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11 IN THE UNITED STATES DISTRICT COURT
 12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 13 SAN FRANCISCO DIVISION

17 **STATE OF CALIFORNIA, by and through**
Attorney General Xavier Becerra;
 18 **COUNTY OF LOS ANGELES; CITY OF**
LOS ANGELES; CITY OF FREMONT;
 19 **CITY OF LONG BEACH; CITY OF**
OAKLAND; CITY OF STOCKTON,

20 Plaintiffs,

21 v.

23 **WILBUR L. ROSS, JR., in his official**
capacity as Secretary of the U.S.
 24 **Department of Commerce; U.S.**
DEPARTMENT OF COMMERCE; RON
 25 **JARMIN, in his official capacity as Acting**
Director of the U.S. Census Bureau; U.S.
 26 **CENSUS BUREAU; DOES 1-100,**

27 Defendants.
 28

3:18-cv-01865

**PLAINTIFFS' OPPOSITION TO
 DEFENDANTS' MOTION FOR
 SUMMARY JUDGMENT**

Date: December 7, 2018
 Time: 10:00 a.m.
 Dept: 3
 Judge: The Honorable Richard G.
 Seeborg
 Trial Date: January 7, 2019
 Action Filed: March 26, 2018

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INTRODUCTION

1
2 The last six decennial census questionnaires sent to every household in the country have not
3 asked about citizenship. And for good reason. The Census Bureau (Bureau) has long opposed
4 adding a citizenship question because its own studies show that doing so would deter
5 participation in and undermine the accuracy of the decennial census.

6 Ignoring this precedent, Secretary of Commerce Wilbur Ross announced this March his
7 eleventh-hour decision to add a citizenship question to the 2020 Census. His decision was made
8 despite (1) the Bureau's recommendation that he *not* include the citizenship question,
9 (2) quantitative and qualitative evidence that the question will significantly depress census
10 response rates and yield inaccurate citizenship data, and (3) the Bureau's failure to pretest the
11 question in violation of governing regulations and established Bureau policies. Plaintiffs¹—all
12 which have a disproportionate share of the nation's non-citizen residents—are already expending
13 substantial funds to mitigate the harm caused by the citizenship question, face considerable losses
14 in federal funding, and are likely to lose their fair share of representation in Congress.

15 Each of Defendants' three arguments for summary judgment is unavailing. First,
16 Defendants argue that Plaintiffs lack standing because their injuries are purportedly too
17 speculative and not fairly traceable to Secretary Ross's decision. Defendants' standing
18 argument—based on nothing more than factual disputes—disregards the harm Plaintiffs have
19 suffered and will suffer. Second, Defendants argue that Plaintiffs cannot prevail on their
20 Enumeration Clause claim because the Secretary intends to conduct a person-by-person
21 enumeration. But the Court has rejected this argument and should do so again, particularly
22 because Defendants' motion fails to address evidence that the citizenship question will impact
23 congressional apportionment. Third, Defendants argue that the Secretary's decision to add a
24 citizenship question did not violate the Administrative Procedure Act (APA) because it was
25 reasonable. Not so. The record shows that Secretary Ross's decision was, in every respect,
26 arbitrary and capricious and contrary to law.

27 ¹ Plaintiffs are the State of California, County of Los Angeles, and Cities of Los Angeles,
28 Fremont, Long Beach, Oakland and Stockton, as well as intervenor Los Angeles Unified School
District (LAUSD).

1 Defendants' motion should be denied in its entirety, and this action should proceed to trial.

2 BACKGROUND

3 I. LEGAL AND HISTORICAL BACKGROUND OF THE CENSUS

4 The U.S. Constitution requires an "actual Enumeration" of the population every ten years
5 by counting "the whole number of persons in each State," without regard to citizenship status.
6 U.S. Const. art. I, § 2, cl. 3 & amend. XIV. There has been no citizenship question on the
7 decennial census since 1950. AR 1314; Decl. Handley 7; *see also* Abowd Dep. (Aug. 29, 2018),
8 Ex. 3 [1950 Census Questionnaire]. The sole constitutional purpose of the census is
9 congressional apportionment. Pub. L. No. 105-119, § 209(a)(2); U.S. Const. art. I, § 2, cl. 3. In
10 addition to this purpose, the federal government relies on census data to distribute hundreds of
11 billions of dollars of funding each year. Decl. Reamer 4.

12 Under the Census Act, Congress delegated its constitutional duty to conduct the census to
13 the Secretary of Commerce and the Bureau, a federal statistical agency within the Department of
14 Commerce. 13 U.S.C. §§ 2, 4, 141(a). Congress has placed fundamental limits on the
15 Secretary's discretion, declaring it "essential" to obtain a population count that is "as accurate as
16 possible, consistent with the Constitution and laws of the United States," and subordinating the
17 Secretary's authority to collect other information to this paramount goal. Pub. L. No. 105-119
18 (codified at 13 U.S.C. § 141 note).

19 Although Congress has delegated to the Secretary its constitutional duty to conduct the
20 census, the Secretary does not have unfettered discretion in carrying out that duty. *Wisconsin v.*
21 *City of New York*, 517 U.S. 1 (1996). The Secretary's actions must bear "a reasonable
22 relationship to the accomplishment of an actual enumeration of the population, keeping in mind
23 the constitutional purpose of the census," which is "to determine the apportionment of the
24 Representatives among the states." *Id.* at 19-20.

25 II. SECRETARY ROSS'S DECISION TO ADD THE CITIZENSHIP QUESTION TO THE 2020 26 CENSUS

27 In March 2017, the Bureau submitted to Congress a report listing five subjects for the 2020
28 Census: age, gender, race/ethnicity, relationship, and homeowner status. AR 204–213; *see* 13

1 U.S.C. § 141(f)(1) (requiring the Secretary to submit a report identifying the “subjects proposed
2 to be included, and the types of information to be compiled” in the 2020 Census by March 2017).
3 The report informed Congress that citizenship would be among the topics included on the
4 American Community Survey (ACS), but not on the decennial census. AR 214–267.

5 The Secretary began considering whether to add a citizenship question to the decennial
6 questionnaire “[s]oon after [his] appointment as Secretary of Commerce.” AR 1321; Comstock
7 Dep. 54:16-55:4. On April 5, 2017, Chief White House Strategist Steve Bannon asked to speak
8 with the Secretary about the census. AR 2561. Around the same time, “at the direction of Steve
9 Bannon,” the Secretary spoke with Kris Kobach, vice chair of the Presidential Advisory
10 Commission on Election Integrity, about the citizenship question—and, specifically, Kobach’s
11 view (contrary to law, *see Evenwel v. Abbott*, 136 S. Ct. 1120, 1129, 1132 (2016)) that it was a
12 “problem” that undocumented persons were included in the census count for apportionment
13 purposes.² AR 763–764. Rather than seek the advice of Bureau staff, the Secretary enlisted Earl
14 Comstock, director of the Commerce Department’s Office of Policy and Strategic Planning, along
15 with Commerce Department legal counsel, to determine whether non-citizens are included in the
16 census count and how to add a citizenship question to the 2020 Census questionnaire. AR 2521,
17 3705, 3710; Comstock Dep. 63:18-21.

