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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY OF SAN JOSE, a municipal corporation; and BLACK ALLIANCE FOR JUST IMMIGRATION, a California nonprofit corporation,

Plaintiffs,

vs.

WILBUR L. ROSS, JR., in his official capacity as Secretary of the U.S. Department of Commerce; U.S. DEPARTMENT OF COMMERCE; RON JARMIN, in his official capacity as Acting Director of the U.S. Census Bureau; U.S. CENSUS BUREAU,

Defendants.

Case No. 3:18-cv-2279-RS

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Date: December 7, 2018
Time: 10:00 a.m.
Dept: 3
Judge: The Hon. Richard Seeborg
Trial Date: January 7, 2019

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INTRODUCTION

The uncontroverted evidence set forth in the administrative record confirms that Secretary of Commerce Wilbur Ross ("Ross") decided to add a citizenship question to the 2020 Decennial Census (the "Census") in early 2017 for improper political reasons. After making that decision, Ross worked with senior members of the Trump administration to conceal his true motivations and provide a pretextual rationale for the decision. The evidence shows that Ross and his staff spent months working with the U.S. Department of Justice ("DOJ") to concoct a *post hoc* justification for the addition of the citizenship question. The result was a formal request from DOJ in late 2017 requesting citizenship data to assist with enforcing Section 2 of the Voting Rights Act ("VRA"). Shortly thereafter, Ross issued a memorandum announcing the addition of the citizenship question (the "Decision Memo"). He then lied about the process by which he made the decision in sworn testimony to Congress, coming clean only after this and related civil actions against him and the U.S. Department of Commerce ("Commerce") shed light on the true facts.

Along the way, Ross failed to follow or uphold the laws and procedures governing any decision to make material changes to the Decennial Census. He also disregarded the technical and scientific advice of his own experts in the U.S. Census Bureau ("Bureau"), who warned that adding the citizenship question would lead to an undercount and cause other problems. No deference need be given to such a patently improper, arbitrary, and capricious decision, and summary judgment should not be granted to Defendants.

As set forth in Plaintiffs' pending motion for partial summary judgment (Doc. No. 99), Plaintiffs should prevail on their APA claim based solely on the administrative record.[1] That same record precludes summary judgment in Defendants' favor. What is more, the evidence developed in the extra-record discovery ordered by this Court (summarized below), including documents produced by Commerce and DOJ, the deposition testimony of witnesses, and the parties' expert reports, confirms Ross's scheme to subvert the legal requirements for adding questions to the Decennial Census and to hide his true motivations from Congress and the American people.

[1] Plaintiffs incorporate by reference herein their partial summary judgment motion in its entirety.

Moreover, Plaintiffs have demonstrated the existence of standing in connection with their own motion for partial summary judgment. Defendants' contention that Plaintiffs may establish standing only by definitively proving what "will" happen as a result of including a citizenship question is not the law. Plaintiffs have standing so long as they can establish a substantial risk of injury, which they have amply done—both below and in their pending motion for partial summary judgment. Defendants' motion should be denied in its entirety.

LEGAL STANDARD

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To defeat a motion for summary judgment, the non-moving party must identify, with "reasonable particularity, the evidence that precludes summary judgment." *Marentes v. State Farm Mut. Auto. Ins. Co.*, 224 F. Supp. 3d 891, 903 (N.D. Cal. 2016). A court considering a summary judgment motion must consider the evidence "in the light most favorable to the nonmoving party." *Balint v. Carson City, Nev.*, 180 F.3d 1047, 1050 (9th Cir. 1999). In evaluating cross-motions for summary judgment, a court must "evaluate each motion separately, giving the nonmoving party in each instance the benefit of all reasonable inferences." *Am. Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1097 (9th Cir. 2003). In claims arising under the APA, the court's deference to the agency is not "unlimited" or "automatic" and a reviewing court must perform a "sufficiently probing" review of the agency's decision to ensure it is not arbitrary and capricious. *San Luis & Delta-Mendota Water Auth. V. Locke*, 776 F.3d 971, 994 (9th Cir. 2014).

ARGUMENT

I. PLAINTIFFS HAVE STANDING.[2]

Defendants erroneously claim that Plaintiffs' standing argument rests on two premises: (1) Plaintiffs are required to prove that there "will" be an actual undercount to establish standing; and

[2] The Court need not find that all plaintiffs have standing for the case to proceed. So long as the Court determines that one of the plaintiffs has standing, all of the plaintiffs may proceed with their claims. *See Carey v. Population Services Int'l*, 431 U.S. 678, 682 (1977) (where multiple plaintiffs join in asserting the same claim, if one plaintiff has standing, the court need not decide the standing of the other plaintiffs); *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993) (same).

(2) that there is no genuine dispute of material fact as to whether there "will" be an actual undercount. Both of these premises is wrong.[3]

A. Plaintiffs Need Not Prove that There "Will" Be an Actual Undercount to Establish Standing.

Plaintiffs' claims of concrete injury are based on various grounds, none of which requires proof that there "will" be an actual undercount. Rather, all of Plaintiffs' claims are based on the "substantial risk" of an undercount, which (1) has caused Plaintiffs to spend money now to mitigate that risk; (2) will injure them in the future if the substantial risk materializes; and (3) in BAJI's case, has placed its members in fear. (Pls.' Mot. (Doc. No. 99) at 10-18.)

First, both San Jose and BAJI have already expended money because of the addition of the citizenship question to the Census. At the time it filed its Complaint, San Jose had spent $50,000 preparing for the Census, a figure that has ballooned to over $300,000 today. What is more, San Jose expects to divert an additional $300,000 for outreach specifically because the citizenship question will be included. (Comp. ¶ 58; Ruster Decl. ¶ 12.)[4] BAJI has similarly diverted substantial resources for the same reason. (Comp. ¶ 23; Tometi Decl. ¶¶ 12–14.)

Second, both San Jose and BAJI will be harmed as a result of the addition of the citizenship question to the Census because of the substantial risk of a loss of funding to San Jose's and BAJI's respective constituents, and harm to BAJI's mission. (*See* Pls.' Mot. at 13-14.)

[3] Defendants do not argue that Plaintiffs lack prudential standing under Section 10(a) of the APA. *See* 5 U.S.C. § 702. Prudential standing requires that "the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute." *Nat'l Credit Union Admin. v. First Nat. Bank & Tr. Co.*, 522 U.S. 479, 488 (1998) (quoting *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970)). There is no question that Plaintiffs' interest in a fair and accurate census is within the zone of interest of the Census Act and the Enumeration Clause. Indeed, when it denied Defendants' Motion to Dismiss, this Court determined that Plaintiffs' claims "easily survive the zone of-interests test." (Aug. 17, 2018 Order Denying Defendants' Motion to Dismiss (Doc. No. 86) ("Order") at 12.)

[4] Plaintiffs refer to the Declarations of Opal Tometi and Jeff Ruster filed in support of their Motion for Partial Summary Judgment (Docs. 99-4 and 99-5) as "Tometi Decl." and "Ruster Decl.," respectively.

Third, BAJI also has standing through its members, who are justifiably afraid that the Bureau or Commerce will share their confidential responses to the citizenship question with other law enforcement agencies. (Pls.' Mot. at 13; Tometi Decl. ¶ 13.)

B. Plaintiffs' Evidence of Standing Satisfies All of Article III's Requirements.

Defendants base their entire standing argument on the premise that Plaintiffs must prove that an undercount "will" definitely occur, erecting an impossible obstacle to standing that no court has ever adopted. (*See* Defendants' Motion for Summary Judgment. (Doc. No. 100) ("Defs.' Mot.") at 8.) As the Supreme Court has stated in similar contexts, "it is certainly not necessary for this Court to wait until the census has been conducted to consider the issues presented here, because such a pause would result in extreme—possibly irremediable—hardship." *U.S. Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 332 (1999) ("D.O.C."); *see also In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197, 1215 (N.D. Cal. 2014) (holding that requiring plaintiffs to wait until they actually suffer harm to have standing "would run counter to the well-established principle that harm need not have already occurred or be 'literally certain' in order to constitute injury-in-fact" (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013))); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153 (2010) (holding that a plaintiff has standing to seek an injunction when it shows that it is "likely to suffer a constitutionally cognizable injury absent injunctive relief").

