or individual members of organizational Plaintiffs. They have not even attempted to do so.

For the same reasons, the organizational Plaintiffs also cannot establish standing in their own right based on their actual or anticipated diversion of resources. To establish standing on a resource-diversion theory, Plaintiffs must show that there is at least a substantial risk of harm justifying the need to divert resources, if not that the harm is "certainly impending." Organizations "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416; *see also Beck*, 848 F.3d at 276-77 (holding that plaintiffs' allegation regarding costs incurred to mitigate risk of identity theft "is merely 'a repackaged version of [plaintiffs'] first failed theory of standing'" (quoting *Clapper*, 568 U.S. at 416)). Indeed, as even Plaintiffs articulate, organizational Plaintiffs only have standing to bring claims on their own behalf if they can show that "they have or imminently will *need* to divert resources to mitigate the impact of the citizenship question." Pls.' Opp'n at 12. As Plaintiffs have not established that the future harm they fear is anything more than speculative,[2] they have not met their burden to show that

[2] Plaintiffs seem to allege that they are harmed merely by their inclusion in the "trusted partners" program for the 2020 Decennial Census, Pls.' Opp'n at 12-13, but the Census Bureau generally uses non-governmental organizations for outreach purposes in every decennial census, and participation in such programs is not required or mandated by law. Plaintiffs have failed to show how the inclusion of the citizenship question would somehow compel their participation in such efforts, or compel the expenditure of more of their own private funds in such efforts, so it is difficult to discern how their voluntary participation in census outreach efforts could constitute a concrete, particularized injury to the organization.

their alleged diversion of resources "results from" Defendants' actions and not their own discretionary choices.

II. Plaintiffs Lack Evidence to Create a Triable Issue on Equal Protection.

Despite wide-ranging and intrusive discovery, Plaintiffs have uncovered no evidence to substantiate their speculation that discriminatory animus motivated the Secretary's decision. Rather than confront that lack of direct evidence head-on, Plaintiffs attempt to create a triable issue of discriminatory intent by second-guessing the Secretary's exercise of discretion and casting aspersions on the entirely unremarkable sequence of agency collaboration that preceded his final decision. This conjecture cannot carry Plaintiffs' burden to demonstrate that the decision "was motivated by discriminatory animus and its application results in a discriminatory effect." *Hayden v. Cty. of Nassau* ("*Hayden I*"), 180 F.3d 42, 48 (2d Cir. 1999). No trial is warranted on Plaintiffs' due-process claim because they have failed to expose evidence creating a dispute as to whether an "invidious discriminatory purpose was a motivating factor" in the challenged decision. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* ("*Arlington Heights*"), 429 U.S. 252, 266 (1977). Dismissal is therefore warranted.[3]

First, Plaintiffs rely heavily on a purported disproportionate impact on certain minority groups comprised of relatively large proportions of immigrants. But "a racially disproportionate impact"

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[3] Dismissal also is warranted because Plaintiffs fail to identify a protected class against which the Secretary allegedly discriminated. Rather than attempt to articulate a cognizable theory of discrimination, Plaintiffs argue that the question "whether their decision to add a citizenship question was intended to target individuals because of race and/or national origin or because of immigration status … only raises the issue of what level of scrutiny the Court applies." Pls.' Opp'n at 14 n.13. But Plaintiffs cannot make out a claim on the basis of citizenship status because the federal government makes many distinctions on the basis of citizenship for privileges such as voting, jury service, benefits eligibility, etc., *see, e.g.*, *Mathews v. Diaz*, 426 U.S. 67 (1976). Any suggestion that their allegations should be construed to encompass animus against anyone of *any* national origin (other than U.S.) would be indistinguishable from a claim based on citizenship. Therefore to set forth a valid equal protection claim here, Plaintiffs were required to prove that the Secretary was motivated by a discriminatory animus toward persons of a *certain* race or national origin. Their failure to do so should prove fatal to their claim.

alone is virtually never sufficient to establish discriminatory intent, *id.* at 264-65, and especially not here because Plaintiffs' theory of harm *relies upon* intentional choices to ignore a legal duty by the very individuals Plaintiffs claim will suffer a disproportionate impact. (The decision itself, of course, is facially neutral in its applicability.) And in any event, DOJ requested block-level CVAP data in order to *protect* the voting rights of minority citizens; Plaintiffs' conclusory dismissal of that request as a "sham rationale," Pls.' Opp'n at 15 n.14, should be rejected because they have not adduced evidence that the request was false. Even if large numbers of individuals will avoid the 2020 census, it is entirely predictable that an undercount of *any* community would have a disparate impact on members of that group—that is a function of the uses to which the census is put, not evidence of discrimination. Regardless, it would defy logic to allow individuals who fail to comply with their legal duty to participate in the decennial population count to thwart the government's ability to collect common-sense information that has been gathered throughout this country's history.

Second, Plaintiffs insist that statements by *other people* both within and outside the current administration—most of which have nothing to do with the census or the challenged decision—evidence discriminatory motive *by the Secretary*. *See* Pls.' Opp'n at 27-32. Those arguments are meritless because statements on unrelated topics by officials who did not participate in the decision to reinstate a citizenship question cannot shed light on "the decisionmaker's purposes." *Arlington Heights*, 429 U.S. at 267. Implicitly conceding that they lack sufficient evidence that discriminatory motives underlie *the Secretary's* decision, Plaintiffs attempt to obscure the proper inquiry by insisting that this Court can consider the alleged motives of other individuals—both within and outside the current administration. *See* Pls.' Opp'n at 14 (criticizing Defendants' "attempt[] to limit the realm of relevant evidence solely to the motives of one man, the Secretary").