18 The Secretary grew impatient with the lack of progress, urging Comstock in early April
19 2017 that “we must get our [Census] issue resolved” by month’s end, AR 3694 (emphasis in
20 original), and complaining on May 2, 2017, that “nothing have [*sic*] been done in response to my
21 months[’] old request that we include the citizenship question.” AR 3710. Comstock responded
22 that, to move forward, “we need to work with [the Department of] Justice to get them to request
23 that citizenship be added” and “to illustrate that DoJ has a legitimate need for the question.” *Id.*
24 Both Secretary Ross and Comstock acknowledged that they would need to be “very careful” to
25 prepare an administrative record that presented the decision in a defensible light. AR 12476.

26
27 _____
28 ² On July 14, 2017, Kobach followed up with an email to the Secretary containing proposed language for a citizenship question to be added to the Census. AR 764.

1 Comstock contacted the White House, which referred him to a DOJ aide. AR 12756, 2462,
2 3701. The aide directed Comstock to another member of DOJ’s staff, who suggested that
3 Comstock engage the Department of Homeland Security (DHS) instead.³ AR 12756. DHS also
4 declined to pursue the citizenship question. After Comstock came up short, the Secretary
5 determined that he would “call the AG” directly. AR 12476, 2652.

6 Six months after he began contemplating a citizenship question, and four months after
7 Comstock set out to find a sponsoring agency, Secretary Ross finally found his audience in
8 Attorney General Jeff Sessions. One of Attorney General Sessions’s senior advisors quickly
9 confirmed that “it sounds like we can do whatever you all need us to do” and “[t]he AG is eager
10 to assist.” AR 2651. Indeed, several months later, in an undated letter received by the Bureau on
11 December 12, 2017, DOJ issued a “formal[] request[]” for the addition of a citizenship question
12 on the 2020 Census questionnaire. AR 663–665. The letter—signed not by an attorney from the
13 Voting Section of the Civil Rights Division, but by Arthur Gary, General Counsel of the Justice
14 Management Division—stated that block-level citizenship data “is critical to the Department’s
15 enforcement of Section 2 of the Voting Rights Act” and that “the decennial census questionnaire
16 is the most appropriate vehicle for collecting that data.”⁴ AR 663.

17 Following receipt of Gary’s letter, Karen Dunn Kelley, Under Secretary of Economic
18 Affairs at the Department of Commerce, contacted senior data scientists at the Bureau, led by
19 John Abowd, the Bureau’s Chief Scientist and Defendants’ expert in this action, to conduct a
20 technical review of whether to add a citizenship question. Kelley Dep. 99:11–101:22.
21 Dr. Abowd was not aware of the potential citizenship question before the Gary letter. AR 3354;
22 Abowd Dep. (Aug. 15, 2018) 12:19–13:1. Abowd’s team performed a technical review of three
23 options to address DOJ’s stated need for block-level citizenship data: Alternative A, which
24 would make no changes in the Bureau’s data collection practices (*i.e.*, requiring DOJ to rely on
25 existing sources of citizenship data, such as the ACS, for Voting Rights Act (VRA) enforcement

26 ³ DOJ had already reported the potential changes it would like to see on the ACS
27 Questionnaire for the 2020 Census; the changes did not involve a citizenship question. AR 311.

28 ⁴ In his deposition, Acting Assistant Attorney General John Gore disagreed with this
conclusion and admitted not knowing whether census-based citizenship data would be more
accurate than ACS data. Gore Dep. 226:1–228:20; 422:11–17.

1 purposes); Alternative B, which would add a citizenship question to the decennial questionnaire;
2 and Alternative C, which would obtain citizenship data for as much of the 2020 Census
3 population as possible by using data from administrative records. AR 1277.

4 On December 22, 2017, Ron Jarmin, the Bureau's acting director, relayed to Gary the
5 Bureau's preliminary findings that Alternative C (using administrative records) "would result in
6 higher quality data produced at lower cost" and proposed "a meeting of Census and DOJ
7 technical experts to discuss the details of this proposal." AR 5491. Gary shared the Bureau's
8 suggestion of an alternative proposal with Gore, who did not inquire further about the proposal.
9 Gore Dep. 267:10-268:11. Ultimately, at the direction of the Attorney General, DOJ refused to
10 meet or otherwise engage with the Bureau about alternatives, explaining that Gary's "letter
11 requesting citizenship be added to the 2020 Census fully describes their request." AR 3460; Gore
12 Dep. 271:21-272:16.

13 In a memorandum dated January 19, 2018, Abowd and his team detailed their review. The
14 memorandum, circulated in draft form, concluded that Alternative B "is very costly, harms the
15 quality of the census count, and would use substantially less accurate citizenship status data than
16 are available from administrative sources," and recommended either Alternatives A or C instead.
17 AR 1312. These conclusions were supported by a comprehensive analysis, including the
18 anticipated impact of each alternative on response rates, data quality, and cost, and by responses
19 to a set of 35 written questions from Commerce officials. AR 1279–1297.

20 Undeterred by the Bureau's findings, Secretary Ross asked Abowd's team to consider a
21 new proposal, Alternative D—a hybrid of Alternatives B and C intended to use the citizenship
22 question to supplement gaps in administrative record data. AR 1308. In a memorandum dated
23 March 1, 2018, most of which is spent analyzing "the weaknesses in Alternative C," Abowd
24 ultimately concluded that "Alternative D would result in poorer quality citizenship data than
25 Alternative C" because "[i]t would still have all the negative cost and quality implications of
26 Alternative B outlined in the draft January 19, 2018 memorandum to the Department of
27 Commerce." AR 1312. Alternative D "would raise questions about why 100 percent of
28 respondents are being burdened by a citizenship question to obtain information for the two

1 percent of respondents where it is missing.” *Id.* And it would not only “lead to more incorrect
2 enumerations,” but would likely “increase the number of persons who cannot be linked to the
3 administrative data because the [data obtained through follow-up procedures] is lower quality
4 than the self-response data.” AR 1311.

5 Given the firm opposition of Bureau experts to adding a citizenship question, Secretary
6 Ross and his staff began contacting external stakeholders to solicit support. Yet finding
7 stakeholders who could “give a professional expression of support for the proposal in contrast to
8 the many folks . . . against the proposal” proved challenging. AR 4853. Indeed, six former
9 Bureau directors wrote to Secretary Ross to oppose the citizenship question and warned that
10 adding the question without first subjecting it to the Bureau’s well-established pretesting
11 standards and requirements “would put the accuracy of the enumeration and success of the census
12 in all communities at grave risk.” AR 1057-58.

13 On March 26, 2018, Secretary Ross issued a memorandum announcing his decision to add a
14 citizenship question to the 2020 Census and directing Kelley to communicate this decision to
15 Bureau staff and Congress before March 31, 2018. AR 1313-1320. Although the decisional
16 memorandum is written as if in direct response to DOJ’s request, AR 1313, Secretary Ross
17 acknowledged in a supplemental memorandum—submitted on June 21, 2018, months after this
18 action was filed—that the citizenship question originated from “senior Administration officials,”
19 not DOJ, and that he had deliberated with other “Federal Government components” before
20 soliciting DOJ’s involvement. AR 1321.