Contrary to Defendants' argument, the case law does not stand for the proposition that Plaintiffs must show that the 2020 Census "will result in an undercount." Defendants' error is based on a misreading and misapplication of *Clapper*. In *Clapper*, the plaintiffs challenged a provision of the Foreign Intelligence Surveillance Act that authorized surveillance of non-U.S. persons outside the United States. 568 U.S. at 401. Plaintiffs' claim for standing was based on their fears that their communications would be intercepted under the new law, and on measures they had undertaken to avoid the new law's surveillance. *Id.* at 410, 416.

In holding that plaintiffs lacked standing under either ground, the Court noted that the series of factual events underlying plaintiffs' future injury were "highly speculative" because there was no evidence that the government would *ever* decide to target the communications of

those with whom the plaintiffs communicated, or that the government would *actually* choose to invoke its authority under the new law to do so. *Id.* at 410-12. No such speculation as to Defendants' actions exist here, and there is no issue as to the "traceability" of Plaintiffs' harm to Defendants' actions as there was in *Clapper*. Here, Ross has already made his decision to add the citizenship question to the Census. It is from that action that Plaintiffs have already suffered, and will continue to suffer, harm, including current expenditures of funds to reduce the probability of an inaccurate differential count, as Defendants have publicly requested. *See Robins v. Spokeo, Inc.*, 867 F. 3d 1108, 1118 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 931 (2018) (describing *Clapper* as presenting a situation where "threatened conduct . . . had not happened yet").

Additionally, *Clapper* expressly cautioned that "[o]ur cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about." 568 U.S. at 414 n.5.[5] It emphasized that "we have found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." *Id.* Ross has publicly responded to concerns about an undercount relating to the citizenship question by stating that local governments should engage in outreach to "encourag[e] non-citizens, their friends, and their families to respond to the Census."[6] (Pls.' Mot. at 10-11.) Moreover, despite its touted non response follow-up ("NRFU") process, the Bureau has been unable to avoid significant undercounts of the very populations at risk here, including San Jose's residents. (Pls.' Mot. at 11-12.) The Bureau's own documents confirm that these populations are

[5] The Ninth Circuit has never adopted the Second Circuit's "objectively reasonable likelihood" standard for actual harm, or its "not fanciful or paranoid" standard for spending to prevent future harm, that were criticized by *Clapper*. Multiple courts in this circuit have noted that "*Clapper* did not change the law governing Article III standing" in the Ninth Circuit. *In re Adobe Sys.*, 66 F. Supp. 3d at 1213; *see also In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 961 (S.D. Cal. 2014) ("*Clapper* simply reiterated an already well-established framework for assessing whether a plaintiff had sufficiently alleged an 'injury-in-fact.'"). As Judge Koh noted in *Adobe Systems*, *Clapper*'s "'certainly impending' language can be traced back to a 1923 decision, *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923), and has been cited numerous times in U.S. Supreme Court cases addressing standing in the intervening decade." *Adobe Sys.*, 66 F. Supp. 3d at 1123 n.4.

[6] Since the filing of Plaintiffs' original motion, the website link for Ross's comments has changed. True and accurate copies of the full remarks and public letter are attached to the Declaration of Ana Guardado ("Guardado Decl.") as Exs. 1 and 2.

at greater risk with a citizenship question. (*Id.*) This in itself is undisputed evidence of the substantial risk of an undercount caused by the addition of the question.

Defendants' only arguments on the issue amount to empty speculation. Dr. John Abowd, the Chief Scientist and Associate Director for Research and Methodology at the Bureau, serves as Defendants' lead expert.[7] Dr. Abowd wrote in his expert report that the Bureau has not "produced credible quantitative evidence that the addition of the citizenship question would increase the net undercount or increase differential net undercounts for identifiable sub-populations." (Declaration of Dr. John Abowd (Doc. No. 100-1) ("Abowd Decl.") ¶ 13.) But he testified that the reason the Bureau did not produce such evidence is that it chose not to look for it. When asked if anyone at the Census "proposed doing that additional analysis to produce credible qualitative evidence" regarding an undercount, Dr. Abowd admitted that he had proposed it, but ultimately declined to devote resources to answering the question. (Abowd Exp. Dep. at 288:10-290:14.) Dr. Abowd explained that there are already enough documented reasons ***not to add the citizenship question***, and that conducting a study on its ultimate effect would not be cost-effective. (*Id.* at 290:3-7.) He admitted that, since he did not study the issue, the citizenship question "could drive the net undercounts way up or they could drive them way down." (*Id.* at 290:8-11.) There is, therefore, by Defendants' own admission, a substantial risk of an undercount.

As to Plaintiffs' standing based on the potential loss of funding, Plaintiffs need not demonstrate with precision the harm that will come from the substantial risk of an undercount. As this Court noted in denying Defendants' motion to dismiss, "courts have consistently held that individual plaintiffs have standing where they allege a loss of federal funding to their states and localities resulting from a census undercount." (Aug. 17, 2018 Order Denying Defendants' Motion to Dismiss (Doc. No. 86) ("Order") at 12.) The cases cited by this Court were not limited to those decided on the pleadings, but included a case upholding an injunction and two decided at

[7] Dr. Abowd was deposed in his individual capacity, was presented as a 30(b)(6) witness for the Bureau, and was deposed as an expert witness. His individual deposition of August 15, 2018 is cited herein as the "Abowd Dep." and is attached to the Declaration of Andrew Case as Exhibit C. Abowd's testimony as the Bureau's 30(b)(6) witness is cited herein as "Bureau Dep." and is attached to the Declaration of Andrew Case as Exhibit F. And Abowd's expert testimony is cited herein as "Abowd Exp. Dep." and is attached to the Declaration of Andrew Case as Exhibit H.

the summary judgment stage. For example, the Second Circuit upheld a preliminary injunction, noting that the harm of an undercount is "real and imminent, not remote" even though future injury "is merely a possibility until it is actual and can no longer be averted." *Carey v. Klutznick*, 637 F.2d 834, 837 (2d Cir. 1980). In granting summary judgment, another court noted that "plaintiffs do not need to prove with mathematical certainty the degree to which they will be injured by the Department's plan." *Glavin v. Clinton*, 19 F. Supp. 2d 543, 548 (E.D. Va. 1998).

C. Defendants Fail to Address BAJI Members' Loss-of-Privacy Fears.

Defendants do not address BAJI's standing theory, namely, that "the inclusion of the citizenship question will instill fear and intimidation in Black immigrant communities." (Compl. ¶ 60.) This fear independently establishes BAJI's standing. *See Spokeo*, 867 F.3d at 1114 (noting that injury stemming from a loss of "reputational and privacy interests that have long been protected in the law").

Since the addition of the citizenship question to the Census, several of BAJI's members have expressed concern about the effects of the citizenship question, such as political dilution and the loss of federal funding, on the historically underrepresented communities whom BAJI represents. (Tometi Decl. ¶¶ 9–11.) Other members have told BAJI that they would be reluctant to participate in the Census if it contains a question about their citizenship status, expressing fears about confidentiality and privacy, particularly in the context of today's heightened anti-immigrant political rhetoric. (Tometi Decl. ¶ 11.)

