UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, *et. al*,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF COMMERCE, *et. al*,

Defendant.

Civil Action No. 1:18-cv-05025-JMF

Hon. Jesse M. Furman

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

The Secretary of Commerce's decision to include a citizenship question in the 2020 Decennial Census marked an abrupt and unjustified departure from more than half a century of practice. His decision is both contrary to law and threatens the longstanding consensus that the Decennial Census ("Census") must be accurate and unbiased. Indeed, he disregarded numerous statutory and regulatory requirements that were put in place to ensure the overall accuracy and integrity of the census. He also ignored overwhelming evidence, including from the Department of Commerce itself, that a citizenship question will dissuade participation in the census by minority immigrant groups and will lead to a differential undercount of them.

This was all by design. Defendants added the citizenship question to diminish the political power of and to harm immigrants of color, including Plaintiffs' members. The Secretary's decision is part and parcel of the Trump Administration's repeated targeting of immigrants of color; indeed, verbal attacks on these communities and their political power formed the cornerstone of President Trump's campaign and has been a consistent feature of his Administration.

Plaintiffs allege that the addition of the citizenship question not only violates the Administrative Procedure Act ("APA") and the Constitution's Enumeration Clause, but also purposefully discriminates against certain minority immigrant communities in violation of the Fifth Amendment. Tellingly, the Department of Commerce recently abandoned its original explanation that the genesis of the citizenship question was at the Department of Justice's request for the purpose of enhancing enforcement of the Voting Rights Act ("VRA"). The Department of Commerce now concedes that it was only after "other senior Government officials . . . raised" the addition of the citizenship question, that Secretary Wilbur Ross (the "Secretary") then asked

the Department of Justice to request its inclusion. AR 1321. The Secretary's shifting explanations, strongly supports an inference of discriminatory intent.

Despite the fact that Plaintiffs and their members are among the groups most likely to be impacted by inclusion of a citizenship question in the 2020 Decennial Census, Defendants argue that Plaintiffs' claims are not justiciable and that they fail to state a claim. For multiple reasons, Defendants' argument should be rejected.

First, ignoring binding precedent, Defendants argue incorrectly that Plaintiffs lack associational and organizational standing, and that they cannot bring constitutional claims on behalf of their members. These arguments turn almost entirely on the possibility that Plaintiffs might lose on the merits. At the motion to dismiss stage, however, Plaintiffs need only allege facts to support an entitlement to relief. Plaintiffs have done just that. Defendants also repeatedly misstate or ignore binding Supreme Court and Second Circuit precedent finding standing in cases involving virtually identical census-based claims. Plaintiffs' claims are justiciable.

Second, Defendants erroneously argue that Plaintiffs fail to state an equal protection claim because they did not adequately allege intent to discriminate. Again, Defendants ignore Plaintiffs' well-pled factual allegations that are plainly sufficient to state a discrimination claim based on *Washington v. Davis*, 426 U.S. 229 (1976) and *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). These include extensive allegations of disparate impact, unexplained departures from substantive and procedural precedent, the historical background of the citizenship question, and contemporaneous statements by President Trump and his Administration that evidence discriminatory purpose. The Secretary's shifting explanation of the genesis of the question alone reflects improper motives and defies

Defendants' invocation of the "presumption of regularity." There is nothing at all regular about Defendants' decision making.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE.

Federal courts, including the Supreme Court and the Second Circuit, have consistently adjudicated claims related to the Census and have expressly rejected arguments that such claims are not justiciable. *See, e.g., Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 332 (1999); *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980). Notwithstanding this definitive case law, Defendants argue that Plaintiffs lack Article III and prudential standing, the political question doctrine bars Plaintiffs' claims, and the Secretary's decision is not subject to judicial review under the APA. None of these arguments has any merit.

A. Plaintiffs Have Organizational Standing

Ignoring Plaintiffs' well-pled allegations in their Complaint, Defendants argue that Plaintiffs do not have organizational standing and cannot sue on their own behalf. Opp. at 11–12. Defendants' arguments should be rejected.

First, Defendants erroneously seek to impose a heightened standard for pleading organizational standing that is squarely inconsistent with precedent. The Second Circuit and the Supreme Court have both recently affirmed that "where an organization diverts its resources away from its current activities, it has suffered an injury that has been repeatedly held to be independently sufficient to confer organizational standing." *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 111 (2d Cir. 2017) (citing *Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1303 (2017)). To demonstrate such an injury, a plaintiff need only show a "'perceptible impairment' of an organization's activities." *Id.* at 110.

"The injury-in-fact necessary for standing need not be large, an identifiable trifle will suffice." *LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir. 2002) (citation & internal quotation marks omitted). For example, in *Nnebe v. Daus*, the Second Circuit held that a taxi driver advocacy group had a sufficient injury for organizational standing "[e]ven if only a few suspended drivers are counseled by [the group] in a year" as a result of the challenged policy because there was "some perceptible opportunity cost expended." 644 F.3d 147,156–57 (2d Cir. 2011).

At the pleading stage, an organizational plaintiff need only allege facts that, taken in the light most favorable to the plaintiff, would show that the challenged conduct impaired its organizational activities in a concrete manner. *See Centro de la Comunidad Hispana*, 868 F.3d at 111; *Olsen v. Stark Homes, Inc.*, 759 F.3d 140, 158 (2d Cir. 2014). Thus, in *Olsen*, the Second Circuit held that a non-profit fair-housing organization had provided sufficiently concrete and particularized allegations of injury for organizational standing by alleging that it had expended resources advocating for one family and performing testing on their behalf due to the defendants' policy, thereby diverting resources "from its other advocacy and counseling activities." *Olsen*, 759, F.3d at 158.