21 **III. THE ADMINISTRATIVE RECORD AND EXTRA-RECORD DISCOVERY IN THIS ACTION**

22 Defendants filed the initial administrative record in this action on June 8, 2018, and
23 supplemented it on June 21, 2018. ECF Nos. 23, 33. In response to the court’s order in the
24 related census case, *State of New York v. U.S. Dept. of Commerce*, Case No. 1:18-cv-02921
25 (S.D.N.Y.) (New York action), Defendants further supplemented the administrative record by
26 producing documents on July 23 and 27, and August 3, 2018.⁵ Defendants have agreed that the

27 ⁵ The documents produced on these dates as part of the supplemental record were not filed
28 with this court. Defendants filed a notice in the New York action with a link to a zip file where

1 administrative record consists of not only the initial record that Defendants filed but also these
 2 and other additional documents specified in stipulations reached in the New York action. Decl.
 3 Wise ¶ 2 & Exs. 1, 2, 3.

4 On August 20, 2018, this Court issued an order permitting Plaintiffs to take discovery
 5 consistent with the discovery order in the New York action. ECF No. 76. Thereafter, Defendants
 6 and the U.S. Department of Justice produced documents, Plaintiffs deposed Defendant-affiliated
 7 witnesses, and both sides deposed each other's expert witnesses.

8 LEGAL STANDARD

9 A party moving for summary judgment “has both the initial burden of production and the
 10 ultimate burden of persuasion” on the motion. *Nissan Fire & Marine Ins. Co. v. Fritz Cos., Inc.*,
 11 210 F.3d 1099, 1102 (9th Cir. 2000). “In order to carry its burden of production, the moving
 12 party must either produce evidence negating an essential element of the nonmoving party's claim
 13 or defense or show that the nonmoving party does not have enough evidence of an essential
 14 element to carry its ultimate burden of persuasion at trial.” *Id.* To carry its ultimate burden of
 15 persuasion on the motion, the moving party must persuade the court that there is no genuine issue
 16 of material fact.” This is a “heavy burden.” *Ambat v. City and County of S.F.*, 757 F.3d 1017
 17 (9th Cir. 2014).

18 ARGUMENT

19 I. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FAILS BASED ON BOTH THE 20 ADMINISTRATIVE RECORD ALONE AND THE FULL EVIDENTIARY RECORD

21 Extra-record evidence is admissible in this case because every exception to limited record-
 22 review applies: the decision-maker acted in bad faith, extra-record evidence is necessary to
 23 determine whether agencies considered all factors, the agencies relied on documents not in the
 24 record, and the case involves technical and complex subject matter. *See Ranchers Cattlemen*
 25 *Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1117 (9th
 26 Cir. 2007). Defendants suggest that this Court should not consider evidence outside the
 27 _____
 28 the documents were available for download. New York action, ECF No. 67. For the Court's ease
 of reference, Plaintiffs submit with this opposition all documents they cite from the administrative
 record.

1 administrative record, with the exception of evidence related to Plaintiffs’ standing. Defs’ Mot.
2 Summ. J. 19-20. But the Court need not resolve that issue to decide this motion for summary
3 judgment, because the motion can be denied on either the administrative record alone or the full
4 evidentiary record. Plaintiffs cite both the administrative record and extra-record evidence in this
5 opposition.

6 **II. PLAINTIFFS HAVE STANDING TO BRING THIS ACTION**

7 For standing, a plaintiff must have “(1) suffered an injury in fact, (2) that is fairly traceable
8 to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable
9 judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Each of these elements
10 is present in this case. Plaintiffs will suffer injuries—a decline in federal funding, costs incurred
11 from additional census outreach efforts, and one or more lost congressional seats—because of the
12 differential undercount that is traceable to the inclusion of a citizenship question on the 2020
13 Census. Removing the citizenship question from the 2020 Census will avert these injuries.

14 **A. The Citizenship Question Will Cause a Differential Undercount in** 15 **Plaintiffs’ Jurisdictions**

16 Adding a citizenship question to the 2020 Census will injure Plaintiffs by causing an
17 undercount of their residents. The Bureau acknowledges that certain populations that the Bureau
18 describes as “hard-to-count,” including non-citizens, immigrants, and Hispanics, will be more
19 likely than other populations to refuse to respond to the Census because they do not trust the
20 federal government with their citizenship information. AR 10386DRB-10393DRB, 13026. For
21 this reason, the Bureau’s Non-Response Follow-Up (NRFU) efforts—that is, the Bureau’s efforts
22 to determine the status and number of residents from households that did not respond to the
23 census questionnaire—will also be largely ineffective at counting these populations. Decl.
24 O’Muircheartaigh 11-12; Decl. Barreto ¶¶ 45-61. Because California has more residents in these
25 subpopulations than any other state, the undercount caused by the citizenship question will be
26 greatest in California—or in other words, “differential.” Decl. Barreto ¶¶ 17, 110-112, 125; Decl.
27 Fraga 19.
28

1 **1. Because of the citizenship question, Plaintiffs’ residents will respond**
2 **to the 2020 Census at a lower rate than other populations**

3 The addition of the citizenship question will cause fewer people to respond to the 2020
4 Census. AR 1311; COM_DIS00009886; Abowd Dep. (Aug. 29, 2018) 242-243. Plaintiff’s
5 expert Dr. Matthew Barreto, Ph.D. estimates based on empirical survey evidence that between 7.1
6 and 9.7 percent of the nationwide population will not respond to the census as a result of the
7 citizenship question. Decl. Barreto ¶ 19. In California, the drop-off is estimated to be the worst
8 of any state in the nation—between 12.3 and 18 percent of the population. *Id.* at ¶ 20.
9 Extrapolating for household-sizes and state-by-state demographics, 12.51 percent of Californians
10 would not be reported, also the highest in the nation. Decl. Fraga 17, 18.

11 Defendants do not deny in their motion that the citizenship question will cause fewer people
12 to respond to the 2020 Census. Defs.’ Mot. Summ. J. 8-9, 12-13. They cannot do so, because the
13 Bureau’s own studies reach the same conclusion. AR 1277, 11639-11640; COM_DIS00009834
14 (“The evidence in this paper also suggests that adding a citizenship question to the 2020 census
15 would lead to lower self-response rates in households potentially containing non-citizens”);
16 Abowd Dep. (Oct. 5, 2018) 358:12-17. The Bureau estimates that, just among households with at
17 least one non-citizen, there will be a 5.8 percent decline in self-response relative to all-citizen
18 households. COM_DIS00009871. The Bureau characterizes this most recent estimate as
19 “conservative” because “the level of [census respondents’] concern about using citizenship data
20 for enforcement purposes may be very different in 2020” than in previous census years. *Id.*

21 In short, the parties agree that the citizenship question will cause a decrease in responses to
22 the 2020 Census, and that effect will be greater in California than in any other state.