Plaintiffs cannot rely on the statements of others—for it is the Secretary to whom Congress has delegated authority over the census and, as the sole decisionmaker, *only* the intent of the Secretary can be at issue. By endeavoring to rely upon and impute to the Secretary the alleged motives of others,

Plaintiffs essentially ask this Court to extend the "cat's paw" theory of liability—a doctrine which "is relatively new and seeks to hold an employer liable under Title VII for an employment decision if such decision is motivated by discriminatory animus," *Voltz v. Erie Cty.*, 617 F. App'x. 417, 423 (6th Cir. 2015) (applying *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011)), in the context of a *non-employment*, facially neutral agency decision reviewable under the APA. This Court should reject Plaintiffs' invitation to expand the doctrine and should focus on the intent of the Secretary—the sole agency decisionmaker. That Plaintiffs have unearthed nothing to suggest that the Secretary harbored any discriminatory animus, despite the production of thousands of documents, does not justify a baseless search for intent among other officials.[4] *See Houlihan v. City of Chi.*, 871 F.3d 540, 554 (7th Cir. 2017) (rejecting attempt to find liability under cat's-paw theory based on purported discriminatory motive of non-decisionmaker because "plaintiffs' evidence amounts to nothing more than speculation … [a]nd speculation cannot defeat summary judgment").

In particular, the record does not support Plaintiffs' bombastic claim that the "historical background leading to the addition of the citizenship question is replete with ulterior motives, connivance, falsehood, and secrecy." Pls.' Opp'n at 17 (capitalization altered). For example, Plaintiffs accentuate the fact that the Secretary had a single conversation with Steve Bannon. *See id.* at 18-19. But the record shows that Bannon "called Secretary Ross in the Spring of 2017 to ask Secretary Ross if he would be willing to speak to then-Kansas Secretary of State Kris Kobach about *Secretary Kobach's* ideas about a possible citizenship question." *See* Defs.' Second Suppl. Resp. to Pls.' First Inter., at 3, Senteno Decl., ECF No. 76-1 (emphasis added). The record does not support Plaintiffs' conjecture

[4] Plaintiffs' contention that "[t]he evidence also includes a January 23, 2017, leaked draft executive order … instruct[ing] the Director of the U.S. Census Bureau to 'include questions to determine U.S. citizenship and immigration status on the long-form questionnaire," Pls.' Opp'n at 27-28, is baseless. As they themselves admit, the purported executive order was *leaked* and cannot be authenticated. It also is inadmissible hearsay, and irrelevant because there is zero evidence the Secretary ever was aware of its existence. It thus cannot constitute part of "[t]he evidence" in this case.

that this single conversation evidences that Bannon had a discriminatory motive for connecting the Secretary to Kobach.

Plaintiffs next try to impute Mr. Kobach's motives to the Secretary by pressing the patently false claim that "Mr. Kobach wrote to Secretary Ross … sending the Secretary the exact language that was eventually added to the short-form." Pls.' Opp'n at 19. On the contrary, the administrative record shows that Kobach urged the Secretary to add an entirely new question to the census—one that would ask respondents about their *legal status*—a request the Secretary flatly rejected. *See* AR 763-64. And in any event none of the documents produced in discovery provide any evidence that the Secretary was motivated by Mr. Kobach's belief that a lack of census citizenship data "leads to the problem that aliens who do not actually 'reside' in the United States are still counted for congressional apportionment purposes." *Id.* at 764. On the contrary, Plaintiffs have unearthed no evidence that the Secretary shared or was influenced by Kobach's outreach—especially since he rejected the proposed question on lawful status. None of the materials Plaintiffs rely upon provide any evidence of a secret discriminatory motive for the reinstatement of a citizenship question.[5]

Third, Plaintiffs endeavor to show that the Secretary's stated reasons for reinstating a citizenship question are designed to mask the true motive: invidious discrimination. But such an "extraordinary claim of bad faith … requires an extraordinary justification," and Plaintiffs come nowhere close to meeting that burden. *In re Dep't of Commerce*, 139 S. Ct. 16, 17 (2018) (opinion of Gorusch, J.). Indeed, far from overcoming the presumption of regularity that attaches to governmental actions, Plaintiffs' opposition is utterly devoid of proof that "the decisionmaker … selected or reaffirmed" his decision "at least in part 'because of,' not merely 'in spite of,' its adverse

[5] Plaintiffs' claim that "[s]hortly after President Trump's inauguration … former Kansas Secretary of State[] Kris Kobach spoke to President Trump, urging him to ensure that the Census include a citizenship question," Pls.' Opp'n at 17-18, is based on inadmissible hearsay (a Kansas City Star news article) and therefore should not be credited, even apart from its utter irrelevance.

effects upon an identifiable group." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (citation and footnote omitted).

Plaintiffs' theory of pretext is flawed from start to finish because they cannot demonstrate that the Secretary did not actually believe the rationale set forth in his decision memorandum or that his initial policy preferences, whatever they may have been, resulted in his approaching the decision with an inalterably closed mind. Even if the Secretary had *additional* reasons for reinstating a citizenship question or expressed interest in adding a question before hearing from DOJ, that does not render his decision, and the rationale thoroughly set forth in his decision memo, pretextual. Indeed, there are myriad legitimate reasons more-precise citizenship data could prove useful to both the federal and state governments, including policy formation and resource allocation. This is why Plaintiffs' attempt to rip from context Mr. Comstock's statement that he "look[ed] for an agency" to make the request, Pls.' Opp'n 19, is misguided. It is utterly unremarkable for an agency head to enter office with predispositions toward certain policy choices and, as Mr. Comstock explained, "what a policy person does" is to "help them find the best rationale to do it," or, "if it's not legal, you tell them that." Comstock Dep., 266:18-267:6, Federighi Decl., Ex. B. That the Secretary thought reinstatement of a citizenship question "could be warranted," AR 1321, and asked his staff to explore such an action, is neither unexpected nor evidence of improper decisionmaking. As Justice Gorsuch has explained, "there's nothing unusual about a new cabinet secretary coming to office inclined to favor a different policy direction, soliciting support from other agencies to bolster his views, disagreeing with staff, or cutting through red tape." *In re Dep't of Commerce*, 139 S. Ct. at 17 (opinion of Gorsuch, J.).