Plaintiffs easily meet this standard here. The Complaint alleges concrete and particularized facts for each of the Plaintiff organizations that support a perceptible impairment via a diversion-of-resources injury. This includes facts alleging each Plaintiff's mission, Compl. ¶¶ 15, 24, 33–34, 44, 49, and how they already have had to and will continue to have to divert resources from other specific organizational priorities to address problems caused by addition of the citizenship question to the Decennial Census, *id.* ¶¶ 20, 22, 31–32, 40–43, 46–47, 57–59.

MRNY's allegations are instructive: its mission of empowering immigrant and working class communities to achieve justice compels it to promote engagement in the Decennial Census

among its members and constituents because of the importance of funding and political power decisions derived from the Census enumeration. *Id.* ¶¶ 49, 55; Declaration of Javier Valdés ¶¶ 4, 7.[1] The Complaint clearly alleges that the addition of the citizenship question is already making this work harder, Compl. ¶¶ 56–59, and thus, MRNY is being compelled to intensify its census outreach work, spending "more resources to reach the same number of people"—and even then, faces the prospect that its work in promoting engagement will likely be less successful than in previous censuses. *Id.* ¶ 58; Valdés Decl. ¶ 15. This diversion not only threatens to harm the organization's mission, but its resource commitment will continue to harm other discrete organizational priorities such as providing legal services and promoting non-census-related civic engagement. Compl. ¶ 59; Valdés Decl. ¶ 16. The other Plaintiffs have alleged similar diversion of resources for the same reasoning. *Id.* ¶¶ 18, 21–22, 28–32, 38, 40–43; *see* Declaration of George Escobar ¶¶ 6, 9–13; Declaration of Abed A. Ayoub Decl. ¶¶ 8, 10–15; Declaration of Elizabeth Plum ¶¶ 11–17. These harms are exactly the type of "perceptible impairment" of activities that establish organizational standing. *See Centro de la Comunidad Hispana*, 868 F.3d at 111; *Olsen*, 759 F.3d at 158.

Nor is there any basis to Defendants' argument that Plaintiffs' injuries are contrived or related to litigation. Opp. at 11. Plaintiffs have pled that they were forced to increase resources for census outreach directly because of Defendant's acts—namely, the addition of the citizenship question has stoked fear and increased the likelihood of lower response rates in their community and among their members. Compl. ¶¶ 21, 29–30, 41, 46, 56; Escobar Decl. ¶¶ 8, 11–13; Ayoub Decl. ¶¶ 2, 11–13; Plum Decl. ¶¶ 14–15, 18 Valdés Decl. ¶¶ 10–13. Indeed, MRNY "has

[1] As the Second Circuit has made clear, "'it is within the [district] court's power to allow . . . by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing.'" *Thompson v. Cty. of Franklin*, 15 F.3d 245, 249 (2d Cir. 1994) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

confirmed from conversations with several of its members that some of them would be fearful of responding to the Decennial questionnaire if the citizenship question is added." Compl. ¶ 56; *see also* Escobar Decl. ¶ 8; Ayoub Decl. ¶¶ 2, 11–13; Plum Decl. ¶¶ 18–23; Valdés Decl. ¶¶ 10–13. Defendants dispute whether that fear is real, *see* Br. at 11; but Defendants' factual disagreement with Plaintiffs does not render Plaintiffs' injuries speculative, and cannot serve as basis for dismissal.

Finally, Defendants make the misplaced argument that at the pleadings stage Plaintiffs must specifically quantify the amount of resources they will be forced to divert. Opp. at 12. But there is no such requirement. For example, even at a later stage of the case, the Seventh Circuit rejected an argument that plaintiff organizations lacked organizational standing, explaining that the "fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury." *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008); *see also* 553 U.S. at 189 n.7 (affirming Seventh Circuit finding that lead plaintiff had organizational standing);

As such, Defendants rely entirely on cases that merely discuss the generic pleading standards and have nothing to do with organizational standing. For example, Defendants analogize to *Fullwood v. Wolfgang's Steakhouse, Inc.*, 2017 WL 377931, at *6 (S.D.N.Y. Jan. 26, 2017), where the court dismissed a claim as conclusory where the plaintiff merely alleged that she had been "damaged" by Defendants. Opp. at 12. But unlike *Fullwood*, Plaintiffs do not rely on a similarly bare incantation of injury—Plaintiffs specifically allege how their work to encourage Census participation has been impeded by the citizenship question, and identify the specific organizational priorities that will suffer from resource diversion due to the need to perform additional Census outreach. Compl. ¶¶ 21–22, 31–32, 40–43, 46–47, 57–59.

Defendants simply ignore these factual allegations. And further details of Plaintiffs' efforts are identified in the declarations. Escobar Decl. ¶¶ 11–13; Ayoub Decl. ¶¶ 13–15; Plum Decl. ¶ 16; Valdés Decl. ¶¶ 2, 14–16.

Because Plaintiffs have pleaded facts showing that they will continue to sustain concrete injuries to specific organizational priorities as a result of Defendants adding the citizenship question, they have adequately supported their organizational standing.

B. Plaintiffs Allege Sufficient Facts To Establish Associational Standing.[2]

It is "common ground that . . . organizations can assert the standing of their members." *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009). An organization has standing to sue if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Com'n*, 432 U.S. 333, 343 (1977); *see also Bldg. & Const. Trades Council of Buffalo, New York & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 144 (2d Cir. 2006). Defendants do not dispute that Plaintiffs satisfy the second and third elements; their only argument is that Plaintiffs have not established that their members would have standing to sue.