These fears are based on threats which, in the words of *Clapper*, are both "traceable" to Ross's decision and based on the fear of a "substantial risk" eventuating for the reasons stated above. And evidence from DOJ confirms the substantiality of these fears. In 2010, DOJ issued a memorandum to Commerce "clarif[ying] that no provision of the PATRIOT Act can compel the Secretary of Commerce to disclose confidential census data." (Declaration of Andrew Case ("Case Decl.") Ex. B at 4.) In June 2018, John Gore, Acting Assistant Attorney General of the Civil Rights Division, testified before Congress on the citizenship question. Gore's Chief of Staff wrote that it was best to dodge the question of whether other agencies could compel Commerce to

provide answers to Census questions "in case the issues addressed in the OLC opinion or related issues come up later for renewed debate." (Case Decl., Ex. B at 3.)

Thus, despite public statements that the Bureau and Commerce will continue to respect the privacy of citizenship answers, DOJ has admitted in private that providing census answers to other agencies (such as Immigration and Customs Enforcement ("ICE")) may "come up later for renewed debate." (*Id.*) Such statements confirm that BAJI's members' privacy concerns are well-founded. *See Baker v. Castle & Cooke Homes Hawaii, Inc.*, No. CIV. 11-00616 SOM, 2012 WL 1454967, at *4 (D. Haw. Apr. 25, 2012) (A loss of privacy, like other "aesthetic, emotional or psychological harms also suffice for standing purposes.")

D. Alternatively, There Are Genuine Issues of Material Fact as to Whether the Citizenship Question Will Cause an Undercount.

Even if one assumes, for purposes of argument, that Plaintiffs must show that there "will" be a net undercount to prove standing, Defendants would not be entitled to summary judgment on that issue because of genuine issues of material fact.[8] As noted above, Dr. Abowd's testimony puts the issue of certainty as to undercount directly in dispute. Indeed, the Bureau itself, at its deposition, testified that adding the question will make it harder to tell whether an undercount comes to pass. The Bureau testified that the question "will make it more difficult to correct—to collect accurate data on the enumeration, which will complicate the assessment of net undercount." (Bureau Dep. at 264:7-10.)[9] Also, the Bureau's past history of differential undercounts of minority populations, at a minimum, creates a dispute of fact on this issue in Plaintiffs' favor. (Pls.' Mot. at 11-12.)

Furthermore, Plaintiffs' experts conducted the studies that Dr. Abowd thought were not worthwhile. Their conclusions show that both a net undercount and a differential undercount of

[8] In fact, the genuine dispute over whether an undercount "will" happen itself shows that there is ***no*** dispute that there is a "substantial risk" that it will happen, thus supporting Plaintiffs' motion.

[9] Defendants' other expert, Dr. Stuart Gurrea, Vice President at Economists Incorporated, has not formed *any* independent opinion on the issue of variations in nonresponse rates across geographic areas or demographic groups as a result of the citizenship question, or on whether or not the Bureau will be able to fully mitigate any decline in self-response rates attributable to a citizenship question through NRFU and imputation. He simply used assumptions regarding the success of NRFU that were provided by Defendants. (Deposition of Dr. Stuart Gurrea ("Gurrea Dep."), Case Decl. Ex. J at 103:4-11; 121:9-122:5; 125:5-9.)

San Jose are not just significant risks, but overwhelmingly likely to occur. The reports are discussed in detail in Section II(B) below in relation to Plaintiffs' Enumeration Clause claim, which is the proper place to discuss the dispute over whether there "will" be an undercount. But there can be no reasonable dispute that a substantial risk of an undercount exists, and that this risk is sufficient to confer standing.

II. GENUINE ISSUES OF MATERIAL FACT PRECLUDE GRANTING SUMMARY JUDGMENT ON PLAINTIFFS' ENUMERATION CLAUSE CLAIM.

Recognizing that there are genuine factual disputes regarding their Enumeration Clause claim, Plaintiffs did not move for summary judgment on that claim. (Pls.' Mot. at 1 n.1.) In their motion, Defendants raise arguments rejected by this Court at the motion-to-dismiss phase and ignore the substantial evidence that adding the question will lead to an actual undercount.

A. Defendants Advance Arguments that This Court Has Previously Considered and Rejected.

Defendants' arguments with respect to Plaintiffs' Enumeration Clause claim amount to nothing more than a near-verbatim repetition of arguments which this Court has already considered and rejected. Defendants continue to maintain that the "Constitution's reference to 'actual Enumeration' requires only that the population be determined by a person-by-person headcount . . . ." (Defs.' Mot. at 16.) But in denying Defendants' motion to dismiss, the Court made clear that "there may be a rare question that is so uniquely impactful on the process of counting itself, that it becomes akin to a mechanics-of-counting-type challenge, which is plainly reviewable under the Enumeration Clause." (Order at 28.) Indeed, a "decision to alter the census in a way that affirmatively interferes with the actual enumeration, and does not fulfill any other reasonable governmental purpose, is subject to challenge under the Enumeration Clause." (*Id.* at 29.) Defendants' rehashing of this argument amounts to an improper motion for reconsideration and should be summarily rejected.

B. There Are Genuine Issues of Material Fact Regarding Enumeration.

Defendants and their experts advance disputed claims as to the effectiveness of the Bureau's enumeration efforts. They claim that "the Census Bureau is fully equipped and funded

to enumerate all those who would be enumerated absent a citizenship question," but their expert admits that they did not conduct a quantitative study to determine whether this equipment and funding will succeed. (Defs.' Mot. at 12; *see supra* Section I(D).) Further, Defendants' wishful thinking about the results of the Census are directly refuted by Plaintiffs' experts.

Dr. Matthew Barreto, Professor of Political Science and Chicana/o Studies at the University of California, Los Angeles, conducted a national survey and determined that the expected drop-off rate for responses to the 2020 Census in light of the citizenship question is between 11.3% and 17.8% for immigrants, between 12.3% and 18.0% for the state of California (the highest drop-off rate of any state in the country), and between 12.7% and 20.3% for San Jose. (Expert Report and Declaration of Dr. Matthew Barreto ("Barreto Decl.") Ex. 1 ¶¶ 19-20.) Further regression analysis showed that black immigrants in California "will likewise experience similar high rates of non-response due to a citizenship question in 2020." (Barreto Decl. ¶ 113.)

The Bureau's optimism is further undercut by the current political environment. As Dr. Barreto underscores:

> Simply put, large percentages of respondents do not believe the Trump administration will protect their information or keep it private when it comes to a question about citizenship status, and this will result in millions of people opting out of the 2020 census and not being counted. ***No amount of follow-up, re-contact, or imputation can correct for this non-response bias***.

(Barreto Decl. ¶ 106 (emphasis added).)

Dr. Colm O'Muircheartaigh, University of Chicago Professor in the Harris School of Public Policy and Senior Fellow at the National Opinion Research Center (NORC), concluded that (1) the introduction of a citizenship question on the 2020 Census will exacerbate the differential non-response among hard-to-count subpopulations; (2) the inclusion of a citizenship question will further result in an increased differential undercount of hard-to-count populations; and (3) NRFU and imputation responses will not only fail to eliminate the impact of the differential non-response, but may actually exacerbate it. (Expert Report and Declaration of Dr. Colm O'Muircheartaigh ("O'Muircheartaigh Decl.") Ex. 2 at 2-3, 16-17.)