Finally, Plaintiffs' attempt to demonstrate pretext through the Secretary's congressional testimony is both inappropriate and unpersuasive. Pls.' Opp'n at 22. The statements at issue do not plausibly support Plaintiffs' claim that invidious discrimination motivated the Secretary's decision because there is no legitimate basis to conclude that, in context, the Secretary's statements were misleading. For example, the Secretary in his March 2018 memorandum did not say he "set out to

take a hard look" at adding the citizenship question following receipt of the Gary Letter; the Secretary actually said he "set out to take a hard look *at the request*" to "ensure that [he] considered all facts and data relevant to the question so that [he] could make an informed decision on how to respond." AR 1313 (emphasis added). That statement does not necessarily imply that he had not previously considered whether to reinstate a citizenship question, or that he had not had discussions with other agencies or government officials before he received DOJ's formal request. Nor would it have made sense for the Secretary to take a "hard look" at DOJ's request before receiving it. Similarly, the Secretary's March 20 statement to Congress that he was "'responding solely to the Department of Justice's request,'" Hr'g on FY 2019 Dep't of Commerce Budget: Hr'g Before the Subcomm. on Commerce, Justice, Sci. & Related Agencies of the H. Comm. on Appropriations, 115th Cong. 9 (2018), at 2018 WLNR 8815056, was actually in answer to a question asking whether he was also responding to requests from third parties, *see id.* And the Secretary's March 22 statement that DOJ "initiated the request for inclusion of the citizenship question" was in response to a question about whether Commerce planned to include a citizenship question on the 2020 census, not a question about the Secretary's decision-making process. *See* Hr'g on Recent Trade Actions, Including Section 232 Determinations on Steel & Aluminum, Hr'g Before the H. Ways & Means Comm., 115th Cong. 24 (2018), at 2018 WLNR 8951469. The statement was immediately followed by an acknowledgment that he had been communicating with "quite a lot of parties on both sides of [the] question" and that he "ha[d] not made a final decision, as yet" on this "very important and very complicated question," *id.* Only by ignoring the context of these statements and eliding the presumption of regularity do Plaintiffs claim they are indicative of pretext—in no way are they supportive of discrimination.

Finally, Plaintiffs continue to rely on purported "[d]epartures from the normal procedural sequence," *Arlington Heights*, 429 U.S. at 267, to cast doubt on the Secretary's motives, Pls.' Opp'n at 22-26. Although this Court credited alleged irregularities in denying the motion to dismiss, MTD Op. at 16-17, ECF No. 80, the procedures employed by the Secretary in reaching his decision neither shed

light on his motives nor provide any creditable evidence of discriminatory purpose. *See In re Dep't of Commerce*, 139 S. Ct. at 17 (opinion of Gorsuch, J.). Plaintiffs' claim that the Secretary "hid from [Census] the fact that Commerce was behind the DOJ 'request,'" Pls.' Opp'n at 25, is specious: Not only is there no requirement whatsoever that an agency keep its subagencies abreast of high-level policy deliberations, but the Secretary's early interest in reinstating the citizenship question from a policy standpoint had zero relevance to the statistical analysis ultimately performed by the Census Bureau. Equally unavailing is Plaintiffs' claim that "Secretary Ross ignored advice and analysis provided by the Census Bureau that the addition of the citizenship question would lower response rates and data quality [and] ignored years of prior practice by failing to test new content." Pls.' Opp'n at 26-27. None of this can tip the scales in any analysis of purported discrimination because, as the Supreme Court has made clear in another census challenge, "the mere fact that the Secretary's decision overruled the views of some of his subordinates is by itself of no moment in any judicial review of his decision." *Wisconsin v. City of New York*, 517 U.S. 1, 23 (1996); *see also In re Dep't of Commerce*, 139 S. Ct. at 17 (opinion of Gorsuch, J.). And Plaintiffs' continued framing of the question as "untested" is inaccurate because, as the Census Bureau explained and the Secretary's analysis adopted, the citizenship question "has already undergone the … testing required for new questions" because the question "is already included on the ACS," meaning that it "has been well tested." AR 1314, 1319. Although circumstantial evidence may be considered in evaluating a claimed violation of equal protection, *Arlington Heights*, 429 U.S. at 266, Plaintiffs still must prove that the official action was "taken for invidious purposes," *id.* at 267, and have not come close to carrying that burden.

III. Plaintiffs' Conspiracy Claim Is Frivolous and Should Be Dismissed.

Plaintiffs' conspiracy claim fails as a matter of law and should for that reason be dismissed. As set forth in Defendants' opposition to Plaintiffs' recent request to depose Kris Kobach, *see* ECF No. 86 at 3-4, Plaintiffs cannot be entitled to relief under 42 U.S.C. § 1985(3) because, as this Court recognized, "here, the Plaintiffs seek only injunctive relief," MTD Op. at 20, yet the statute they invoke

does not provide a cause of action for injunctive relief against a government official in an official-capacity suit. *See* 42 U.S.C. § 1985(3) (stating that the injured party "may have an action for the recovery of damages"). This language stands in stark contrast to its companion provision, which provides 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." *See* 42 U.S.C. § 1983. This provision demonstrates clearly that Congress both considered and provided for differing remedies under the two statutory provisions; in fact, there is no ground to assume, in light of § 1985(3)'s express reference to damages in contrast to the explicit reference to injunctive relief in § 1983, that Congress in any way authorized official-capacity suits for equitable relief under the former. *See Cyan, Inc. v. Beaver Cty. Emps. Ret. 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."). Moreover, it is telling that Plaintiffs cite no authority in which injunctive or declaratory relief under § 1985(3) even was sought—much less awarded.