1. Plaintiffs are not required to plead the names of individual members.

Contrary to Defendants' argument that Plaintiffs New York Immigrant Coalition ("NYIC"), CASA de Maryland ("CASA"), and American-Arab Anti-Discrimination Committee ("ADC") lack associational standing because they did not "identif[y] a single member who has suffered or will suffer an injury," Opp. at 5, there is no authority "that supports the proposition that an association must 'name names' in a complaint in order properly to allege injury in fact to

[2] Plaintiff ADC Research Institute is not a membership organization and thus does not assert associational standing.

its members." *Bldg. & Const. Trades Council of Buffalo*, 448 F.3d at 145 (2d Cir. 2006). In fact, the Second Circuit and other courts have explicitly held otherwise. *See id.*; *Hancock Cty. Bd. of Sup'rs v. Ruhr*, 487 F. App'x 189, 198 (5th Cir. 2012) ("We are aware of no precedent holding that an association must set forth the name of a particular member in its complaint in order to survive a Rule 12(b)(1) motion to dismiss based on a lack of associational standing."); *Ass'n of Am. Physicians & Surgeons, Inc. v. Sebelius*, 901 F. Supp. 2d 19, 31 (D.D.C. 2012), *aff'd*, 746 F.3d 468 (D.C. Cir. 2014) ("Since *Summers*, however, several Courts have found that a plaintiff need not identify the affected members by name at the pleading stage" because "general allegations encompass the specific facts necessary to support the claim").

Rather, at the pleading stage, an association bringing suit on behalf of its members need only "allege that one or more of its members has suffered a concrete and particularized injury" that is "actual and imminent," fairly traceable to the defendants, and redressable by the relief sought. *Bldg. & Const. Trades Council*, 448 F.3d at 145. Plaintiffs NYIC, CASA, and ADC easily satisfy this standard: CASA and ADC both allege that their members will be harmed by the loss of political power and reduction in funds, Compl. ¶¶ 25–27 (CASA), 35–37 (ADC), and NYIC alleges that its members will be harmed by the loss of or reduction in funds, *id*. ¶¶ 16-17. Thus, Plaintiffs NYIC, CASA, and ADC all properly allege injury resulting from Defendants' conduct. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (at "pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice").

The cases Defendants rely upon are not to the contrary. Opp. at 5. None of the cited cases holds that an association must identify the name of an injured member at the pleading stage in order to establish associational standing. *See Summers*, 555 U.S. 488 (2009) (reversing entry of permanent injunctions); *Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 814 (D.C.

Cir. 2006) (analyzing petition for review of administrative action and citing for authority *Lujan*, which held that at general factual allegations suffice at the pleading stage); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 & n.23 (1982) (noting that association must plead *how* members are injured). Because Defendants' argument rests entirely on a nonexistent pleading requirement, Plaintiffs NYIC, CASA, and ADC have all established associational standing.

In any event, each Plaintiff has submitted a declaration in opposition to the Motion to Dismiss identifying individual members who will be harmed by loss of political power or loss of funding. *See* Escobar Decl. ¶¶ 16–18 (identifying three CASA members), Ayoub Decl. ¶¶ 17–19 (identifying three ADC members); Plum Decl. ¶¶ 18–23 (identifying NYIC members and five individual members of NYIC members); Valdés Decl. ¶¶ 18–22 (identifying 5 individual members of Make the Road).

2. Plaintiff Make The Road New York Has Sufficiently Alleged Associational Standing Based On Injury To An Identified Member.

Despite the fact that, in the Complaint, Plaintiff Make The Road New York ("MRNY") identified an individual member, Perla Lopez, who faces harm, Defendants incorrectly argue that MRNY also did not establish associational standing. Opp. at 6–10. Defendants assert that Ms. Lopez's injuries are "too abstract and attenuated" because they purportedly rely on speculation that adding the citizenship question to the census will cause "a net *decrease* in the response rate for the 2020 Census . . . where Ms. Lopez lives." Opp. at 6–7. Like their associational standing argument as relates to Plaintiffs NYIC, CASA, and ADC, Defendants' argument that MRNY lacks associational standing also fails.

To begin, Defendants largely ignore the Supreme Court, Second Circuit, and other decisions that have embraced the types of census-derived injuries alleged here, including

reduction of political power on the intrastate level, diminishment of funding tied to census enumeration, and loss of seats of the resident's state in the congressional apportionment process. In *Dep't of Commerce v. U.S. House of Representatives*, for example, the Supreme Court held that plaintiffs challenging a proposed Census Bureau action had standing to seek relief for non-speculative injuries based on the "threat of vote dilution." 525 U.S. at 332; *see also Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (holding that individual plaintiffs "have alleged concrete harm in the form of dilution of their votes" resulting from Census Bureau conduct); *State of Tex. v. Mosbacher*, 783 F. Supp. 308, 313 (S.D. Tex. 1992); *City of New York v. U.S. Dep't of Commerce*, 713 F. Supp. 48, 50 (E.D.N.Y. 1989). The Court specifically found standing based on the effects of the census on intrastate districting. *Dep't of Commerce*, 525 U.S. at 331, 332. It also held that a plaintiff's "expected loss of a Representative to the United States Congress" for his state "undoubtedly satisfies the injury-in-fact requirement of Article III standing." *Id*. at 331; *see also Mosbacher*, 783 F. Supp. at 313; *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980). Similarly, the Second Circuit held in *Carey* that citizens challenging an "undercount on the basis. . . that improper enumeration will result in loss of funds to their city have established both an injury fairly traceable to the Census Bureau and a substantial probability that court intervention will remedy the plaintiffs' injury."[3] 637 F.2d at 838.