Dr. O'Muircheartaigh concludes that NRFU in 2020 will "produce a more severe differential non-response in tracts containing higher proportions of non-citizens than . . . in 2010." (O'Muircheartaigh Decl. at 12.) Administrative enumeration will "systematically discriminate against hard-to-count subpopulations and will not correct the under-enumeration that occurs at the earlier stages of data collection." (*Id.* at 15.) Further, "given the perceived threat from the citizenship question and poorer linguistic capabilities of enumerators, willing and knowledgeable proxy respondents will likely be more difficult to find in neighborhoods where a substantial portion of households contain a non-citizen." (*Id.* at 16.) The Bureau itself also acknowledges that "proxy responses are higher for hard-to-count subpopulations, provide much lower quality information, and contain more coverage errors than self-responses." (*Id.*) With regard to imputation, "[w]hatever the method used, imputation further systematically disadvantages hard-to-count subpopulations, in particular non-citizens and households containing non-citizens." (*Id.*)

Plaintiffs' expert opinions that the citizenship question will result in an uncorrectable undercount in violation of the Enumeration Clause clearly constitute "evidence that precludes summary judgment." *Marentes v. State Farm Mut. Auto. Ins. Co.*, 224 F. Supp. 3d 891, 903 (N.D. Cal. 2016). At a minimum, those opinions establish the existence of genuine issues of material fact as to whether adding the citizenship question will, as this Court stated when discussing the applicable standard, "affirmatively interfere[] with the actual enumeration, and does not fulfill any other reasonable governmental purpose." (Order at 29). Accordingly, the Court should deny Defendants' motion for summary judgment on Plaintiffs' Enumeration Clause claim.

III. ROSS'S DECISION TO ADD THE CITIZENSHIP QUESTION WAS ARBITRARY AND CAPRICIOUS.

Defendants seek summary judgment based on boilerplate statements regarding the deference to agency decision-making in ordinary APA cases. (Defs.' Mot. at 20.) But this is no ordinary APA case. Regardless of the deference to agency decision-making, a decision must be set aside as arbitrary and capricious when "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so

implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("State Farm"). An agency decision must be set aside when it fails to "adhere to voluntarily adopted, binding policies that limit its discretion." *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987). And a decision is arbitrary and capricious if an agency "ignores or countermands its earlier factual findings without reasoned explanation for doing so." *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015).

Ross's decision to add the citizenship question must be set aside for all the reasons above. He relied on pretextual political concerns. He entirely failed to consider the impact of field testing. And he ignored the scientific evidence presented by the Bureau—the only scientific evidence before him. The decision should be set aside as arbitrary and capricious because Ross "ignore[d] evidence contradicting [his] position," rendering the decision arbitrary and capricious. *Butte Cty., Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010); *see also Michigan v. E.P.A.*, 135 S. Ct. 2699, 2707 (2015) (holding that an EPA regulation that entirely ignores costs is arbitrary and capricious). As noted in their motion, Plaintiffs are entitled to summary judgment on their APA claim based on the administrative record alone. At minimum, the evidence precludes summary adjudication of the APA claim in Defendants' favor.

A. Plaintiffs May Rely on Extra-Record Discovery to Defeat Defendants' Motion for Summary Judgment.

Defendants argue that this Court's summary judgment rulings should "be confined to the record before the Secretary." (Defs.' Mot. at 20.) Defendants misstate the law. Certainly, when the administrative record is sufficient to show that an agency decision was arbitrary and capricious, summary judgment striking down that decision is appropriate. *See, e.g.*, *Nat'l Wildlife Fed. v. Babbit*, 128 F.Supp.2d 1274, 1289 (E.D. Cal. 2000) (striking down agency decisions based on the administrative record alone). Thus, Plaintiffs' motion for partial summary judgment is based solely on the administrative record and conclusively demonstrates the arbitrariness, capriciousness, and unlawfulness of Ross's decision.

But courts have admitted extra-record evidence in APA cases when (1) it is necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) it is necessary to determine whether the agency has relied on documents not in the record, (3) supplementing the record is necessary to explain technical terms or complex subject matter, or (4) plaintiffs make a showing of agency bad faith. *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2004). Specifically, a trial court may admit expert evidence to "develop a background against which it can evaluate the integrity of the agency's analysis," rather than to "judge the wisdom of the agency's action." *Locke*, 776 F.3d at 993.

This Court has already found that Plaintiffs made a showing of agency bad faith to justify the extra-record discovery in this case. (Aug. 17, 2018 Order Granting Request to Conduct Discovery Outside the Administrative Record (Doc. No. 87).) And while the administrative record alone is sufficient to overcome Defendants' motion, the extra-record evidence also confirms that the Ross did not, in fact, consider all relevant factors and relied on documents not in the record.[10]

B. Ross's Stated Reason for Adding the Citizenship Question Was Pretextual and Unreasonable.

Defendants argue they may survive review under the arbitrary-and-capricious standard so long as Ross can "trace[] the steps from the facts found during the agency's extensive review of DOJ's request to [Ross's] ultimate decision." (Defs.' Mot. at 23.) Ordinary APA deference, however, does not excuse "administrative misconduct not covered by the other more specific paragraphs" of the APA. *Assoc. of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984). The December 12, 2017 letter from DOJ to the Bureau (the "DOJ Request") was created at Commerce's behest to provide it with a back-door justification for the question. The DOJ Request was cited repeatedly by Ross as the reason he

[10] Plaintiffs respectfully request that the Court, in its decision, specify to what extent it is relying on the administrative record, and to what extent it is relying on extra-record discovery. Documents that were produced as part of the administrative record, along with public documents subject to judicial notice, have been submitted attached to the Guardado Decl. as Ex. 3, while extra-record discovery, including deposition transcripts, have been attached to the Case Decl. as Exs. A – N.

considered adding the question at all, even as he and DOJ took pains to hide the fact that he had requested it. Although the "path may reasonably be discerned" as to how the decision was made, the path here is a circle, beginning with Ross well before DOJ's December 2017 letter and ending with his arbitrary and capricious decision. (Defs.' Mot. at 20.) "For an agency to say one thing"—that DOJ requested the question, "and do another"—secretly demand that DOJ make that request, "is the essence of arbitrary action" because it shows that the "stated reason may very well be pretextual." *Pub. Citizen v. Heckler*, 653 F. Supp. 1229, 1237 (D.D.C. 1986).

1. Ross, Commerce, and DOJ Engaged in a Furtive Backdoor Process and Concealed It from Congress, The Public, and the Courts.

a. Ross Sought to Add the Question from the Moment He Took Office.

Ross's Director of Policy and Strategic Planning, Earl Comstock, testified that, shortly after Ross's appointment in February 2017, Ross and his staff decided to add a citizenship question to the Census and that the first person to raise the issue was Ross himself. (Case Decl. Ex. G (Deposition of Earl Comstock) ("Comstock Dep.") at 104:2-17.) Karen Dunn Kelley, the Under Secretary of Commerce for Economic Affairs, testified that by the time she was confirmed in Summer 2017, she knew that Ross was "interested in considering" adding a citizenship question to the Census, months before DOJ issued its request. (Case Decl. Ex. E (Deposition of Karen Dunn Kelley) ("Kelley Dep.") at 151:3-152:7.) And Gore admitted that DOJ did not initiate communications with Commerce regarding the citizenship question. (Case Decl. Ex. I (Deposition of John Gore) ("Gore Dep.") at 67:5-68:5.)

The evidence shows that Ross and other high-level officials in the Trump administration wanted a citizenship question on the 2020 Census so that non-citizens could be excluded from congressional apportionment. In March 2017, Earl Comstock, Commerce's Director of Policy and Strategic Planning, wrote Ross emails regarding how non-citizens are treated for apportionment, including in one a blog post from The Wall Street Journal titled, "[t]he Pitfalls of Counting Illegal Immigrants." (0002462, 0002521.)[11] In the spring and summer of 2017, Steve Bannon and Kris

[11] Documents produced as the administrative record are identified by Bates-number.