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) (quoting *Cuban v. Kapoor Bros., Inc.*, 653 F. Supp. 1025, 1033 (E.D.N.Y. 1986), *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*"). Plaintiffs' claim fails as a matter of law.

Even aside from the fatal legal deficiencies in Plaintiffs' claim, they have failed even to grapple with the threshold they must satisfy to create a triable issue of conspiracy (much less against a member of the President's cabinet and one or more of his closest advisors). Although Plaintiffs attempt to minimize their burden by cherry-picking language to the effect that direct evidence of a meeting of the minds is not required, Pls.' Opp'n at 32, they ignore the Fourth Circuit's explication that "[t]his burden is weighty" and cannot "amount[] to nothing more than rank speculation and conjecture," *Penley v. McDowell Cty. Bd. of Educ.*, 876 F.3d 646, 658 (4th Cir. 2017) (internal citation omitted). Plaintiffs' claim that the Secretary and other officials "discussed adding a citizenship question to the decennial census for immigration enforcement purposes or to exclude immigrants from Congressional apportionment," Pls.' Opp'n at 32, is untethered from any admissible evidence and relies only on "rank speculation and conjecture," *Penley*, 876 F.3d at 658. Plaintiffs should not be permitted to try this claim.

IV. Defendants Are Entitled to Judgment on the Enumeration Clause Claim.

The government's motion explained that even if Plaintiffs had shown that the citizenship question will cause *some* differential net undercount (giving them Article III standing), they have not shown that the citizenship question will cause such a *significant* differential net undercount as to violate the Enumeration Clause. Defs.' Mem. at 18-19.

Yet in support of their Enumeration Clause claim, Plaintiffs rely solely on the same evidence and argument that they contend gives them Article III standing. Pls.' Opp'n at 45. But this Court has explained that the Enumeration Clause imposes a higher standard than Article III: "Plaintiffs' allegation that the citizenship question will affect the accuracy of the census does not automatically render the citizenship question unconstitutional. The Census Bureau is not obligated, nor expected, to conduct a perfectly accurate count of the population." *Kravitz* MTD Order at 23.

Instead, the citizenship question does not violate the Enumeration Clause unless it "*unreasonably* compromises the distributive accuracy of the census." *Id.* at 24 (emphasis added). Plaintiffs have adduced no evidence, however, that any effect the citizenship question might have on distributive accuracy rises to the level of unreasonable, especially in light of the value of the information gathered by the question. The Defendants are therefore entitled to summary judgment on the Enumeration Clause claim.

V. The Government Is Entitled to Judgment on Plaintiffs' APA Claims and Plaintiffs Fail to Establish Disputes of Fact Fit for Trial.

A. The Secretary's Decision Was Not Arbitrary and Capricious.

As the administrative record shows, the Secretary's decision was not arbitrary and capricious because he set out to understand the costs and benefits of reinstating a citizenship question before making his decision and explained his reasoning based on the record before him. Plaintiffs offer no coherent theory why the Secretary's decision should be set aside as arbitrary and capricious under the APA, instead presenting the Court with criticisms of the Secretary's ultimate judgment. But disagreement with the Secretary's decision is not sufficient to set aside his judgment under the APA; the Secretary, not Plaintiffs, is charged by statute with conducting the decennial census, and he has "virtually unlimited discretion" in his discharge of that duty. *Wisconsin*, 517 U.S. at 19. To set aside the Secretary's considered judgment under the APA, Plaintiffs must explain why, given the evidence before him at the time of his decision, the Secretary did not engage in reasoned decisionmaking such that his ultimate decision can only be deemed arbitrary and capricious. 5 U.S.C. § 706(2); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (explaining that the question for the Court is whether the agency's decision "was the product of reasoned decisionmaking"). The Court determines only whether the agency "articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 105 (1983).

1. Plaintiffs improperly seek *de novo* review of the Secretary's decision.

In addressing Plaintiffs' arbitrary-and-capricious claim, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (*per curiam*); *see also Fla. Light & Power Co. v. Lorion*, 470 U.S. 729, 743 (1985). This record constitutes the "whole record" contemplated by the APA's standard of review. 5 U.S.C. § 706. Yet Plaintiffs ask this Court to disregard these basic principles and review *de novo* the Secretary's judgment based on a new record developed for the first time in district court. Pls.' Opp'n at 34. Plaintiffs seem to agree that this request is a significant departure from requirements set forth by statute and the Supreme Court, acknowledging that APA review is "based on the full administrative record that was before the Secretary at the time he made his decision." *Id.* (quoting *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 420 (1971)). Yet Plaintiffs simply assert, almost in passing, that this case "presents circumstances that warrant consideration of evidence beyond the administrative record," *id.*, without bothering to explain those circumstances.

Instead, Plaintiffs' suggest that because the Court authorized limited extra-record discovery, it also must ignore limits on APA review and interrogate the substance of the Secretary's policy decision. But this Court has not so held. In authorizing extra-record discovery, the Court did not resolve the question of what materials would be subject to the Court's review in resolving the APA claim, nor did the Court suggest that this discovery order invited *de novo* review of the Secretary's judgment. Setting aside the correctness of the Court's order authorizing extra-record discovery, a question on which the Supreme Court has granted Defendants' petition for a writ of certiorari in the related New York challenges to the Secretary's decision, a bad-faith finding in authorizing discovery does not overcome the clear rule that this Court "may not substitute its policy judgment for that of the agency when the policy is rational." *Johnson v. Dep't of Educ.*, No. 17-cv-2104 (RDB), 2018 WL 3420016, at *3 (D. Md. July 13, 2018); *see also, e.g.*, *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) ("A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the

alternatives."); *C&W Fish Co. v. Fox*, 931 F.2d 1556, 1565 (D.C. Cir. 1991) (explaining that courts "will not second guess an agency decision or question whether the decision made was the best one").