23 **2. The differential undercount will remain following the Bureau’s**
24 **“combined enumeration” efforts**

25 The Bureau’s follow-up enumeration efforts will be insufficient to prevent a differential
26 undercount of Plaintiffs’ residents. Such efforts have a limited track record of success and will be
27 hampered by the initial differential non-response caused by the citizenship question.
28

1 There has been a differential undercount of hard-to-count subpopulations—in particular, the
2 Hispanic population, the immigrant population, and non-citizens in general—in all recent
3 censuses. AR 1286. All available evidence indicates that this trend will continue, particularly for
4 members of these populations who choose not to respond to the 2020 Census because of the
5 citizenship question. The Bureau admits that, in 2020, the NRFU efforts of census enumerators
6 will likely be less successful for hard-to-count populations than for other populations. Abowd
7 Dep. (Oct. 12, 2018) 263:20-264:5. Given the sensitivity of the citizenship question, those
8 refusing to initially self-respond because of the question are particularly unlikely to respond to
9 follow-up contacts. Abowd Dep. (Oct. 12, 2018) 255:16-256:6; COM_DIS00009874 at 42 n.59
10 (“If a household declines to self-respond due to the citizenship question, we suspect it would also
11 refuse to cooperate with an enumerator coming to their door, resulting in a need to use a proxy”);
12 Decl. O’Muirheartaigh 5, 13; Decl. Barreto ¶¶ 12-15. As with the initial non-response, the
13 failure of the NRFU efforts of census enumerators reflects the lack of trust among these
14 subpopulations that the federal government will protect the confidentiality of their responses.
15 Decl. O’Muirheartaigh 2; Decl. Barreto ¶¶ 25-26.

16 Following enumerator NRFU, the Bureau’s “final attempt” procedures of imputation
17 through administrative records and proxy enumeration (information provided by a willing
18 respondent, such as a neighbor or landlord) will also fail to fully mitigate the undercount resulting
19 from the citizenship question.⁶ The Bureau acknowledges that, for hard-to-count populations,
20 there are gaps in the administrative data used for enumeration. Abowd Dep. (Oct. 12, 2018)
21 255:2-8. Non-citizens, for example, are among the groups for which administrative records are
22 least likely to exist. Decl. O’Muirheartaigh 14-15 (citing AR 1310-1311). And given the
23 perceived threat from the citizenship question, willing and knowledgeable proxy respondents will
24

25
26 ⁶ Although Defendants do not identify the statistical method of count imputation as a
27 “combined enumeration” strategy, that approach would also be insufficient to mitigate the non-
28 response because of differences between responding households and non-responding households.
Decl. O’Muirheartaigh 16; Decl. Barreto ¶¶ 39-40, 51-52; *see also* Abowd Dep. (Oct. 12, 2018)
109:3-22.

1 likely be more difficult to find in neighborhoods where a substantial proportion of households
2 contain a non-citizen. Decl. O’Muirheartaigh 16; Abowd Dep. (Oct. 12, 2018) 255:16-256:13.

3 Because the Bureau’s NRFU efforts will not fully remediate the large initial non-response
4 caused by the citizenship question, the differential undercount of Californians will remain.

5 **B. The Differential Undercount Resulting from the Citizenship Question Will**
6 **Injure Plaintiffs**

7 An undercount resulting from the citizenship question will imminently and concretely
8 injure Plaintiffs, even if the undercount is slight. Defendants have submitted no admissible
9 evidence that addresses the size or effects of an undercount that will result from the citizenship
10 question. Their expert, Dr. Stuart Gurrea, an economist, admits that he has no expertise in NRFU
11 or knowledge of how successful the Bureau’s NRFU will be in 2020. Gurrea Dep. 32:15-18,
12 103:23-104:4. Dr. Gurrea’s “opinions” are based entirely on assumptions about NRFU success
13 that Defendants provided to him, and for which Defendants have submitted no basis in fact or
14 expert opinion. Gurrea Report ¶ 54; Gurrea Dep. 121:9-122:1.

15 Indeed, Plaintiffs will experience at least three types of injury as a result of the citizenship
16 question. First, Plaintiffs will lose federal funds as a result of the undercount. If a differential
17 undercount occurs, no matter the size of the undercount, California will lose funds from
18 numerous federal programs, including: Title I grants to education agencies; Women, Infants, and
19 Children (WIC) grants; and social service block grants. Decl. Reamer 5, 26-28. Defendants
20 appear to concede this point, and dispute only whether such losses are “material.” Yet no
21 “materiality” requirement exists for standing based on financial loss. “For standing purposes, a
22 loss of even a small amount of money is ordinarily an injury.” *Czyzewski v. Jevic Holding Corp.*,
23 137 S. Ct. 973, 983 (2017); *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017)
24 (“A dollar of economic harm is still an injury-in-fact for standing purposes.”). California is likely
25 to lose millions of dollars, but even if California were to experience a decline in federal funding
26 of only .01 percent, as Defendants’ expert suggests in one scenario, the State would still lose
27 more than \$200,000 in Title I funding, alone. Gurrea Report 28; *see also id.* at 29-30.

28

1 Second, in an attempt to mitigate the undercount caused by the citizenship question,
2 California has appropriated and begun spending \$90.3 million, largely for community outreach.
3 Request for Judicial Notice (RJN) Exs. B at CAL000147; C at CAL000152-154; D at
4 CAL000162, CAL000230; E at CAL000235-253; F at CAL000269-273, CAL000278-279,
5 CAL000292-294; I at CAL000411; J at CAL000443-444; K at CAL000540; L at CAL000717
6 (detailing the Legislature’s additional appropriations to California’s Complete Count efforts
7 because of the citizenship question). California’s budget for the 2020 Census swelled because of
8 the addition of the citizenship question. *See, e.g.*, RJN Exs. A at CAL000001-5; G at
9 CAL000322-323; H at CAL000364-369.

10 Third, California is likely to lose at least one congressional seat as a result of the citizenship
11 question. Decl. Fraga 3-4, 17-18, 21-28; *see also* Decl. Barreto ¶¶ 20, 110-140. The empirical
12 survey evidence estimates that between 12.3 and 18 percent of Californians will refuse to respond
13 to the Census. Decl. Barreto ¶ 20. Based on that data and the national non-response rates,
14 California may lose as many as *three* congressional seats, if the Bureau’s NRFU efforts are
15 unsuccessful. Decl. Fraga 10-13, 21-23; *see also id.* at 56-58.

16 California’s county and city co-plaintiffs, as well as LAUSD, will also suffer these harms.
17 Take the County of Los Angeles, which, after receiving additional funds from the State of
18 California, will still need to spend more than \$2.6 million of its own funds on community
19 outreach as result of the citizenship question. Decl. Baron ¶¶ 4-9; RJN No 1. Or LAUSD, which
20 stands to lose its fair share of Title I grants distributed by the State. Decl. Reamer 16. Any of
21 these injuries confers standing upon all of the Plaintiffs, because “once the court determines that
22 one of the plaintiffs has standing, it need not decide the standing of the others.” *Leonard v.*
23 *Clark*, 12 F.3d 885, 888 (9th Cir. 1993) (citing *Carey v. Population Servs. Int’l*, 431 U.S. 678,
24 682 (1977)); *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017).