Kobach both lobbied Ross to ask the question, and Kobach specifically brought up apportionment.[12] (Pls.' Mot. at 22-23.) On May 24, 2017, David Langdon sent an email to Comstock and Ellen Herbst stating "Long story short is that the counting of illegal immigrants . . . has a solid and fairly long legal history." (0012465.) He goes on to describe attachments to the email, which include a DOJ opinion released during the presidency of George H. W. Bush regarding excluding undocumented individuals from the decennial census. (*Id.*)

On August 11, 2017, James Uthmeier sent a memorandum entitled "Census Memo." (Case Decl. Ex. A at COM_DIS00018590.) While the memo itself has been withheld, in the cover email Uthmeier wrote that "our hook here," was to claim that "[u]litmately, we do not make decisions on how the data should be used for apportionment, that is for Congress (or possibly the President)." (*Id.*) On September 15, Leonard Shambon, a special legal advisor in the Office of the Chief Counsel for Economic Affairs, sent Uthmeier a memo titled "foreigners included in enumeration," which detailed the history of "counting foreign citizens residing in the united states in census enumerations for apportionment." (Case Decl. Ex. A at COM_DIS00017126-27.)

b. Comstock Asked DOJ to Request the Question Because Adding It Without an Agency Request Would Not Comport with the Paperwork Reduction Act

As Plaintiffs set forth in their motion, the administrative record shows the backhanded path Commerce took to ask DOJ to request the question. (Pls.' Mot. at 3-4.) Comstock testified that he had to get another agency to ask the question to comply with the Paperwork Reduction Act. (Comstock Dep. at 153:2-154:17.) Comstock went "looking for an agency" to ask the question—not because any agency had raised any issue with census data, but because Ross wanted the question added. (*Id.* at 181:19-21.) When both DOJ and the Department of Homeland Security ("DHS") rejected his request to ask the question, Comstock's efforts reached a "dead end." (*Id.* at 411:6-12.) Gore testified that by September 2017, DOJ had decided it did not wish to "raise the citizenship question." (Gore Dep. at 69:4-9.) Comstock testified that without DOJ, "that would probably put an end to the citizenship question." (Comstock Dep. at 190:5-12.)

[12] After months of denials, Ross eventually admitted on October 11, 2018 that he did in fact discuss the citizenship question with Steve Bannon. (*See* Case Decl. Ex. M at 3.)

c. Ross Asked Former Attorney General Jeff Sessions to Order DOJ to Make the Request

Depositions have confirmed that Sessions ordered Gore to request the question at Ross's instruction. Gore was first drawn into deliberations about a citizenship question in the Census by Mary Blanche Hankey and Sessions himself shortly after Labor Day in 2017. (Gore Dep. at 73:2-13; 74:18-75:3.) Gore testified that he understood that when Sessions called him in mid-September of 2017, he did so at Ross's behest. (*Id.* at 84:2-6.) Even before the DOJ Request, Kelley recalled that Commerce was having internal discussion about getting the letter. (*See* Kelley Dep. at 128:19-21 ("[W]e thought we were going to get a letter, and then a letter came.").)

Testimony shows a remarkable role played by political appointees, including the Attorney General himself, in bypassing the ordinary back-and-forth review process between agencies that request data from the Bureau. Before he wrote the first draft of the DOJ Request, Gore solicited input on the letter from political appointees within DOJ, with the exception of one round of edits incorporating thoughts from the Chief of DOJ's Voting Rights Section. (Gore Dep. 152:9-18.). When Acting Census Bureau Director Ron Jarmin ("Jarmin") told DOJ that he could provide it with the requested data through administrative records and suggested holding a meeting between the Bureau and DOJ, Gore took the comments to Sessions. (Gore Dep. at 256:1-22.) Sessions told Gore that DOJ would not pursue Jarmin's proposal and instructed Gore not even to take a meeting to discuss the matter. (Gore Dep. at 271:21-272:6; 274:5-9.)

d. DOJ Does Not Actually Need the Data

The evidence shows that the DOJ Request was issued to "provide a pretext for the ulterior motive" of Defendants, and should be set aside. *Woods Petroleum Corp. v. U.S. Dep't of Interior*, 18 F.3d 854, 859 (10th Cir. 1994). Gore confirmed at his deposition that DOJ does not need block-level citizenship data to enforce the Section 2 of the Voting Rights Act. He testified that DOJ has always relied on statistical data to enforce the Voting Rights Act ("VRA"). (Gore Dep. at 175:10-19.) Gore testified that DOJ had never declined to bring a VRA claim because it relied on statistical estimates. (Gore Dep. at 204:3-10.) When asked whether he agreed that "CVAP data collected through the census questionnaire is not necessary for DOJ's VRA enforcement efforts,"

he stated "I do agree with that. Yes." (Gore Dep. at 300:8-11). The very author of the request to the Bureau testified under oath that DOJ did not need the requested data for the stated reason.

Plaintiffs' experts provide additional evidence as to the pretextual nature of DOJ's request. Dr. Lisa Handley, who has served as a voting rights and redistricting expert for over thirty years and has advised clients including states, local jurisdictions, and DOJ, has submitted an expert report discussing the effectiveness of current Bureau resources for enforcing the VRA. (Expert Report and Declaration of Dr. Lisa Handley ("Handley Decl.") Ex. 3.) Dr. Handley opined that currently available census data, including citizenship data derived from the American Community Survey, has proven to be "perfectly sufficient to ascertain whether an electoral system or redistricting plan dilute minority votes" under the VRA. (*Id.* at 4.) She also found that the inclusion of citizenship data in the decennial census could present several issues that would work against the stated purpose of having more accurate information to enforce the VRA. Significantly, Dr. Handley found that because of confidentiality concerns, citizenship data reported in the decennial census will have to go through a disclosure avoidance process to modify or remove data that puts confidential information at risk of disclosure. (*Id.* at 17-19.) This may result in *higher margins of error* of block level CVAP data for the Census than currently exist among ACS block group level citizenship data currently relied upon for VRA enforcement. (*Id.* at 20.)

Pamela Karlan, a constitutional law scholar from Stanford University Law School who has spent decades litigating cases under the VRA on behalf of both private parties and DOJ, has submitted a report discussing whether the inclusion of a citizenship question on the Census would assist DOJ's enforcement of the VRA. (Expert Report and Declaration of Professor Pamela Karlan ("Karlan Decl.") Ex. 4.) Professor Karlan opined that never has anyone even hinted that the data on citizenship generated from the American Community Survey is not sufficient for the prosecution of Section 2 claims. (*Id.* at 4.) Further, Professor Karlan summarized the history of unsuccessful VRA litigation and was "wholly unable to find a single case where the availability of citizenship data from the decennial census would have changed the outcome." (*Id.* at 11.) Professor Karlan's ultimate conclusion was that "a citizenship question on the decennial census

would not assist the Department of Justice (or private parties) in enforcing section 2 of the Voting Rights Act." (*Id.* at 12.) There is no evidence in this case to the contrary.

e. Defendants Concealed that DOJ Had Been Ordered to Ask the Question at Ross's Behest

Ross and Commerce hid the fact that they were behind the DOJ Request from the Bureau, the public, and this Court. Until this lawsuit was filed, neither Jarmin nor Abowd knew that Commerce was behind the DOJ Request. (Abowd Dep. at 280:3-13.) Even when Bureau officials met in person with Ross and Comstock, they were kept in the dark about the true nature of the request for a citizenship question. (Case Decl. ¶ 5, Ex. D (Deposition of Ron Jarmin) ("Jarmin Dep.") at 400:11-401:2.)

And the deception did not stop there. Ross himself testified that DOJ "initiated" the process by sending the DOJ Request, when in fact it had taken Ross's intervention with the Attorney General to get DOJ to send the letter.[13] When Comstock testified before Congress, he swore to Congresswoman Eleanor Holmes Norton that the citizenship question was being included because "[w]e received a request from the Department of Justice for this, and their rationale was that the level of the information that they needed to enforce the Voting Rights Act was not available." (Comstock Dep. at 294:18-295:1.) Comstock admitted in his deposition that he did not mention in his sworn testimony his own active role in getting DOJ to request the question. (*Id.* at 298:17-299:1.)