Although courts may permit expansion of the administrative record through discovery under certain exceptions to the administrative-record rule, APA review nonetheless appropriately proceeds on the whole record without fact finding by the district court. As the government explained in its motion, "[w]hen a party seeks review of agency action under the APA . . . the district judge sits as an appellate tribunal." *Doe v. Tenenbaum*, 127 F. Supp. 3d 426, 436 n.2 (D. Md. 2012) (quoting *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009)). Thus, those "limited circumstances" where "district courts are permitted to admit extra-record evidence" do not allow a court to engage in *de novo* review of the agency's decision through fact finding; rather, "[t]hese limited exceptions operate to *identify and plug holes* in the administrative record." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (emphasis added). That is why APA cases do not encompass testimony from experts seeking to contradict the agency's judgment; otherwise, the Court would be left to "simply substitute the judgment of plaintiff's experts for that of the agency's experts." *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 201 (4th Cir. 2009), *denied reh'rg en banc*, 567 F.3d 130 (4th Cir. 2009). Plaintiffs thus cannot point to "disputes" of "material fact" created through materials obtained through discovery because APA review contemplates review of the record as a matter of law, not fact finding.

Plaintiffs understandably have no answer to this authority because even where a court may authorize an *expansion* of the record through discovery, the Court's fundamental role in an APA case—deciding as a matter of law whether the agency's decision is arbitrary and capricious based on the record before the agency—does not change. *See, e.g.*, *Andreas-Myers v. NASA*, No. GJH-16-3410, 2017 WL 1632410, at *5 (D. Md. Apr. 28, 2017) (explaining that, in an APA matter, "the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did" (quoting *Kaiser Found. Hosps. v. Sebelius*, 828 F. Supp. 2d 193, 198 (D.D.C. 2011))). Indeed, on a motion for summary judgment in an APA case

"the standard set forth in Rule 56(a) does not apply because of the limited role of a court in reviewing the administrative record," and summary judgment instead "serves as a mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Hospira, Inc. v. Burwell*, No. GJH-14-02662, 2014 WL 4406901, at *9 (D. Md. Sept. 5, 2014). That is why "the Court would appropriately dispose of the case on summary judgment even if, as a general matter, [a] dispute [of fact] were genuine." *Doe*, 127 F. Supp. 3d at 436 n.2. Regardless what materials the Court concludes are a proper subject of review, there is no need for a trial to resolve "disputed material facts," as Plaintiffs assert, because APA claims are appropriately resolved on summary judgment.

2. The Secretary considered the evidence before him and reasonably explained his decision to include a citizenship question.

Plaintiffs first contend that the Secretary's decision was arbitrary and capricious because his decision did not reasonably account for evidence about a citizenship question's effect on self-responses to the census—specifically, a decline in self-response rates. Pls.' Opp'n at 35-37.[6] Plaintiffs suggest that the Secretary ignored the evidence such that his decision "runs counter to the evidence before [him]." *State Farm*, 463 U.S. at 43. Plaintiffs are wrong on both counts.

First, the Secretary considered and accounted for the effect of a citizenship question on response rates. The Secretary acknowledged that the Census Bureau and many stakeholders raised concerns that a citizenship question would have a negative impact on the response rate for non-citizens, but also noted that no one had produced definitive evidence that the response rate would decline "materially" as a result. AR 1315. The Secretary observed that while there was recent evidence

[6] Here, Plaintiffs seem to suggest a two-prong argument challenging both the Secretary's alleged failure to account for a decline in self-response rates and his alleged failure to account for a decline in accuracy of self-responses. Pls.' Opp'n at 35. But Plaintiffs do not actually distinguish between these two arguments, focusing entirely on the decline in self-response rates. *See id.* at 35-37. If Plaintiffs intended to separately challenge the accuracy of self-responses, they failed to do so.

that self-response rates on the ACS were lower, there were a number of potential causes for this separate and apart from the citizenship question, including the outreach efforts and increased public awareness for the decennial census and the increased burden of responding to the much longer ACS. AR 1315. Weighing the information that had been provided to him, the Secretary concluded that "while there is widespread belief among many parties that adding a citizenship question could reduce response rates, the Census Bureau's analysis did not provide definitive, empirical support for that belief." AR 1316. Regardless what Plaintiffs think of that explanation, "the Supreme Court has instructed that '[e]ven when an agency explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that account if the agency's path may reasonably be discerned.'" *Nat'l Elec. Mfrs. Ass'n v. U.S. Dep't of Energy*, 654 F.3d 496, 514-15 (4th Cir. 2011) (quoting *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004)). The Secretary considered the issue of a decline in self-response rates and provided a rational explanation for his decision. Nothing more is required.

In arguing to the contrary, Plaintiffs cite a technical review of the DOJ request prepared by the Census Bureau and dated January 19, 2018, Pls.' Opp'n at 36, but the Secretary's decision fully accounted for this analysis. In that memorandum, the Census Bureau analyzed self-response rates in previous surveys—namely, the American Community Survey (ACS) and the "long-form" census that previously went to only a portion of households—that included a question about citizenship status. AR 1280-81. Reviewing the data, the Bureau wrote that there was "a reasonable inference" that inclusion of a citizenship question "would lead to some decline in overall self-response." AR 1281. The Bureau similarly analyzed breakoff rates—the rate at which a respondent starts an online survey but changed his or her mind about responding during the survey—for the 2016 ACS, which included a citizenship question. AR 1281. Plaintiffs argue that the technical review thus presented "empirical evidence of lower response rates" that the Secretary did not account for, making the Secretary's decision unreasonable. Pls.' Opp'n at 36. That assertion is remarkable, given that the Secretary expressly addressed this analysis in his decision memorandum. The Secretary explained that