These cases highlight that MRNY adequately pled facts to establish injury to Ms. Lopez and its other members and, thus, that it has associational standing. MRNY alleges that Ms. Lopez resides in Queens County, New York, and that because the number of Latino and other

[3] Other courts have followed suit. *See City of Detroit v. Franklin*, 4 F.3d 1367, 1374 (6th Cir. 1993) (finding standing for anticipated loss of funding related to the Census because "many federal programs do disburse funds based upon population figures as reported in the decennial census"); *Mosbacher*, 783 F. Supp. at 313; *see also Nat'l Law Ctr. on Homelessness & Poverty v. Kanto*r, 91 F.3d 178, 185 (D.C. Cir. 1996) ("general allegations that federal funding will be reduced by the conduct of the census have been held sufficient to withstand motions to dismiss.").

immigrant residents of Queens "far exceeds the New York state average, the differential undercount will cause her and other Make the Road New York members in Queens to lose out on political power and funding that will instead go to other areas of New York State." Compl. ¶ 53. These are the same types of injuries that have been found sufficient to establish standing in cases like *Department of Commerce* and *Carey*. Plaintiffs NYIC, CASA, and ADC provide the same type of allegations in the Complaint. *Id.* ¶¶ 16–17, 25–26, 36–37. With this opposition, MRNY is submitting a declaration identifying additional members who also will be harmed by the addition of the citizenship question. Valdés Decl. ¶¶ 18–22. The same is true for the other Plaintiffs. Escobar Del. ¶¶ 8, 16–18; Ayoub Decl. ¶¶ 17–19; Plum Decl. ¶¶ 18–23.

Defendants do not even mention, let alone distinguish, the Supreme Court's decision in *Department of Commerce*. Although Defendants acknowledge *Carey*, they attempt to bury it in a footnote, attempting to distinguish it on the ground that the injuries at issue did not flow from "the mere inclusion of a question." Opp. at 10 n.5. But this is a distinction without a difference. The injury in fact in this case and in *Carey* is effectively the same: loss of representation due to a disproportionate undercount.

Ignoring these well-pled allegations, Defendants' motion to dismiss boils down to an attempt to litigate the case on the merits. Defendants argue repeatedly that Plaintiffs lack standing because of a lack of "'definitive, empirical' evidence regarding the effect of reinstating a citizenship question" and because the Census Bureau supposedly has remedial plans to try to mitigate the differential undercount. Opp. at 7. Of course, whether or not Plaintiffs ultimately succeed in proving that the undercount of immigrant communities of color will increase due to the citizenship question, or that their members live in states and localities that will be harmed due to the loss of funding, intrastate vote dilution, and for some, loss of a congressional

representative caused by an increased differential undercount, is irrelevant to the threshold question of standing at the pleading stage. These are precisely the "sort of factual issue[s] which require[] testing by affidavit or testimony, and [are] not an appropriate basis on which to deny standing in a motion to dismiss." *City of Camden v. Plotkin*, 466 F. Supp. 44, 49 (D.N.J. 1978); *see also Lujan*, 504 U.S. at 561 (noting that "general factual allegations of injury resulting from the defendant's conduct" suffice at the pleading stage because courts must "'presum[e] that general allegations embrace those specific facts that are necessary to support the claim'") (quoting *Lujan*, 497 U.S. at 889).

Unsurprisingly, most of the cases Defendants cite in their attempt to argue that Plaintiffs' injuries are speculative were decided at the summary judgment stage after plaintiffs conducted discovery. *See, e.g.*, *Kantor*, 91 F.3d at 181; *Ridge v. Verity*, 715 F. Supp. 1308, 1311 (W.D. Pa. 1989); *FAIR v. Klutznick*, 486 F. Supp. 564, 566 (D.D.C. 1980). These cases do not support Defendants' proposition that, because Plaintiffs' claims may be disproven at trial, their injuries are therefore inherently speculative and cannot form the basis for standing. Nor does *Strunk v. U.S. Dep't of Commerce*, No. 09–1295, 2010 WL 960428, at *3 (D.D.C. Mar. 15, 2010), suggest that Plaintiffs lack standing. There, the court dismissed a *pro se* plaintiff's claim for vote dilution not because he alleged he was a resident of an affected state, but because of his vague assertion that the Census Bureau planned to count tourists caused him "spiritual and temporal injuries," of which vote dilution was one. Here, in contrast, Plaintiffs have alleged more than what is necessary to allege a concrete injury based on loss of political power and funding.

C. Plaintiffs' Injuries Are Traceable To Defendants' Conduct

With respect to Defendants' argument that Plaintiffs have not established that their injuries are traceable to Defendants' conduct, Plaintiffs incorporate by reference arguments in

the Memorandum of Law in Opposition to Defendants' Motion to Dismiss filed in *State of New York v. U.S. Dep't of Commerce*, No. 1:18-cv-02921, ECF No. 182, at 16-19. Additionally, the Second Circuit recently rejected the very argument raised by Defendants here—*i.e.*, that a plaintiff lacks standing to challenge an administrative action where the plaintiff's injuries flow from how the agency's action causes others parties to behave. In *Natural Resources Defense Council v. National Highway Traffic Administration*, -- F.3d --, 2018 WL 3189321, at *5 (2d Cir. June 29, 2018), the Second Circuit held that environmental organizations had standing to challenge the National Highway Traffic Association's indefinite delay in increasing penalties for failure to comply with fuel standards, based on injuries flowing from increased pollution. The Court held that it was "common sense and basic economics" that delaying an increased penalty for automakers that violate fuel standards would lead automakers to violate those standards more frequently, and thus cause more pollution that would injure the plaintiff organizations' members.