1 **C. Plaintiffs' Injuries Are Traceable to the Citizenship Question and**
2 **Redressable by Its Removal**

3 As this Court held in its Order denying Defendants' Motion to Dismiss, Plaintiffs' injuries
4 are traceable to the citizenship question and redressable by its removal from the 2020 Census
5 questionnaire. Defendants offer no new arguments nor any evidence on these issues.

6 "Caustion may be found even if there are multiple links in the chain connecting the
7 defendant's unlawful conduct to the plaintiff's injury, and there's no requirement that the
8 defendant's conduct comprise the last link in the chain." *Mendina v. Garcia*, 768 F.3d 1009,
9 1012 (9th Cir. 2014) (citing *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997)). The key question is
10 whether the "government's unlawful conduct is at least a substantial factor motivating the third
11 parties' actions." *Id.* at 1013 (internal citations and quotations omitted).

12 Here, the evidence shows that the citizenship question will directly cause some people not
13 to respond at all to the 2020 Census. Decl. Barreto ¶¶ 17-20. The differential undercount that
14 results will harm Plaintiffs. Defendants' act of adding the question to the census is a "substantial
15 factor" in such harm, which would be redressed by removing the question.

16 **III. DEFENDANTS VIOLATED THE ENUMERATION CLAUSE AND ARE NOT ENTITLED TO**
17 **SUMMARY JUDGMENT ON THAT CLAIM**

18 The Enumeration Clause of the Constitution requires Secretary Ross's actions to bear "a
19 reasonable relationship to the accomplishment of an actual enumeration of the population,
20 keeping in mind the constitutional purpose of the census," which is "to determine the
21 apportionment of the Representatives among the states." *Wisconsin*, 517 U.S. at 19-20. The
22 addition of the citizenship question was unreasonable under *Wisconsin* because the Secretary's
23 decision "affirmatively interferes with the actual enumeration" by causing an undercount, and that
24 effect is not counterbalanced by a reasonable governmental purpose. ECF No. 75 at 29.

25 Defendants first contend that the *Wisconsin* standard does not apply here, asserting that the
26 Enumeration Clause only requires Secretary Ross to conduct a "person-by-person headcount"
27 rather than conduct the census through estimate or conjecture. Defs.' Mot. Summ. J. 15. No
28 legal authority supports this argument, and this Court correctly rejected it in its Order Denying

1 Motion to Dismiss. ECF No. 75 at 28-29. As this Court reasoned, Defendants’ interpretation of
 2 the clause is overbroad, because it would mean that the Secretary’s exercise of discretion related
 3 to the census questionnaire would never be subject to judicial scrutiny, despite the “strong
 4 constitutional interest in [census] accuracy.” *Id.* at 28; *accord Utah v. Evans*, 536 U.S. 452, 478
 5 (2002). Nor would the *Wisconsin* standard effectively prohibit all demographic questions on the
 6 census or mean that the citizenship question is unconstitutional in every time period. *See* ECF
 7 No. 75 at 28. What matters is that, in the specific context and political climate of the 2020
 8 Census, the citizenship question will, in fact, be “uniquely impactful” on the enumeration. *Id.*

9 Defendants also argue that Plaintiffs cannot prove that the citizenship question would
 10 impact the accuracy of the census because Defendants expect that the Bureau’s NRFU efforts will
 11 correct the decline in the self-response “and result in a complete enumeration.” Defs.’ Mot.
 12 Summ. J. 17-18. As explained above in relation to standing, all available evidence indicates
 13 otherwise, and, at the very least, this argument merely raises a disputed fact for purposes of
 14 summary judgment. And while Defendants argue that complete accuracy is not required by the
 15 Constitution, they have not even attempted to meet their burden to defend the citizenship
 16 question’s effect on apportionment. In fact, Plaintiffs’ experts will show that malapportionment
 17 is likely. Decl. Fraga 3-4, 17-18, 21-28; *see also* Decl. Barreto ¶¶ 20, 110-140.

18 **IV. DEFENDANTS VIOLATED THE ADMINISTRATIVE PROCEDURE ACT AND ARE NOT**
 19 **ENTITLED TO SUMMARY JUDGMENT ON THAT CLAIM**

20 **A. Defendants Cannot Establish that Secretary Ross’s Decision Was Not**
 21 **Arbitrary and Capricious**

22 The Administrative Procedure Act “sets forth the procedures by which federal agencies are
 23 accountable to the public and their actions subject to review by the courts.” *Franklin v.*
 24 *Massachusetts*, 505 U.S. 788, 796 (1992). To ensure that agency actions are reasonable and
 25 lawful, a court must conduct a “thorough, probing, in-depth review” of the agency’s reasoning
 26 and a “searching and careful” inquiry into the factual underpinnings of the agency’s decision.
 27 *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971). After undertaking
 28 that review, a court “shall” set aside agency action if it is “arbitrary, capricious, an abuse of
 discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

1 Agency action should be set aside as arbitrary and capricious if the agency (1) fails to
2 disclose and explain the basis of its decision, (2) offers “an explanation for its decision that runs
3 counter to the evidence before the agency, or is so implausible that it could not be ascribed to a
4 difference in view or the product of agency expertise,” or (3) fails to “consider an important
5 aspect of the problem.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S.
6 29, 43 (1983); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). Here,
7 Defendants violated the APA on each of these grounds.

8 **1. The Secretary Failed to Disclose a Plausible, Non-Pretextual Basis for**
9 **the Agency’s Decision**

10 The APA requires an agency decision-maker to “disclose the basis of its” decision.
11 *Burlington Truck Lines*, 371 U.S. at 168 (internal quotation marks omitted). In cases where the
12 purported rationale for agency action is pretextual, the action must be set aside without further
13 inquiry. *See, e.g., N.E. Coal. on Nuclear Pollution v. Nuclear Regulatory Comm’n*, 727 F.2d
14 1127, 1130-31 (D.C. Cir. 1984); *Squaw Transit Co. v. United States*, 574 F.2d 492, 496 (10th Cir.
15 1978); *Pub. Citizen v. Heckler*, 653 F. Supp. 1229, 1237 (D.D.C. 1986).

16 Although Defendants contend that the existence of a memorandum purporting to provide a
17 basis for the Secretary’s decision is sufficient to withstand arbitrary-and-capricious review, this
18 argument fails where, as here, the memorandum’s function is to “provide a pretext for the ulterior
19 motive” of the decision-maker. *Woods Petroleum Corp. v. U.S. Dep’t of Interior*, 18 F.3d 854,
20 859 (10th Cir. 1994) (invalidating agency decision as arbitrary and capricious where action was
21 pretext for ulterior motive). Because the record establishes that the stated basis for the
22 Secretary’s decision is pretextual, summary judgment is inappropriate.

23 The Secretary’s decisional memorandum claims that receiving the letter from Arthur Gary
24 prompted him to take a “hard look” at whether a citizenship question could be helpful to DOJ in
25 providing data for VRA enforcement purposes. But in the eight months before receiving DOJ’s
26 letter, the Secretary had considered the impact of including non-citizens in the census count on
27 congressional apportionment, deliberated about taking census-related action with Steve Bannon
28 and Kris Kobach, and placed pressure on his staff to deliver a citizenship question on the census.