comparisons to the ACS were unpersuasive and did not yield definitive, empirical support because "response rates generally vary between decennial censuses and other census sample surveys." AR 1315. And comparisons to the long-form surveys failed because those surveys "differed significantly in nature" because they were, *inter alia*, significantly longer and more time-consuming. AR 1315. The Secretary thus acknowledged the exact data on which Plaintiffs rely and explained that "the Census Bureau's analysis did not provide definitive, empirical support." AR 1316. Plaintiffs may disagree with that conclusion, but "the mere fact that the Secretary's decision overruled the views of some of his subordinates is by itself of no moment in any judicial review of his decision," *Wisconsin*, 517 U.S. at 23, and a court is not permitted to set aside an agency decision merely because the court disagrees with the agency's analysis. *Elec. Power Supply Ass'n*, 136 S. Ct. at 782.

Lastly, Plaintiffs seek to challenge the Secretary's conclusion that any putative decline in self-response rates could be addressed through NRFU and other means of ensuring an actual enumeration. Pls.' Opp'n at 36-37. As an initial matter, Plaintiffs' argument appears rooted in the assertion that the inclusion of a citizenship question would increase the NRFU workload, *see id.*, but the Secretary addressed precisely this point, explaining that the estimated increase in NRFU operations "falls well within the margin of error" for the cost estimates provided to Congress. AR 1319. But more importantly, Plaintiffs' arguments suffer from two fundamental fallacies. First, Plaintiffs argue that the Secretary's decision is contrary to extra-record evidence about NRFU adduced through discovery after the Secretary's decision. That argument is simply irrelevant under the APA, as the question is not whether the Secretary made the *right* decision but whether the Secretary made a *reasonable* decision based on the evidence before him. Plaintiffs' contention that there "are disputed facts as to the efficacy of NRFU and whether Defendants will have funds and resources allocated to conduct the needed NRFU" totally disregards the APA standard of review and seeks to convert the district court into a forum for policymaking. Pls.' Opp'n at 37. Needless to say, the APA does not empower the Court (or Plaintiffs) to make policy for the Department of Commerce or the conduct of the decennial

census, an area where the Secretary has virtually unlimited discretion. Second, Plaintiffs rely on experts to contradict the record before the Secretary. Pls.' Opp'n at 36-37. As the government has explained, that is prohibited by Fourth Circuit precedent. *Ohio Valley Envtl. Coal.*, 556 F.3d at 201.

3. The Secretary considered the issue of testing when deciding to include a citizenship question.

Plaintiffs next argue that the Secretary incorrectly stated that "there is no mechanism for identifying individuals who would not respond [to the census] due to the addition of a citizenship question." Pls.' Opp'n at 37. As an initial matter, Plaintiffs mischaracterize what the Secretary wrote. In the course of discussing the "limited empirical evidence" to substantiate a material decrease in self-response rates, the Secretary noted that, throughout his wide-ranging consultations with the Census Bureau and a variety of stakeholders, no one had provided information "to determine the number of people who would in fact not respond due to a citizenship question being added, and *no one ha[d] identified* any mechanism for making such a determination." AR 1317 (emphasis added). The Secretary was making a factual assessment of the record before him. Plaintiffs note that the Census Bureau had briefed the Secretary on data from previous long-form censuses and the ACS, but as explained *supra*, the Secretary expressly accounted for that data and the Census Bureau's analysis. And the Secretary determined that these analyses were not an appropriate mechanism for gauging the effects on self-response rates from including a citizenship question on the short-form census. AR 1315-16.

Regardless, the gravamen of Plaintiffs' claim is that the Census Bureau could have (or should have) conducted additional testing before the Secretary decided to include a citizenship question on the 2020 census. Pls.' Opp'n at 37-38. Here, Plaintiffs again simply seek to substitute the opinions of their own experts for that of the agency. But Plaintiffs' experts are not the government officials charged with making these decisions, and the Court is not tasked with determining the right decision through a *de novo* review of the issues. Consequently, the Court cannot "simply substitute the judgment of plaintiff's experts for that of the agency's experts," and the Court should disregard Plaintiffs' efforts

to win a policy debate by presenting dueling experts in court. *Ohio Valley Envtl. Coal.*, 556 F.3d at 201. In any event, the Secretary addressed the issue of testing in his memorandum. In reviewing DOJ's request, the Census Bureau concluded that, "[s]ince the question is already asked on the American Community Survey, [it] would accept the cognitive research and questionnaire testing from the ACS instead of independently retesting the citizenship question." AR 1279. In his memorandum, the Secretary thus reasonably concluded that "the citizenship question has already undergone the cognitive research and questionnaire testing required for new questions." AR 1319.

4. The Secretary considered the relevant issues presented when deciding to include an additional question on the census.

Lastly, Plaintiffs appear to argue that the Secretary failed to address issues related to the inclusion of an additional question on the decennial census. Pls.' Opp'n at 38-41. These arguments again focus on questions of testing and the available data concerning self-response rates. To the extent Plaintiffs reiterate their complaints that the Secretary "ignored" the Census Bureau's analysis of ACS data on the citizenship question or failed to adequately test the citizenship question before deciding to include it on the 2020 census, Pls.' Opp'n at 39, those arguments fail for the reasons described above. The Secretary considered the ACS data and explained why he found it to be inconclusive as to the issue before him, and the Secretary relied on the Census Bureau's own representations about the need for further testing of the citizenship question. AR 1315, 1316, 1319. And to the extent Plaintiffs yet again rely on outside expert testimony to contradict agency officials, the relevant authorities make clear that such evidence is far outside the scope of review in an APA matter.