When they first produced the administrative record in this matter, Defendants concealed the fact that Ross himself had been behind the DOJ Request. (Notice of Filing of Administrative Record, Doc. No. 38.) Only after this Court ordered Defendants to produce additional documents did the scope of Ross's involvement begin to become clear. And even then, DOJ took pains to hide the fact that Ross had demanded that it send the DOJ Request. An undated series of talking points regarding this very litigation begins with the following reminder: "**NOT PUBLIC:** In

[13] *See* Transcript of a Hearing Before the Committee on Ways and Means, U.S. House of Representatives, March 22,2018, serial no. 115-FC09, *available at* https://docs.house.gov/meetings/WM/WM00/20180322/108053/HHRG-115-WM00-Transcript-20180322.pdf.

2017, Secretary of Commerce Wilbur Ross requested that the Justice Department send a letter requesting the addition of a citizenship question on the 2020 Census." (Case Decl. Ex. B at 2.)

At every step, Defendants hid the true nature of this process and the true reasons leading to DOJ's December 2017 letter and Ross's Decision Memo. To describe this scenario as merely raising a genuine dispute of fact is beyond understatement. For the reasons stated in Plaintiffs' own motion, these facts mandate that this Court conclude that Ross's purported rationale is "a fictional account of the actual decision-making process and must perforce find its actions arbitrary." *Home Box Office v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977).

C. Defendants Departed from Historical Practice Without Justification.

Defendants admit that, before adding content to a survey, the Bureau "work[s] with the other agencies to test the question (cognitive testing and field testing)."[14] (Defs.' Mot. at 25; 0001296.) But there was no field testing of the citizenship question.

Defendants make much of the fact that the Bureau, in its January 19 Memo, wrote that "[s]ince the question is already asked on the American Community Survey, we would accept the *cognitive* research and questionnaire testing from the ACS." (001279) (emphasis added). But cognitive testing—whether a question is phrased in a way that respondents understand it—is only one facet of testing. And when Ross wrote in the Decision Memo that "the citizenship question has already undergone the *cognitive* research and questionnaire testing required for new questions," he was merely parroting the January 19 Memo, which pointedly did not mention field testing. (Defs.' Mot. at 25; 001319) (emphasis added). In fact, when Ross wrote that adding the question did not present an issue with regard to historical practice because "the question had been asked in some form or another for nearly 200 years" he was ignoring (1) the history of citizenship questions on the census; (2) the impact of adding questions without field testing, of which former Bureau heads had made him aware; and (3) the Bureau's testing protocol, which was altered by some person or persons who have not been identified even through extra-record discovery. In the face of such overwhelming evidence that testing protocols were ignored and concealed, there is

[14] Defendants state that the Bureau "typically" conducts cognitive and field testing; the Bureau wrote that it "always" does. (Defs.' Mot. at 25; 0001296.)

no support for Defendants' claim that Ross "reasonably concluded" that no testing was necessary. (Defs.' Mot. at 25.) Eliminating the testing protocol was a drastic change in agency policy that "rests upon factual findings that contradict those which underlay its prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-516 (2009).

1. No Question Like the One Ross Decided to Include Has Ever Appeared on a Census Questionnaire.

The nation's foremost historian of the census, Professor Margo Anderson, has submitted a report on the history of citizenship related questions on census questionnaires. (*See* Expert Report and Declaration of Dr. Margo Anderson ("Anderson Decl."), Ex. 5.) This report shows that Ross's "some form or another" view of the question's history grossly misstates the context, placement, purpose, and phrasing of citizenship questions. Although the "long-form" sample survey and, more recently, the American Community Survey, have gathered citizenship data since 1970, no citizenship-related question has appeared on the full decennial census for nearly 70 years. Adding a citizenship question in the form that Ross ordered would "break from historical practice." (*Id.* at 2.)

Early censuses—conducted solely by in-person enumerators—requested the number of "Foreigners not naturalized" or "ALIENS" in households, sometimes limiting the question to "White Persons." (Anderson Decl. at 3-4.) No question regarding citizenship was asked at all from 1840-1860, and in 1870 the census added a question that closely tracked the language of the Fourteenth Amendment to measure the population of former slaves denied the right to vote on account of their race. (*Id.* at 4- 5.) From 1890 through 1950, the census included questions about citizenship, but until women were granted the right to vote it was asked only of men. (*Id.* at 6.) The last time the full population of census respondents were asked their citizenship status was 1950, before the census was broken into a "long form" and a "short form." (*Id.* at 6-7.)

After the break between the "long form" census that collects detailed statistical information from a small group and the "short form" census that asks a small number of questions of everyone, citizenship has never been asked of the whole population. (Anderson Decl. at 12-13.) This covers the entire life of Section 2 of the VRA. Further, the current question, which dates

from the 1990 long form census, has always "required a substantial amount of editing" before accurate data could be released because of "erroneous entries." (*Id.* at 13.) For example, the Bureau reported in 1990 that 22% of the people who entered a U.S. State as their birthplace identified themselves as a "naturalized citizen." (*Id.* at 13.)

2. Ross Ignored the Bureau's Testing Processes and Procedures.

Hermann Habermann, a former director of the Bureau, met with Ross and discussed with him the importance not only of *cognitive* testing, but of *field* testing: testing designed to measure the performance of new questions on census instruments. (Declaration and Expert Report of Hermann Habermann ("Habermann Decl.") Ex. 6; 001259.) Director Habermann's expert report sets forth not merely the protocol for such testing, but also the reasons behind it, including the legal parameters that require it and the Bureau policies endorsing it. (Habermann Decl. at 4-5.)

The Bureau's testing protocol has been implemented to comply with the Paperwork Reduction Act of 1995 ("PRA"). *See* 44 U.S.C. §§ 3504(e)(3)(A), 3506(e)(4); 5 C.F.R. § 1320.18(c). The PRA requires that agencies must provide reasons that they need new data before collecting it, and that they test their collection processes. (Habermann Decl. at 4-5.) Interagency communication is critical; past agency requests for data have involved particular attention to the justification for the granularity of data. (*Id.* at 7.)

The Bureau, like other agencies, has established Standards and Guidelines for Statistical Surveys. (Habermann Decl. at 12-13.) These include not only *cognitive* pre-testing of survey questions, but *field* testing to ensure questions perform as expected in a full-scale survey. (*Id.*) These requirements were ignored by Ross.

Not only did Habermann meet with Ross, but also six former Bureau chiefs wrote to express the importance of field testing. (001058.) The record is replete with evidence of the importance of the Bureau's testing protocol. Acting Director Jarmin testified that the well-established process for adding questions involves a multi-year testing process in order to evaluate how various factors impact the performance of questions on the census and their sensitivity. (Jarmin Dep. at 259:7-261:22.) This process, Jarmin testified, was not followed with the citizenship question. (*Id.* at 183:4-185:22.) He testified that it is not fair to assume a question will

perform the same on a short form census as it will on the ACS. (*Id.* at 220:7-221:17.) Throughout this process, the Bureau continually emphasized the need to follow its process. It wrote that it was "too late to add a question to the 2018 End-to-End Census Test so additional testing on a smaller scale would need to be developed and implemented as soon as possible." (0003891.) It emphasized that the test "would also require approval from OMB." (0009867.)

But this process was totally ignored by Ross, who wrote in the Decision Memo that "the question has been well tested" based only on the Bureau's statements regarding *cognitive* testing and the fact that it has appeared (in a different context) on the ACS. (001314.) He ignored the rigorous testing protocol and the concerns of the Bureau and former directors that performance on the ACS is not the equivalent of testing. The Decision Memo offers no "reasoned explanation" for ignoring prior findings. *Vill. of Kake*, 795 F.3d at 966-67. And as set forth below, even the Bureau itself believes that the question has only undergone adequate cognitive testing when it follows a birthplace question.