That logic compels a finding that Plaintiffs in this case have sufficiently pled an injury traceable to Defendants' conduct. Here, Plaintiffs allege numerous facts that the addition of the citizenship question will lead to an undercount. *See, e.g.*, Compl. ¶¶ 2, 144 (the Secretary's admission that there will be a "decline" estimated at 1 percent in responses), 145 (Director Jarmin's admission that there would be an impact on the "response rate of subgroups"). Because the question will intimidate immigrants of color, this population will fail to respond to the Decennial Census in greater numbers than other groups. *Id.* at 4, 75–80, 127–146. The resulting differential undercount will diminish their political power and cause a reduction in federal funds distributed to their communities. *Id.* ¶¶ 146. These allegations easily satisfy the "relatively modest" burden to allege traceability. *Rothstein v. UBS AG*, 708 F.3d 82, 92 (2d Cir. 2013).

D. Plaintiffs Have Standing To Bring Constitutional Claims On Behalf Of their Members, and On Their On Behalves.

Defendants argue that Plaintiffs lack prudential standing because they are not the direct victims of Defendants' "'discriminatory intent toward Latinos, Asian-Americans, Arab-Americans, and immigrant communities of color generally,'" Opp. at 13 (quoting Compl. ¶ 195), unconstitutional conduct and therefore cannot establish third-party standing, *id*. There are two reasons for the Court to reject this argument.

First, Defendants' argument implicitly concedes that immigrants of color would have standing to bring Plaintiffs' constitutional claims individually. That concession is fatal to their argument, because Plaintiffs have alleged sufficient facts to establish associational standing to challenge the impact of unconstitutional conduct on their *members*, most of whom are immigrants of color, and the subjects of Defendants' purposeful discrimination. Compl. ¶¶ 23–25, 33–35, 48–50. For example, CASA alleges that it seeks to "create a more just society by increasing the power of and improving the quality of life in low-income immigrant communities" and that it has "more than 90,000 members," many of whom live in jurisdictions where immigrant populations exceed the national average, and which will therefore be uniquely harmed by addition of the citizenship question. *Id.* ¶¶ 23–26; Escobar Decl. ¶¶ 3–5. Plaintiff ADC alleges that it is a "civil rights organization" with "several thousand members" and is "committed to defending and promoting the rights and liberties of Arab-Americans," some of whom are immigrants, and that its "objectives include combating stereotypes and discrimination against and affecting the Arab-American community in the United States[.]" Compl. ¶ 33–35; Ayoub Decl. ¶¶ 3–6. And MRNY alleges that its more than 22,000 members live in jurisdictions with Latino immigrant populations that exceed the national and state averages and that they too will be harmed by Defendants' conduct. *Id.* ¶¶ 49–50; Valdés Decl. ¶¶ 2–5.

In fact, courts have recently held that both CASA and MRNY are the type of organizations who can bring associational standing claims based on harms to their members. In *Casa De Maryland v. U.S. Department of Homeland Security*, 284 F. Supp. 3d 758, 771 (D. Md. 2018), the court rejected arguments that CASA lacked associational standing, explaining that it is a "prototypical example[ ] of possessing association standing." The Eastern District of New York reached a similar conclusion as to MRNY. *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 282 n.12 (E.D.N.Y. 2018).

Second, Defendants' argument rests on a mischaracterization of Plaintiffs' discrimination claim as relying exclusively on harm to third parties. As previously explained, Plaintiffs also allege injuries directly to themselves from the addition of the citizenship question. Compl. ¶¶ 21–22, 27–32, 40–43, 46–47, 54–59; Escobar Decl. ¶¶ 3, 11–13, 19; Ayoub Decl. ¶¶ 11, 14–15; Plum Decl. ¶¶ 25–29; Valdés Decl. ¶¶ 2, 14–16, 22. Because Plaintiffs themselves suffered an injury, the third-party standing doctrine that forms the basis of Defendants' argument does not apply. *See, e.g.*, *Wasatch Equal. v. Alta Ski Lifts Co.*, 55 F. Supp. 3d 1351, 1362 (D. Utah 2014), *aff'd*, 820 F.3d 381 (10th Cir. 2016) (plaintiffs had prudential standing to bring equal protection claim where they alleged that they were subject to differential treatment by government); *Bassett v. Snyder*, 951 F. Supp. 2d 939, 953 (E.D. Mich. 2013) (plaintiffs had prudential standing because they were "asserting their own Fourteenth Amendment rights to equal protection and due process").

Moreover, there is little doubt that Plaintiffs have standing as corporations to assert a discrimination claim on their own behalf. In recent years, courts have clarified that "corporations have standing to assert race discrimination claims." *Carnell Const. Corp. v. Danville Redevelopment & Hous. Auth.*, 745 F.3d 703, 714 (4th Cir. 2014). As the D.C. Circuit

explained, "if a corporation can suffer harm from discrimination, it has standing to litigate that harm," especially because the "Supreme Court has held that a party need not be a member of a protected minority in order to suffer harm from discrimination." *Gersman v. Grp. Health Ass'n, Inc.*, 931 F.2d 1565, 1568 (D.C. Cir. 1991), *vacated on other grounds*, 502 U.S. 1068 (1992); *see also Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1060 (9th Cir. 2004) (adopting the *Gersman* rationale).

This rationale applies equally where, as here, the injury asserted by the organization is a diversion of resources. In *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 2265 (2017), the Sixth Circuit found the organizational plaintiff had standing to bring equal protection claims, among others, challenging a restrictive Ohio voting law. It noted that the injury suffered by the organization was directly related to the law's "alleged impact on the opportunity to vote of the African–American community" and because the burden of this law "would cause them to change significantly their expenditures and operation and a favorable decision would redress that injury," Northeast Ohio Coalition for the Homeless had organizational standing. *Id.*

For these reasons, the Court should reject Defendants' arguments that Plaintiffs lack standing to bring an equal protection claim.