Plaintiffs also baselessly assert that the government "skew[ed] the record" by including in the administrative record a document providing answers to questions posed by the Secretary about the citizenship question—specifically, the answer to a question about the process for adding new questions to the census. Pls.' Opp'n at 40. Plaintiffs take issue with the editing of the answer, which explained that the Census Bureau did not feel bound by past precedent with respect to the process for

adding a question to the census, given the lapse in time from the most recent such example. AR 1296. Plaintiffs cannot contest that this statement accurately represents the Census Bureau's position, as there is no evidence to the contrary, and instead they insinuate some form of impropriety in the editing of the document. But Plaintiffs cite exactly no evidence to that effect, and indeed, senior Census Bureau officials signed off on the position. AR 13023. Although Plaintiffs inappropriately introduce outside experts to discuss the *consideration* of other possible new questions for inclusion on the census, they cannot do not contest the accuracy of the information provided to the Secretary, which stated only that "no new questions have been added to the Decennial Census (for nearly 20 years)." AR 1296. Thus, the Secretary relied on the accurate information provided to him, ultimately from the Census Bureau, regardless of what Plaintiffs' experts would have done in the same situation.

B. The Secretary's Decision Was Not Pretextual.

Plaintiffs next argue that that the Secretary's explanation for his decision to include a citizenship question on the census was a false pretext and did not disclose his actual reasons. Pls.' Opp'n at 41-43. According to Plaintiffs, the Secretary's stated reason for including a citizenship question—"to provide complete and accurate data in response to the DOJ request," AR 1320—was "baseless and pretextual" because the Secretary "extracted" the request from DOJ. Pls.' Opp'n at 42. To make their point, Plaintiffs rely mainly on the faulty arguments and mischaracterizations that they offered in support of their equal-protection arguments. *See id.* Those arguments fail for the reasons discussed *supra* in explaining why Plaintiffs' equal-protection claim fails. Plaintiffs cannot demonstrate that the Secretary did not actually believe the rationale set forth in his memorandum or that any initial policy preferences render his decision arbitrary and capricious. *See Jagers v. Fed. Crop Ins. Corp.*, 758 F.3d 1179, 1186 (10th Cir. 2014). So long as the Secretary sincerely believed that reinstating a citizenship question on the census would aid DOJ in enforcing the VRA, the Secretary's subjective deliberative process in reaching that conclusion is irrelevant to APA review.

Beyond questions of intent, Plaintiffs also suggest that the Secretary's underlying process betrays something more fundamentally arbitrary and capricious. Pls.' Opp'n at 42. Plaintiffs cast aside Justice Gorsuch's exhortation in the parallel New York challenges to the Secretary's decision "there's nothing unusual about a new cabinet secretary coming to office inclined to favor a different policy direction, soliciting support from other agencies to bolster his views, disagreeing with staff, or cutting through red tape." *In re Dep't of Commerce*, 139 S. Ct. at 17 (opinion of Gorsuch, J.). Plaintiffs instead suggest that the Secretary's decisionmaking process *must* be unusual—indeed, arbitrary and capricious—because the Secretary "siloed" the Census Bureau and "skewed the record." Pls.' Opp'n at 42. But these unadorned assertions in Plaintiffs' brief are not borne out by the facts.

The Secretary consulted extensively with the Census Bureau. Indeed, the Bureau's analysis was central to the Secretary's decisionmaking, as detailed in his decision memorandum. AR 1313-1320. Plaintiffs seem to suggest that the Secretary should have raised the issue with the Census Bureau sooner, but offer no explanation why the Secretary would have raised the issue before the DOJ request. After the Secretary was confirmed, he "began considering various fundamental issues" regarding the 2020 Census, "including funding and content," as well as schedule, contracting issues, systems readiness, and the upcoming 2018 End-to-End Test. AR 1321; *see also* AR 317-22, 1416-70. These issues examined by the Secretary early in his tenure "included whether to reinstate a citizenship question," which he and his staff "thought . . . could be warranted." AR 1321. The Secretary questioned why a citizenship question was not on the census questionnaire and sought other general background "factual information." AR 2521-22, 12465, 12541-43; *see also* AR 3699. Only then did the Commerce Department reach out to determine "whether the Department of Justice (DOJ) would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act." AR 1321. Once DOJ issued its request, the issued was squarely presented to the Secretary, and he appropriately engaged with the Census Bureau to better understand how the Department could address DOJ's request.

Plaintiffs' baseless assertion that the government "skewed" the record is again wholly unsupported. Plaintiffs do not actually explain what they mean by this assertion, but presumably they seek to insinuate that the government improperly did not disclose some unspoken illicit motive for reinstating a citizenship question beyond the DOJ request. But here Plaintiffs simply seek to imply what they cannot prove. The Secretary adequately explained his process of considering the relevant issues, began a review process upon receiving the DOJ request, and then explained his decision to include a citizenship question to provide the data sought in that request. As Justice Gorsuch explained, there is nothing untoward about a back-and-forth exchange among federal agencies, and Plaintiffs' efforts to suggest misconduct without any proof to that effect must be rejected.