1 AR 763–764, 2561, 3694, 3710, 4004; *see D.C. Fed’n of Civic Ass’ns v. Volpe*, 459 F.2d 1231,
2 1237 (D.C. Cir. 1971) (Bazelon, J.) (overturning an agency decision where “impartial evaluation
3 of the project envisioned by the statute was impermissibly distorted by extraneous pressures”).

4 Indeed, uncontroverted facts demonstrate that the Secretary involved DOJ only after it
5 became apparent that his actual rationale for adding a citizenship question—to serve political
6 interests—would not withstand scrutiny. AR 12476. DOJ not only did not originate the request,
7 AR 1321, but rejected the Secretary’s bid that it do so. AR 2458. Defendants even pursued DHS
8 as a potential sponsoring agency, even though DHS does not enforce Section 2 of the VRA. *Id.*
9 DOJ only reconsidered after Secretary Ross personally lobbied the Attorney General. AR 2636,
10 2653, 4004. The Secretary then collaborated with DOJ to develop a letter giving the false
11 impression that DOJ initiated the request independently, AR 12756—even though just one year
12 earlier, DOJ had determined that it had no such need—and worked with staff to curate a
13 whitewashed administrative record to support this pretext.⁷ AR 12476. These efforts to conceal
14 the Secretary’s prejudgment of the issue provide further proof of the arbitrary and capricious
15 nature of Defendants’ decision. *Cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133,
16 147 (2000) (“In appropriate circumstances, the trier of fact can reasonably infer from the falsity
17 of the explanation that the employer is dissembling to cover up a discriminatory purpose.”).

18 The rationale supplied by the Gary letter—to enhance DOJ’s enforcement of Section 2 of
19 the VRA by providing statistics of the citizen voting-age population (CVAP) at the census block
20 level—is similarly pretextual. DOJ has enforced the VRA since its enactment in 1965, even
21 though block-level citizenship data from the decennial census has never been available over this
22 period. Decl. Karlan 6. No Section 2 case has ever failed on account of an absence of survey-
23 based citizenship data, such as from a census questionnaire. *Id.* at 7-11; Decl. Handley 4
24 (“[C]urrently available census data, including [ACS data], has proven to be perfectly sufficient
25 to ascertain whether an electoral system or redistricting plan dilutes minority votes[.]”). While
26 the Gary letter concludes that the decennial census questionnaire is the “most appropriate vehicle

27 ⁷ The administrative record was compiled by Sahra Park-Su, who received no training in
28 how to prepare an administrative record, and who simply “ke[pt] the record of all documents that
were handed to [her].” Park-Su Dep. 127:21-24; 188:20-25; 190:23-191:4.

1 for collecting” block-level citizenship data, the letter offers no explanation about why the
2 questionnaire itself would be superior to other methods of data collection, such as the use of
3 administrative records. AR 663-665; *California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d
4 1054, 1065 (N.D. Cal. 2018) (suspension of agency rule was arbitrary and capricious where
5 record evidence cited in support of agency’s stated concern “provides no citation or factual basis
6 for that claim”). Tellingly, the administrative record contains no evidence that shows that DOJ
7 needs block-level CVAP data. When internal Bureau experts questioned DOJ’s request and
8 sought clarifying information, DOJ declined to engage with the Bureau about workable
9 alternatives, and instead claimed that the Gary letter “fully describes their request.” AR 3460.

10 Defendants contend that the Secretary “reasonably accepted DOJ’s determination” that the
11 decennial questionnaire is the most appropriate means to obtain block-level citizenship data.
12 Defs.’ Mot. for Summ. J. 21; Comstock Dep. 176:5-9 (“[DOJ] were the people that needed it for
13 ACS, and our understanding was . . . you’d need to put it on the decennial census to do that.”).
14 The APA, however, “does not permit such a dodge.” *Del. Dep’t of Nat. Res. & Envtl. Control*,
15 785 F.3d 1, 16 (D.C. Cir. 2015) (reversing challenged rulemaking in which “EPA seeks to
16 excuse its inadequate responses by passing the entire issue off onto a different agency”). Gore
17 himself admitted that it is unnecessary to use the decennial questionnaire to obtain the requested
18 data, and he admitted not knowing whether census-based citizenship data would have greater
19 accuracy or smaller error margins than the existing citizenship data on which DOJ currently
20 relies. Gore Dep. 226:1-228:20; 422:11-17.

21 Defendants also assert that whether the Secretary’s decision was pretextual is of no
22 moment because the reviewing court must limit its consideration to the agency’s stated rationale,
23 irrespective of any policy preferences or additional reasons the decision-maker may have had.
24 Defs.’ Mot. for Summ. J. 23–24. But the clear requirement that the agency “disclose the basis”
25 of its decision establishes otherwise. *Burlington Truck Lines*, 371 U.S. at 168. Permitting an
26 agency to paper the record so as to conceal the actual basis for its decision would render this
27 requirement meaningless. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 248-49 (1972).
28

1 Because Defendants have not established and cannot establish that they disclosed a
2 plausible, non-pretextual basis for the Secretary's decision, summary adjudication of the APA
3 claim would be inappropriate.

4 **2. The Secretary's Decision Runs Counter to Evidence Before the**
5 **Agency**

6 Agency action is arbitrary and capricious if the agency offers "an explanation for its
7 decision that runs counter to the evidence before the agency...." *State Farm*, 463 U.S. at 43; *see*
8 *also, e.g., City of Kansas City, Mo. v. Dep't of Hous. & Urban Dev.*, 923 F.2d 188, 194 (D.C. Cir.
9 1991) ("Agency action based on a factual premise that is flatly contradicted by the agency's own
10 record does not constitute reasoned administrative decision-making and cannot survive review
11 under the arbitrary and capricious standard."). Defendants' decision should also be set aside
12 because it runs counter to substantial evidence before the agency in two critical respects.

13 First, the decision is contrary to the evidence that a citizenship question will depress census
14 response rates. Secretary Ross's decisional memorandum indicated that the impact of the
15 question on the response rate was an "important consideration" in his decision-making. AR 1317.
16 But he dismissed this concern as unsupported, claiming that "neither the Census Bureau nor the
17 concerned stakeholders could document that the response rate would in fact decline materially."
18 AR 1315. In fact, the Bureau had done just that. In his January 19, 2018 memorandum to Ross,
19 Dr. Abowd compared the response rate between citizen and non-citizen households to the 2010
20 Census and 2010 ACS questionnaires in an effort to determine whether the ACS citizenship
21 question deterred responses. Abowd's team calculated a net decline in self-responses to the ACS
22 by non-citizens in excess of five percent, and concluded that this would be a reasonable estimate
23 of the lower bounds of the decline in self-response rates that would occur if a citizenship question
24 is added to the 2020 Census questionnaire. AR 1280-1282.

25 Second, the decision is contrary to the evidence that asking a citizenship question in
26 conjunction with using administrative records (Alternative D) would yield *less* accurate
27 citizenship data than using administrative records alone (Alternative C). Accuracy was another
28 concern emphasized in the decisional memorandum. AR 1313, 1316, 1317. But the Bureau had

1 advised Ross in its March 1 memorandum that a “key difference” between Alternatives C and D
2 was that “Alternative D would result in poorer quality citizenship data than Alternative C.”
3 AR 1312, 1314. The Bureau had determined that, based on historical census and ACS data, non-
4 citizens misreport themselves as citizens “for no less than 23.8% of the cases, and often more
5 than 30%.” AR 1283, 1284, 1312. The self-reported citizenship data of non-citizens is thus
6 largely inaccurate.