E. The Political Question Doctrine Does Not Bar Plaintiffs' Claims; The APA Claim Is Not Precluded From Judicial Review.

Plaintiffs incorporate by reference the arguments in the Memorandum of Law in Opposition to Opposition Defendants' Motion to Dismiss *State of New York v. U.S. Dep't of Commerce*, No. 1:18-cv-02921, ECF No. 182, at 19–32.

II. PLAINTIFFS PROPERLY PLEAD AN INTENTIONAL DISCRIMINATION CLAIM.

In *Arlington Heights*, the Supreme Court identified a non-exhaustive set of factors that may constitute part of the "mosaic" of evidence that can create an inference of intentional discrimination: (1) disparate impact, i.e., whether the action "bears more heavily on one race than another"; (2) the "historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes"; (3) "[d]epartures from the normal procedural sequence" and "[s]ubstantive departures;" and (4) "contemporary statements" by those deciding the issue. 429 U.S. at 266–68. Significantly, there is no need to allege, or prove, that intentional discrimination was the sole reason for a particular governmental action; rather, "[i]t is enough if plaintiffs show that race was one of several possible motivating factors for defendants' actions." *People United for Children, Inc. v. City of New York*, 108 F. Supp. 2d 275, 296 (S.D.N.Y. 2000). Plaintiffs need not allege that illicit intent was the sole reason for adding the citizenship question, as government action undertaken for multiple reasons is unconstitutional if intentional discrimination "was *a* motivating factor" in the decision. *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1216–17 (2d Cir. 1987) (emphasis added).

Here, Defendants' scattershot arguments that Plaintiffs failed to state an equal protection claim ignore factual allegations in the Complaint. Taken together, Plaintiffs allege a cornucopia of facts that intentional discrimination "was *a* motivating factor" in the decision to add a citizenship question to the Decennial Census. *Id.* at 1216–17. Thus, Defendants' motion to dismiss this claim should be denied.

A. Plaintiffs Allege Ample Facts Supporting An Inference Of Intentional Discrimination Under *Arlington Heights*.

Defendants' principal argument is that Plaintiffs fail to state an equal protection claim because they do not allege facts "indicating any *direct* discriminatory intent." Opp. at 18 (noting absence of "factual allegations directly indicating discriminatory intent"). This misses the central point of *Arlington Heights*—that because "discriminatory intent is rarely susceptible to direct proof, a district court facing a question of discriminatory intent must make 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Mhany Management, Inc. v. County of Nassau*, 819 F.3d 581, 606 (2d Cir. 2016) (quoting *Arlington Heights*, 439 U.S. at 266). Defendants' position amounts to the long-discredited view that "because no one ever said anything overtly race-based, this was all just business as usual." *Mhany Management*, 819 F.3d at 611. *Arlington Heights* says no such thing; rather, it expressly recognizes that relevant factors to determine discriminatory intent include the "historical background of the decision," the "specific sequence of events leading up to the challenged decision" including departures from substantive and procedural practice, and the impact of the decision. 429 U.S. at 267; *see also Rosen v. Thornburgh*, 928 F.2d 528, 533 (2d Cir. 1991) ("A victim of discrimination is . . . seldom able to prove his or her claim by direct evidence is usually constrained to rely on the cumulative weight of circumstantial evidence."). Here, the facts pled in the Complaint are more than sufficient to create an inference that intentional discrimination based on race and national origin "was *a* motivating factor" in the decision to add a citizenship question to the Decennial Census. *See Yonkers Bd. of Educ.*, 837 F.2d at 1216–17.

1. Plaintiffs' Complaint contains undisputed allegations of disparate impact.

Defendants do not dispute that Plaintiffs allege sufficient facts regarding disparate impact. *See* Compl. ¶¶ 112–150. The Court need look no further than the Secretary's and Census Bureau's own admissions that including a citizenship question on the census will decrease the response rate among certain minority communities for evidence of disparate impact. *Id*. ¶¶ 2, 128-35, 144–45. Defendants' concession on this factor is significant because "the racially disproportionate effect of official action provides an important starting point." *Crawford v. Bd. of Educ.*, 458 U.S. 527, 544 (1982).

2. Plaintiffs allege facts about the historical background of the Secretary's decision that reveal discriminatory intent.

The Complaint alleges numerous facts surrounding the historical background of the decision and related actions taken by Defendants. Plaintiffs allege, among other things, that (i) the Census Bureau has long opposed inclusion of a citizenship question on the Census because it will impair accuracy and exacerbate undercounting of color, Compl. ¶¶ 81–90; and (ii) proponents of adding a citizenship question to the Decennial Census have long been motivated by the prospect of diluting the political power of immigrant communities of color, and have expressly acknowledged that they lobbied the Trump Administration for that purpose, *see* Compl. ¶¶ 99–104, 187–89. For example, Kansas Secretary of State Kris Kobach spoke with President Trump shortly after his inauguration about adding a citizenship question and admitted that his goal in doing so was to exclude "illegal aliens from the apportionment process" and thus to reduce the political power of immigrant communities of color. *Id.* ¶¶ 101–02. Around this same time, another Trump Administration official circulated a draft executive order proposing census questions to determine immigration and citizenship status in the context of cutting off

employment and public assistance benefits to immigrants. *Id.* ¶ 103. And the decision to add the citizenship question came shortly after the Secretary took other actions to undermine the Census Bureau's efforts to mitigate the undercount of immigrant communities, including ending the Census Bureau's longstanding practice of hiring non-citizen census enumerators who possessed hard-to-find language skills and familiarity with hard-to-count immigrant communities. *Id.* ¶ 149.