C. The Secretary Did Not Violate Any Statutory Requirements.

Plaintiffs also contend that the Secretary's decision must be set aside because he violated 13 U.S.C. § 141(f)(3) by "not includ[ing] citizenship for the decennial census questionnaire . . . in the list of subjects submitted to Congress," and "provid[ing] no evidence that Secretary Ross's decision memo, his submission to Congress, or his supplemental memo set forth *any* new circumstances that necessitate the addition of a citizenship question." Pls.' Opp'n at 43. Strangely, Plaintiffs cite no case law and do not even attempt to address Defendants' argument that congressional reporting requirements—such as § 141(f)—are not judicially reviewable. *See, e.g.*, *Guerrero v. Clinton*, 157 F.3d 1190, 1196 (9th Cir. 1998) ("[T]his issue seems to us quintessentially within the province of the political branches to resolve as part of their ongoing relationships." (quoting *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 318-19 (D.C. Cir. 1988)); *Renee v. Duncan*, 686 F.3d 1002, 1016-17 (9th Cir. 2012) (explaining that the courts could not redress an injury based on an alleged violation of a requirement "to file an annual report to Congress"); *Wilderness Soc'y v. Norton*, 434 F.3d 584, 591 (D.C. Cir. 2006) (declining to review an agency's required submission of recommendations to the President, because "[t]here is no good reason to believe that such an order will redress [plaintiffs'] injuries. No legal consequences flow from the recommendations"); *Taylor Bay Protective Ass'n v. Adm'r, EPA*, 884

F.2d 1073, 1080-81 (8th Cir. 1989) (declining to review agency compliance with a congressional reporting provision because "nothing in the scheme indicat[es] that judicial review . . . is necessary or advisable. . . . Additionally, the nature of the agency action here is distinct from the type of agency action normally reviewable"); *United States v. White*, 869 F.2d 822, 829 (5th Cir. 1989) (declining to review an agency's compliance with a congressional reporting requirement because "[t]his court will not scrutinize the merits or timeliness of reports intended solely for the benefit of Congress"); *Hodel*, 865 F.2d at 318-19 (declining to review an agency's allegedly insufficient report under a congressional reporting provision because managing the reports should be left to Congress, and the Court "despair[ed] at formulating judicially manageable standards" to evaluate the reports on Congress's behalf). Plaintiffs' argument should be straightforwardly rejected on that basis.

Plaintiffs' protestation that "Secretary Ross's decision memo, his submission to Congress, [and] his supplemental memo" do not "set forth *any* new circumstances that necessitate the addition of a citizenship question," Pls.' Opp'n at 43, is nonsensical. Section 141(f)(3) requires only that the Secretary inform Congress of his *modifications* to subjects, types of information, or questions, not the "new circumstances" forming the basis thereof. *See* § 141(f)(3) (requiring the Secretary to submit "a report containing the Secretary's determination of the subjects, types of information, or questions as proposed to be modified"). And, coupled with § 141(f)(3)'s explicit delegation of the "new circumstances" determination to the Secretary alone, *see* § 141(f)(3) (calling for a report "if *the Secretary finds* new circumstances exist" (emphasis added)), Congress has clearly "expressed an intent to prohibit judicial review" under the APA, *Webster v. Doe*, 486 U.S. 592, 599 (1988) (citing 5 U.S.C. § 701(a)(1)), regardless of whether § 141(f) is a reporting requirement or a substantive requirement.[7]

[7] For the reasons discussed in Defendants' motion for summary judgment, ECF No. 82-1 at 30-32, the Secretary has not violated 13 U.S.C. § 6(c). Because the Secretary made an explicit determination that using administrative records alone would be inadequate for a significant portion of the population, the information that could be gained from administrative records alone was not of "the kind, timeliness, quality and scope of the statistics required" for DOJ's Voting Rights Act

D. The Secretary Complied with All Relevant Statistical Standards.

Plaintiffs contend that the Secretary's decision to reinstate a citizenship question violated the Office of Management and Budget's (OMB) statistical guidelines. Pls.' Opp'n at 44-45. But it is undisputed that the only OMB guideline they cite—a CNSTAT principle about independence from external influence—is merely a "[b]est [p]ractice[]" that "should guide federal statistical agency decisions." Lowenthal Decl. Ex. A at 20-21, ECF No. 85-3 at 216-17. It does not impose specific binding legal requirements. Courts have therefore concluded that "OMB guidelines do not provide judicially manageable standards" for APA review because they "'vest agencies with unfettered discretion.'" *Styrene Info. & Research Ctr., Inc. v. Sebelius*, 944 F. Supp. 2d 71, 82 (D.D.C. 2013) (citation omitted); *accord Ams. for Safe Access v. U.S. Dep't of Health & Human Servs.*, No. 07-cv-1049, 2007 WL 4168511, at *4 (N.D. Cal. Nov. 20, 2007) ("OMB guidelines do not create a duty to perform legally required actions that are judicially reviewable."), *aff'd*, 399 F. App'x 314 (9th Cir. 2010).

CONCLUSION

For these reasons, Defendants' motion for summary judgment should be granted.[8]

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enforcement efforts. Additionally, there is no apparent distinction between the citizenship question and a number of other questions on the decennial census—like sex, race, and ethnicity—for purposes of 13 U.S.C. § 6(c). Administrative records could likely be used in the enumeration for some or all of the characteristics, yet no one suggests that the Census Act prohibits the Census Bureau from including those questions on the decennial census questionnaire.

[8] APA cases can and should be decided at summary judgment. *See, e.g.*, *Audubon Naturalist Soc'y of the Cent. Atl. States, Inc. v. U.S. Dep't of Transp.*, 524 F. Supp. 2d 642, 660 (D. Md. 2007). If the Court concludes that Plaintiffs have satisfied their burden as to standing and that Plaintiffs have the better argument on the merits, the correct means of the resolving the case is through a grant of summary judgment, not trial. *Cf. Allstate Ins. Co. v. Fritz*, 452 F.3d 316, 323 (4th Cir. 2006) ("District courts have an inherent power to grant summary judgment *sua sponte* so long as the party against whom summary judgment is entered has notice sufficient to provide [it] with an adequate opportunity to demonstrate a genuine issue of material fact." (internal quotation marks and citation omitted)).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this fourth day of December, 2018, I caused a copy of the foregoing *Reply in Further Support of Defendants' Motion for Summary Judgment* to be sent to all parties receiving CM/ECF notices in this case.

/s/ Carol Federighi
CAROL FEDERIGHI