7 Because Secretary Ross’s central assertions in the decisional memorandum about response
8 rates and citizenship data accuracy are directly contradicted by evidence proffered by the
9 Bureau’s own internal experts, those assertions cannot be accorded any weight. *See McDonnell*
10 *Douglas Corp. v. U.S. Dep’t of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (courts will
11 “not defer to the agency’s conclusory or unsupported suppositions”); *see also, e.g., Islander E.*
12 *Pipeline Co., LLC v. Conn. Dep’t of Env’tl. Prot.*, 482 F.3d 79, 99 (2d Cir. 2006) (reversing where
13 agency offered “no explanation for dismissing record evidence that runs counter to its findings”).
14 Accordingly, Defendants cannot establish that the decision to add a citizenship question was not
15 arbitrary and capricious for failure to account for the evidence before the agency.

16 3. The Secretary Failed to Consider Important Aspects of Adding the 17 Citizenship Question to the 2020 Census

18 An agency’s decision is also arbitrary and capricious where it fails to consider an
19 “important aspect of the problem.” *State Farm*, 463 U.S. at 43. In that regard, an agency must
20 engage in a meaningful examination of the potential costs of a decision along with the potential
21 benefits. *Friends of Santa Clara River v. U.S. Army Corps of Eng’rs*, 887 F.3d 906, 923 (9th Cir.
22 2018); *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017).
23 Thus, an agency acts arbitrarily and capriciously where it does not “adequately analyze the . . .
24 consequences” of its decision. *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932
25 (D.C. Cir. 2017).

26 Defendants failed to meaningfully examine important aspects of adding the citizenship
27 question in at least two respects: (1) they did not analyze whether an undercount would remain
28

1 after follow-up enumeration efforts, and (2) they did not adequately pretest the question in
2 accordance with well-established Bureau standards and policies.

3 **a. Defendants Never Considered Whether Follow-Up**
4 **Enumeration Efforts Would Prevent an Undercount**

5 Before Secretary Ross issued the decisional memorandum, none of the Defendants
6 examined whether the initial non-response resulting from the citizenship question would cause an
7 undercount, even after follow-up enumeration efforts. Conducting such an analysis is not only
8 “important,” *see State Farm*, 463 U.S. at 43, but fundamental to the census. Yet Defendants
9 looked only at the effects of initial non-response on data accuracy and NRFU costs. *See, e.g., AR*
10 *1278, 1317*. The failure to consider this important issue renders the decision to add the question
11 arbitrary and capricious.

12 **b. Defendants Disregarded the Fact that the Citizenship Question**
13 **Had Not Been Adequately Tested**

14 The development of the 2020 Census is governed in part by the Paperwork Reduction Act
15 of 1995, which directs the Office of Management and Budget (OMB) to issue “[g]overnmentwide
16 policies, principles, standards, and guidelines” governing “statistical collection procedures and
17 methods” that agencies are required to follow. 44 U.S.C. §§ 3504(e)(3)(A), 3506(e); 5 C.F.R.
18 § 1320.18(c). Under Congress’s direction, the OMB has issued Statistical Policy Directives
19 defining the standards that agencies, including the Bureau, must follow in developing and
20 pretesting survey content.⁸ The Bureau has also imposed rigorous standards by which data
21 collection instruments and supporting materials must be “pretested with respondents to identify
22 problems . . . and then be refined, prior to implementation.” Habermann Dep., Ex. 3 [U.S. Census
23 Bureau, Statistical Quality Standards], at i, ii, 8, 10 (reissued Jul. 2013); *see also AR 3890, 4773,*
24 *9865; Decl. Habermann 12-15; Decl. O’Muircheartaigh 4-7*. These standards and procedures are

25 ⁸ *See* Office of Mgmt. and Budget, Statistical Policy Directive No. 1, Fundamental
26 Responsibilities of Fed. Statistical Agencies and Recognized Statistical Units, 79 Fed. Reg.
27 71,610, 71,615 (Dec. 2, 2014), *available at* <https://www.bls.gov/bls/statistical-policy-directive-1.pdf>; Office of Mgmt. and Budget, Statistical Policy Directive No. 2, Standards and Guidelines
28 for Statistical Surveys §§ 1.3, 1.4, 2.3 (2006), 71 Fed. Reg. 55,522 (Sept. 22, 2006), *available at* https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/statpolicy/standards_stat_surveys.pdf.

1 mandatory: all Bureau employees “must comply” with them, and they “apply to all information
2 products released by the Bureau and the activities that generate those products,” including the
3 decennial census. Habermann Dep., Ex. 3, at ii, 2, 6.

4 When new questions are added to an existing survey, pretesting “must be performed” to
5 evaluate whether additions “cause potential context effects.” Habermann Dep., Ex. 3, at 8, 12-23.
6 Pretesting not only concerns the wording or placement of a question on a questionnaire, but also
7 tests for respondents’ cognitive perception of a question, response rates, and data quality and
8 accuracy. Habermann Dep., Ex. 3, at 7-8; Decl. Habermann 12-13. It is vital that questions are
9 tested for the particular questionnaire on which they will appear and under similar circumstances
10 that will govern the survey. O’Muircheartaigh Dep. 78-81. This is especially salient for
11 questions like the citizenship question that are deemed “sensitive” given the social and political
12 context in which they are to be administered. Habermann Dep. Ex. 3, at 8-9; O’Muircheartaigh
13 Dep. 81-82.

14 As Secretary Ross concedes in his decisional memorandum, the citizenship question has not
15 been pretested for placement on the 2020 Census; this failure violates the Bureau’s mandatory
16 standards and procedures. AR 1318-1319. Past and present Bureau officials—including six
17 former Bureau Directors—warned of the dangers of adding a question without following those
18 pretesting procedures. AR 1057-1058, 10386DRB. Although the Secretary concluded that no
19 testing for the citizenship question was required for the 2020 Census because a similar question
20 already appears on the ACS, AR 1319, that conclusion ignores the vast contextual differences
21 between the ACS and the decennial census. For example, the 2020 Census questionnaire is much
22 shorter than the ACS; a single question like the citizenship question could have a much greater
23 impact on the questionnaire as whole. O’Muircheartaigh Dep. 71-73. The 2020 Census is also
24 conducted under far greater scrutiny and publicity than the ACS, which could heighten the
25 sensitivity of the citizenship question and impact response rates. Habermann Dep. 32-34;
26 O’Muircheartaigh Dep. 69-70. And the 2020 Census will be administered under a starkly
27
28

1 different social and political climate from when the ACS questions were tested.⁹
2 O’Muircheartaigh Dep. 68–71. According to Dr. Abowd, the best way to test the question’s
3 effect on the census count and data collection would have been through a randomized controlled
4 trial, yet no such test was performed before the Secretary issued his decisional memorandum.
5 Abowd Decl. 4-5; Abowd Dep. (Aug. 15, 2018) 59-60, 83-84; Abowd Dep. (Aug. 29, 2018) 104-
6 105; Abowd Dep. (Oct. 5, 2018) 426-430.