Defendants attempt to brush aside the statements of Mr. Kobach and others as irrelevant because they purportedly are not alleged to have participated in the decision to reinstate the citizenship question. Opp. at 18. But that is incorrect—indeed, the Administrative Record contains a smoking gun as to Mr. Kobach's involvement—emails regarding a previously-undisclosed conversation between the Secretary and Mr. Kobach regarding the citizenship question.[4]

As applied to the 2020 Decennial Census, this makes perfect sense. The allegations in the Complaint form a sufficient basis for a factfinder to infer discriminatory intent in the Secretary's decision.

3. Plaintiffs allege that Defendants departed, procedurally and substantively, from past practice.

The Complaint includes numerous allegations describing how the addition of a citizenship question reflects a sea change in position by the Census Bureau and represents a dramatic departure, procedurally and substantively, from prior practice. As a matter of substance, for decades during both Republican and Democratic administrations, the Census

[4] *See* AR 763–64 (confirming Mr. Kobach discussed his view that it was a "problem" that "aliens who do not actually reside in the United States are still counted for congressional apportionment purposes" directly with Secretary Ross and other senior Commerce officials at the direction of White House Chief Strategist Steve Bannon.). References to the Administrative Record are found in *State of New York et al. v. Department of Commerce et al.*, 18-CV-02921 ECF No. 173 and 189-1. The Court can take judicial notice of the administrative record. *See Marshall County Health Care Authority v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993).

Bureau has rejected including a citizenship question on the decennial census because it was viewed as destructive to achieving a full count in all communities, and would exacerbate the undercount of immigrant communities in particular. *See* Compl. ¶¶ 81–90. And, as a matter of process, Defendants rushed to add the citizenship question by trampling over normal Census Bureau practices and safeguards, steamrolling forward without any pretesting, input from advisory committees, attention to deadlines, or regard for federal regulations requiring adherence to scientific norms. *Id.* ¶¶ 152–77, 191. This decision reversed was made over the objections of the Census Bureau's Chief Scientist, who concluded the addition of the question would be "very costly" and "harm the quality of the census count." AR 1277.

Defendants barely acknowledge these allegations. They have nothing at all to say about Plaintiffs' allegations that the Secretary's decision constitutes a significant substantive departure from past practice. This is especially telling given the absence of an alternative, non-discriminatory justification for the decision. Although Secretary Ross's March 26 memorandum explaining his decision cites the Department of Justice's need for the citizenship question for the purpose of enforcing the VRA, this effort was the first time proponents of the citizenship question have cited that rationale. Comp. ¶ 189. And Secretary Ross has now admitted that the genesis of the idea to add the citizenship questions came from unnamed "other senior Administration officials," and that it was only after this suggestion that he solicited the Justice Department to offer a *post hoc* rationale for a decision which, at that point, appears to have already been made. *See* AR 1321. And, in any event, "it is of no moment that the complained-of conduct would be permissible if taken for nondiscriminatory reasons," where, as here, there is evidence of *a* discriminatory motive. *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995).

Unsurprisingly, Defendants are silent about the Secretary's machinations. Regardless, even if the VRA motive were not pure pretext, it lacks a basis in fact: the Department of Justice has successfully brought dozens of Section 2 actions since its enactment in 1965 without the presence of a citizenship question. *See* Compl. ¶ 187.

Defendants limit their argument to suggesting the Secretary's sudden decision to add a citizenship question without following the traditional testing regimen is justified because "a citizenship question has long been used in other census surveys," including the American Community Survey ("ACS"). Opp. at 19. But Plaintiffs' Complaint explains the significant differences between the Census and the ACS—among other things, "the ACS is not a hard count, but rather a sample that is used to generate statistical estimates, and which can be adjusted to correct for an undercount." Compl. ¶ 93. In fact, the Census Bureau itself recognizes that "the Decennial Census and ACS 'serve different purposes.' While the Decennial Census is intended to 'provide an official count of the entire U.S. population to Congress,' the ACS is intended to provide information on the social and economic needs of communities." *Id.* ¶ 94. The Complaint identifies further important differences between the citizenship question on the ACS and on the Decennial Census, none of which Defendants address or even acknowledge. *E.g.*, *id.* ¶ 95 (explaining that citizenship is one of more than 50 questions on 28 page ACS and is not "a simple binary yes/no question"); *id.* ¶ 97 (summarizing reasons why citizenship question on ACS does not implicate same concerns as Decennial Census). [5]

[5] Defendants also erroneously accuse Plaintiffs of ignoring inclusion of a citizenship question, as recently as 2000, on the so-called long-form census questionnaire. *Compare* Opp. at 19 with Compl. ¶¶ 92–93 (discussing the long form questionnaire included a citizenship question between 1970 and 2000, when it was replaced by the ACS).

Defendants' attempt to invoke the "presumption of regularity" can be easily rejected. Opp. at 17 n.7. Defendants do not cite any case to support the proposition that a presumption of regularity increases the burden to plead a discrimination claim. More importantly, the presumption of regularity is just that, a presumption, and does not apply where, as here, Plaintiffs allege departures from numerous statutory and regulatory requirements. Compl. ¶¶ 81–90.

Defendants have nothing more to say about their abrupt departure from past practice.