3. Commerce Concealed that It Was Violating the Process by Deleting It from the Record; Witnesses Refuse to Admit Who Did It.

After the DOJ Request, but before Ross's Decision Memo, Commerce sent a list of 35 questions to the Bureau. (0005216.) In response to Question 31, the Bureau provided Commerce with a summary of the "well-established process" for adding questions to the Census or the ACS. (0009832-33.) Commerce Deputy Counsel Michael Walsh and Senior Policy Advisor Sahra Park-Su deleted this answer and provided a shorter one, stating that "[c]onsistent with longstanding practice for adding new questions to the ACS survey, the Bureau is working with relevant stakeholders to ensure that legal and regulatory requirements are fulfilled and that the question would produce quality, useful information for the nation." (00013023; *See* Deposition of Sahra Park-Su ("Park-Su Dep."), Case Decl. Ex. K at 141:14-143:1 ("Mike Walsh then handwrote the draft response for me on my paper, which then I then went back and typed it up and sent it to Census.").) Christa Jones, a Senior Advisor at the Bureau, wrote that she was "fine" with this answer but noted that "I just want us all to be clear that the questionnaires was [*sic*] not identical from 1990 to now." (0013023.)

But this answer was revised yet again. The final version of what the administrative record suggests is the Bureau's response no longer states that the Bureau will comply with longstanding practice but that the Bureau "did not feed [*sic*] bound by past precedent when considering the Department of Justices' request." (001296.) This document appears only twice in all of Defendants' production—in the original administrative record and as a freestanding Commerce document, not attached to any email. (Case Decl. Ex. A at COM_DISC00020961.) No one who was deposed admitted writing it, and most people claimed they had never even seen it.[15]

Abowd testified at his deposition that he had never seen this version of the answer. (Abowd Dep. at 281:8-282:16 ("Until today, I was unaware of any discrepancy between" the Bureau's response to Question 31 and the version included in the original AR).) Jarmin testified that he does not know who wrote the answer. (Jarmin Dep. at 211:19-21 ("Q: Do you know who wrote the language in Number 31? A: I do not.").) Park-Su testified that she had not written the new answer and doesn't know who did. (Park-Su Dep. at 159:19-160:4; 169:16-21.)

4. Commerce and the Bureau Failed to Follow The Bureau's "Well-Established Process" For Adding Content.

The evidence shows that Commerce thought there simply was not enough time to test the citizenship question before adding it to the survey, so they ignored the process and added it anyway without testing. As David Langdon, an employee in the Office of Policy and Strategic Planning at Commerce, testified that adding the question was so urgent that it could not be tested. (Deposition of David Langdon ("Langdon Dep."), Case Decl. Ex. L at 243:7-16 ("[T]he time frame wouldn't – the Secretary's decision wouldn't – you know, wouldn't accommodate that kind of testing.").) The Bureau did not have any opportunity to test whether the citizenship question would perform the same on the decennial census as it had on the ACS. (*See* Jarmin Dep. at 221:15-222:2.) In fact, the Bureau does not believe that the question has undergone adequate

[15] In response to an interrogatory from the New York Immigration Coalition, Defendants provided the following list of people who worked on the response: Ron Jarmin, Enrique Lamas, Burton Reist, Christa Jones, Michael Walsh, and Sahra Park-Su, and that no one outside the Bureau worked on the response after February 23, 2018. (Park-Su Dep. at 169:16-21.) Park-Su testified that she did not draft the final version, which differs substantively from the February 23, 2018 version. (*Id*. at 159:19-160:4.)

cognitive testing because, when used in the Bureau's surveys, it had always followed a birthplace question. (Bureau Dep. at 24:4-9 ("Q: So you're not aware of any testing – any cognitive testing of the citizenship question without a preceding question about nativity, is that right? A: . . . I'm not aware of any, no.");142:18:-143:4 ("I asked my staff . . . and their answer was that it was adequately tested . . . without the citizenship question, but not adequately tested with the citizenship question.").) The testing used for planning NRFU, on which Defendants place great reliance, did not include the citizenship question, and neither did the end-to-end test. (*Id.* at 200:20-201:3; 225:13-16.)

Far from "reasonably conclud[ing]" that no testing was necessary (Defs.' Mot. at 25), Ross ignored the difference between field testing and cognitive testing and bypassed a collection of agency protocols designed to ensure accuracy in reporting. The evidence is overwhelming that the Secretary's decision did not flow from a "reasoned analysis" that "examine[d] the relevant data and articulate[d] a satisfactory explanation for its actions including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 42-43 (citation omitted).

D. Defendants' Defenses Against Plaintiffs' Arbitrary and Capricious Claim Lack Merit.

Defendants assert that they are entitled to summary judgment because there is no genuine dispute that Ross (1) "articulated a satisfactory explanation for his eminently reasonable decision," (2) "considered all facts and data relevant to the question," (3) specifically considered alternatives, response rates, and testing in ways that were neither arbitrary nor capricious, and (4) did not simply create a pretextual explanation for a decision made long before DOJ "requested" the citizenship question. (Defs.' Mot. at 22-25.) They ask that this court sanction Ross's rejection of all the evidence presented to him by agency experts because agency heads may differ from their "subordinates." (Defs.' Mot. at 24, *citing St. Marks Place Hous. Co. v. U.S. Dep't of Hous. & Urban Dev.*, 610 F.3d 75, 83 (D.C. Cir. 2010).) But *St. Marks* involved an agency head choosing to interpret a statute in a manner differently than the recommendation of the agency counsel, not an agency head rejecting the totality of the scientific evidence before him. *See* 610 F.3d at 82-84.

Unlike another case that Defendants cite, *F.E.R.C. v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016), *as revised* (Jan. 28, 2016), here Ross did not explain why he chose one technical expert over another, choosing the view of "an eminent regulatory economist.". Nothing in the record suggests *any reason at all* for adding the question other than the DOJ Response, and the DOJ Response was entirely engineered by Commerce and Ross. Even if DOJ needed block-level CVAP data—and the undisputed evidence is that it did not—nothing in the record supports Ross's statement that this data would be more accurately procured by a citizenship question than by other means, as the Bureau concluded. (001277–85.) *See Action on Smoking & Health v. CAB*, 699 F.2d 1209, 1216-1218 (D.C. Cir. 1983) (agency's decision failed to give sufficient consideration to narrower alternatives).

Ross did not "articulate a satisfactory explanation" in rejecting other alternatives to meet DOJ's non-existent need, and his "failure to provide even that minimal level of analysis" renders his decision arbitrary and capricious. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (finding regulation is arbitrary and capricious where it was "issued without the reasoned explanation that was required in light of the Department's change in position and the significant reliance interests involved."). And simply deferring to DOJ itself—quite apart from the fact that DOJ was reluctantly pulled into this charade, and never needed the data it claimed to need—is an insufficient reason for agency action. *Del. Dept. of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 16 (D.C. Cir. 2015) ("EPA seeks to excuse its inadequate responses by passing the entire issue off onto a different agency. Administrative law does not permit such a dodge.").

Ross thumbed his nose at the only expertise with which he was presented. There is simply no evidence to support, and substantial evidence to rebut, his conclusory claim that "[t]he citizenship data provided to DOJ will be more accurate with the question than without it." (001319); *See City of Kansas City, Mo. v. Dep't of Hous. & Urban Dev.*, 923 F.2d 188, 194 (D.C. Cir. 1991) ("Agency action based upon a factual premise that is flatly contradicted by the agency's own record does not constitute reasoned administrative decision-making and cannot survive review under the arbitrary and capricious standard."). In short, Ross did not disagree with

his subordinates; he simply "defie[d] the expert record evidence." *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 93 (D.C. Cir. 2010).