7 Although pretesting may not be required for questions that “performed adequately in
8 another survey,” Habermann Dep., Ex. 3, at 8, the Secretary did not demonstrate—and
9 Defendants have not presented evidence—that the citizenship question “performed adequately”
10 on the ACS. To the contrary, the Bureau’s own analysis indicates that the question performs
11 poorly on that questionnaire, lowering response rates, and compromising data accuracy. AR
12 1284; O’Muircheartaigh Dep. 79–82. In light of those problems, the Bureau is presently
13 considering removing the citizenship question from the ACS. Abowd Dep. (Oct. 12, 2018) 178-
14 182. Thus, what pretesting data the Secretary may have had for the citizenship question on the
15 ACS, he set aside in favor of the unsupported conclusion that testing for the decennial census was
16 adequate.

17 These factors show that the decision to add the citizenship question without abiding by the
18 mandatory pretesting requirements was arbitrary and capricious. The decision evinces a failure to
19 consider an “important aspect of the problem”—that the question had not been adequately tested
20 for placement specifically on the 2020 Census in violation of the Bureau’s well-established
21 mandatory standards and procedures. *See State Farm*, 463 U.S. at 43. It is also an “irrational
22 departure” from agency policy and procedure “that must be overturned as ‘arbitrary, capricious,
23 [or] an abuse of discretion[.]’” *I.N.S. v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996) (quoting 5
24 U.S.C. § 706(2)(A)). The well-established, mandatory pretesting policies and procedures—which
25 the Secretary failed to meaningfully consider—constitute “regulations, established agency

26 ⁹ In fact, a national study commission by the Census Bureau concluded that the presence
27 of the citizenship question could be a “major barrier” to participation in the 2020 Census due in
28 part to those factors. *2020 Census Barriers, Attitudes, and Motivators Study (CBAMS) Survey and
Focus Groups: Key Findings for Creative Strategy* (Oct. 31, 2018), available at
<https://www2.census.gov/cac/nac/meetings/2018-11/mcgeeney-evans-cbams.pdf>.

1 policies, or judicial decisions,” that inform the Court of meaningful standards by which it may
2 review the Secretary’s decision. *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 868 (9th Cir.
3 2003); *see also Salazar v. King*, 822 F.3d 61, 76 (2d Cir. 2016) (“To determine whether there is
4 ‘law to apply’ that provides ‘judicially manageable standards’ for judging an agency’s exercise of
5 discretion, the courts look to the statutory text, the agency’s regulations, and informal agency
6 guidance that govern the agency’s challenged action.”). Even though the Census Act authorizes
7 the Secretary to conduct the census “in such a form and content as he may determine,” 13 U.S.C.
8 § 141(a), that authorization is not unlimited, and agency decisions are subject to judicial review.
9 *See Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 720 (9th Cir. 2011); *Spencer Enters.,*
10 *Inc. v. United States*, 345 F.3d 683, 688 (9th Cir. 2003).

11 For these reasons, Defendants’ failed to consider an important aspect of the citizenship
12 question—that it had not been adequately tested for placement on the 2020 Census questionnaire.

13 **B. Defendants Cannot Establish that Secretary Ross’s Decision Was Not**
14 **Contrary to Law**

15 **1. The Decision Violated the Census Act’s Reporting Requirement, 13**
16 **U.S.C. § 141(f)**

17 Courts must set aside agency actions and decisions that are made “in excess of statutory
18 jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C). The
19 Census Act sets forth an unambiguous process for selecting and amending questions to the
20 decennial census. 13 U.S.C. § 141(f). The Act requires the Secretary to, at least three years
21 before “the appropriate census date,” submit a report to Congress identifying the “subjects
22 proposed to be included, and the types of information to be compiled” in that census. *Id.*
23 § 141(f)(1). If the Secretary wants to amend or add to the proposed “subjects [or] types of
24 information,” he must submit a new report to Congress explaining that “*new circumstances exist*
25 *which necessitate*” modifications. *Id.* § 141(f)(3) (emphasis added).

26 The process by which the citizenship question was added to the 2020 Census violated
27 section 141(f)(3). In March of 2017, the Secretary submitted a report listing the subjects planned
28 for the 2020 Census; citizenship or immigration status was not on that list. AR 194-270;
Langdon Dep. 121-23. The Secretary did not, however, submit another report explaining what

1 “new circumstances” arose since March 2017 that necessitated the addition of a citizenship
2 question. The Secretary’s decisional memorandum contends that collecting citizenship data
3 would assist in VRA enforcement, but it does not explain how data gathered specifically via the
4 decennial census is *necessary* for that goal. AR 1313-1314. Nor does the memorandum explain
5 what circumstances changed since March 2017 that suddenly require the use of census-gathered
6 citizenship data for VRA enforcement. *Id.* Even DOJ did not consider citizenship data collected
7 through the decennial census questionnaire to be “necessary” for VRA enforcement, only that it
8 would be of assistance. Gore Dep. 298-300 & Ex. 25.

9 Defendants do not dispute that the Secretary failed to submit the report required under 13
10 U.S.C. § 141(f)(3) to modify the list of census topics. They do not identify what “new
11 circumstances” had arisen or argue that data gathered via the decennial census is necessary for
12 VRA enforcement. Defendants instead contend that the Secretary’s addition of the citizenship
13 question without submitting the report required under section 141(f)(3) is not subject to judicial
14 review. Defs.’ Mot. Summ. J. 24–25 (citing 5 U.S.C. § 551). That argument, however, ignores
15 the APA’s requirement for courts to set aside an agency decision—like the decision to add the
16 citizenship question—made in a manner that exceeds statutory authority. 5 U.S.C. § 706(2)(C);
17 *see also District of Columbia v. U.S. Dep’t of Commerce*, 789 F. Supp. 1179, 1188 n.16 (D.D.C.
18 1992) (“[A]most every court that has considered the issue has held that 13 U.S.C. § 141 does not
19 preclude judicial review.”). By violating the unambiguous process set forth in section 141(f), the
20 Secretary’s decision to add the citizenship question was unlawful under the APA.¹⁰

21 **2. The Decision Violated the Census Act’s Requirement of Using**
22 **Administrative Records Where Appropriate, 13 U.S.C. § 6(c)**

23 The Secretary’s decision to add a citizenship question to the 2020 Census also violates the
24 APA by exceeding statutory authority and limitations under section 6, subdivision (c) of the

25 _____
26 ¹⁰ Contrary to what Defendants suggest, Plaintiffs do not assert a separate cause of action
27 under the Information Quality Act. *See* Defs.’ Mot. Summ. J. 24-25.) Rather, the addition of the
28 citizenship question, without abiding by the mandatory agency standards and procedures,
demonstrates the arbitrary and capricious nature of the decision, in violation of the APA. *See*
Section IV.A.3.b, *supra*; *see also Lowry v. Barnhart*, 329 F.3d 1019, 1022 (9th Cir. 2003) (“An
agency’s regulations may create judicially enforceable duties.”).

1 Dated: November 16, 2018

Respectfully Submitted,

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