4. Plaintiffs Allege Multiple Comments That Evince Discriminatory Intent.

Plaintiffs' Complaint identifies numerous statements and actions that support an inference of discriminatory intent when make the decision to add the citizenship question to the Decennial Census. For example, several presidential appointees and allies urged addition of the citizenship question precisely because of its likely impact on immigrant communities of color and Latinos more broadly. *Id.* ¶¶ 179–82*; see also* AR 763–64. And, Plaintiffs allege that statements by Defendants and others indicate that they sought to add a citizenship question based on motives other than VRA enforcement. *Id.* ¶¶ 98–108, 179–81, 183–92. Most directly, the President's reelection campaign sent out two emails before and after the decision was announced, neither of which mentioned VRA enforcement, and the former of which stated that this decision should "be COMMON SENSE … but 19 attorneys general said they will fight the President if he dares to ask people if they are citizens." *Id.* ¶ 178.

These statements suggesting discriminatory intent underlying the citizenship question are part of an extensive record of discriminatory statements by senior Government officials, including the President, expressing a desire to curtail the growing political clout of immigrants communities of color. The President has publicly expressed outrage at the growing political power of immigrant communities of color, criticizing "chain migration" and its political consequences, *id.* ¶ 107, complaining that "all of these people that are pouring across are going to vote for Democrats" *id.* ¶ 108. The President has also made statements focusing on immigrants' countries of origin, broadly railing against immigrants being admitted from "shithole countries" like El Salvador, Haiti, and others in Africa, and saying he preferred immigrants "from places like Norway." *Id.* ¶ 109. Nowhere in their opposition do Defendants

acknowledge Secretary Ross' own comments in the same vein, including his endorsement of ending "chain migration." *Id.* ¶ 148.

While Defendants attempt to brush away the significance of statements by anyone other than the Secretary, there is no reason the Court "must or should bury its head in the sand when faced with overt expressions of prejudice." *Batalla Vidal*, 291 F. Supp. 3d at 278. When multiple officials influence a final decision, as the Complaint alleges here, the relevant inquiry is whether the decision was "tainted with discriminatory intent even if the decisionmakers personally have no strong views on the matter." *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 49 (2d Cir. 1997). Sensibly, there is still liability for intentional discrimination when a "biased individual manipulates a non-biased decision-maker into taking discriminatory action." *Batalla Vidal*, 291 F. Supp. 3d at 279. There simply is no justification for the Court to ignore statements by the President, and others, that are powerfully suggestive of discriminatory intent simply because the Secretary was the one who made the final decision to add the citizenship question to the Decennial Census.

Finally, Defendants are also wrong that they can avoid the searching review that applies to equal protection claims involving discrimination on the basis of race and national origin by invoking *Trump v. Hawaii*, 528 U.S. ---, 2018 WL 3116337 (June 26, 2018). Opp. at 17. Noting that *Hawai'i* involved a facially neutral policy, Defendants argue that the Court held that "deferential review may apply 'across different contexts and constitutional claims.'" *Id.* (quoting *Hawai'i*, 2018 WL 3116337, at *20). But Defendants omit the first half of the quoted sentence, which made clear that the deferential review at issue was the standard established by *Kleindeinst v. Mandel*, 408 U.S. 753 (1972) for situations in which U.S. persons challenged the exclusion of a noncitizen. Unsurprisingly, the "contexts and constitutional claims" that the Court listed all

concerned policies related to the admission of noncitizens. *See Hawai'i*, 2018 WL 3116337, at *20-21 (describing application of *Mandel* in cases concerning admission and immigration). Indeed, the *Hawai'i* Court explained that it applied this deferential standard of review partly because the *Mandel* standard "'has particular force' in admission and immigration cases that overlap with 'the area of national security.'" *Id*. at *21. Neither Plaintiffs' claims nor the Defendants' justification of the citizenship question are remotely related to the admission of noncitizens, let alone to national security.

Plaintiffs' allege facts more than sufficient to infer that adding the citizenship question was motivated by a "bare . . . desire to harm a politically unpopular group," and thus a violation of the equal protection clause even applying rational basis review. *Dep't of Agriculture v. Moreno*, 413 U. S. 528, 534 (1973); *see also Trump*, 2018 WL 3116337, at *25 (noting established case law striking down governmental action even without heightened scrutiny when that action is "inexplicable by anything but animus") (Kennedy, J, concurring) (quoting *Romer v. Evans*, 517 U.S. 620, 632 (1996)); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (striking down decision under rational basis review that "rest[s] on an irrational prejudice").

The Complaint pleads facts showing that the "sheer breadth" of the decision to add a citizenship question "is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects" and thus "lacks a rational relationship to legitimate state interests." *Romer*, 517 U.S. at 632. In addition to detailing how each of the *Arlington Heights* factors are satisfied, the Complaint also explains why the VRA rationale offered by Secretary Ross is a flimsy pretext. *See* Compl. ¶¶ 8, 183–92. Defendants'

machinations to conceal the origin and genesis of the citizenship question reinforce that conclusion. There is no rational, legally defensible reason for Defendants' conduct.

* * *

The Complaint presents more than just the "mosaic" of discrimination evidence required to create an inference of intentional discrimination—it details hard facts that touch on each *Arlington Heights* factor and provides a compelling case for racial and national origin animus. Indeed, the Trump Administration's undisguised policy is one of unprecedented and undisguised animus toward immigrants (at least those immigrants who are the "wrong" color or religion). Therefore Plaintiffs' allegations of intentional discrimination re more than sufficient for the pleading stage. *Cf. E.E.O.C. v. Port Auth. of New York & New Jersey*, 768 F.3d 247, 254 (2d Cir. 2014) (holding that "a discrimination complaint need not allege facts establishing each element of a prima facie case of discrimination to survive a motion to dismiss").

III. CONCLUSION

Defendants chose to corrupt the Decennial Census, departing from longstanding practice and the widely accepted view that it should be above politics and focused to the singular goal of an accurate enumeration. The Court should deny Defendants' motion and afford Plaintiffs an opportunity to prove their claims on the merits.

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