Ross's disregard for agency policy likewise provides evidence that completely contravenes Defendants' claims to administrative normality. This Court has already noted that the Bureau's "internal agency standards provide 'law to apply' in evaluating the Secretary's exercise of his discretion." (Order at 23-24.) These internal standards were not just ignored, they were cut from the record. Testing was bypassed not because it was not required, but because it would interfere with Ross's pre-ordained timing. (Langdon Dep. at 243:7-16.) In the face of Ross's disdain for agency procedure, summary judgment in his favor would be inappropriate—but summary judgment in Plaintiffs' favor is. *Water Quality Ins. Syndicate v. U.S.*, 225 F. Supp. 3d 41, 68-69 (D.D.C. 2016) (vacating agency decision that "ignore[d] critical context" and "cherry-pick[ed] evidence").

Finally, Defendants' cloak-and-dagger process, in which they tried to hide what they were doing from the Bureau, Congress, the public, and this Court, demonstrates improper motives. *See Home Box Office, Inc.*, 567 F.2d at 54-55 ("[W]here, as here, an agency justifies its actions by reference only to information in the public file while failing to disclose the substance of other relevant information that has been presented to it, a reviewing court cannot presume that the agency has acted properly . . . but must treat the agency's justifications as a fictional account of the actual decision-making process and must perforce find its actions arbitrary") (*per curiam*). Clearly, "extraneous pressure intruded into the calculus of considerations on which the Secretary's decision was based." *D.C. Fed'n of Civic Assoc'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971). This evidence not only mandates denial of Defendants' motion, but also conclusively supports judgment in Plaintiffs' favor on their APA claim.

IV. ROSS'S DECISION WAS IN EXCESS OF STATUTORY JURISDICTION, AUTHORITY, OR LIMITATIONS UNDER SECTION 706(2)(C) OF THE APA.

A. Ross Violated Section 141(f)(3) the Census Act.

Defendants do not even pretend that Ross acted in accordance with the congressional mandate set forth in 13 U.S.C. § 141(f)(3) when he added a citizenship question to the 2020

Census without determining whether "new circumstances" existed at the time which necessitated the modification of subjects previously settled upon pursuant to 13 U.S.C. § 141(f)(1). They simply say that Ross "submitted the required reports" but leave out the fact that the reports he submitted did not comply with the law. (Defs.' Mot. at 27.) Defendants maintain that the Census Act provides no private right of action, that it does not allow for judicial review under the APA, and that adding a question that will affect the life of every household in America does not constitute "agency action." With respect to the first point, Defendants misunderstand Plaintiffs' claim. With regard to the latter two, Defendants are plainly wrong.

B. Plaintiffs' Ultra Vires APA Claim Does Not Depend on the Existence of a Private Right of Action Under Section 141(f) of the Census Act.

Defendants erroneously assert that Plaintiffs' section 706(2)(C) claim fails because the Census Act does not confer a private right of action. But Plaintiffs bring their claim under Section 706(2)(C) of the APA, which bars agencies from acting "in excess of statutory jurisdiction, authority, or limitations." It is well-established that a "plaintiff need not establish a private right of action under a statute before it may sue under the APA." *Rapid Transit Advocates, Inc. v. S. Cal. Rapid Transit Dist.*, 752 F.2d 373, 378 (9th Cir. 1985).

C. Violations of the Census Act Are Subject to Judicial Review Under the APA.

The APA broadly provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The statute affords two exceptions to this broad grant: where "statutes preclude judicial review" or where "agency action is committed to agency discretion by law." 5 U.S.C. §§ 701(a)(1), (2). As this Court has already held, the Census Act does not preclude judicial review and the congressional mandate in Section 141(f)(1)-(3) limits the Secretary's discretion. (*See* Order at 21-25.) Judge Furman arrived at the same conclusion. *See New York v. Commerce*, 315 F. Supp. 3d 766, 798–99 (S.D.N.Y. 2018) ("[T]he Court concludes that it has jurisdiction to entertain Plaintiffs' APA claims.").

The core concern of ultra vires review under 706(2)(c) is whether the agency followed its statutory mandate, not whether the decision was issued by memo, rule, order, or a report to

Congress—even FAQs on an agency website may be struck down under 706(2)(C) if they misstate the law. *See New Hampshire Hosp. Assoc. v. Burwell*, Civil No. 15-cv-460-LM, 2016 WL 1048023, at *16-19 (D.N.H. Mar. 11, 2016) (striking down answers to "Frequently Asked Questions" on the website for the Center for Medicare and Medicaid Services "CMS" under Section 706(2)(C)).

D. By Adding the Question Without Adhering to the Deadlines Set by Congress, Defendants Acted Beyond Their Authority.

Ross failed to follow 13 U.S.C. § 141(f)(1)-(3) when he added the topic of citizenship over a year after the Bureau had submitted the topics for the Census to Congress. Citizenship was not one of the topics, and Ross added it without finding that "new circumstances exist which necessitate that the subjects" be modified. 13 U.S.C. 141(f)(3). Defendants mischaracterize this claim by stating that "Defendants submitted the required reports to Congress," and by claiming that a report to Congress does not constitute final agency action. (Defs.' Mot. at 27.) But the final agency action here was the ***decision to add the question***; the reporting requirements merely prove that the decision was beyond Ross's legal authority.

Defendants' citation to *Guerrero v. Clinton* only emphasizes the agency action challenged in this case. 157 F.3d 1190, 1195 (9th Cir. 1998). In *Guerrero*, the territory of Guam brought an APA claim demanding that the United States issue a "better report" regarding the Compact of Free Associations Act of 1985. There was "no dispute that the Director has to submit reports to Congress: he has been doing so for three years." *Id.* at 1194. The court held that Guam had no standing to demand "a better report" because the report was "simply a document submitted to Congress that Congress has no obligation to consider, let alone act upon." *Id.* at 1194-95. *Guerrero* is inapplicable to Plaintiffs' 706(2)(c) claim not merely because it was decided on the basis of standing, but also because it involved ministerial reporting, not the congressional restrictions on executive action set forth in 13 U.S.C. § 141(f)(1)-(3).

The Census Act is unambiguous as to the process the Secretary of Commerce must follow when developing content for the census. Ross violated that process when he added a topic after the statutory deadline. He did not provide an explanation demanded by the statute: that he set

forth the "new circumstances" which "necessitate" that the subjects be modified. 13 U.S.C. § 141(f)(3). In the Decision Memo, Ross not only put forward a rationale that was arbitrary and capricious, but he failed to meet a deadline mandated by Congress. *See, e.g.*, *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 113 (2d Cir. 2018) (vacating an agency's decision for failing to comply with unambiguous statutory deadlines).

E. The Reports Themselves May Be Challenged as Final Agency Action.

In any event, the March 2018 report, and the failure to file a report setting forth the "new circumstances" that "necessitate" changing the topics, are final agency actions in their own right.[16] The March 2018 Report, by implementing the Secretary's decision, set forth a new topic on the Census that will affect every household in America, and therefore is an order "from which legal consequences will flow." *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016).

Reports to Congress that codify agency decision-making are the quintessential type of documents subject to 706(2)(C) review. *See, e.g.*, *Motion Picture Ass'n of Am., Inc. v. F.C.C.*, 309 F.3d 796, 799–800 (D.C. Cir. 2002) (holding that a FCC decision to regulate video descriptions, promulgated in mandatory report to Congress, was ultra vires under 706(2)(C)); *see also Tutein v. Daley*, 43 F. Supp. 2d 113, 116 (D. Mass. 1999) (challenging under 706(2)(C) a report to Congress issued pursuant to the Sustainable Fisheries Act). When a Court finds that an agency did not abide by its statutory authority in making a decision that it was then required to report (to Congress or to anyone), then the decision itself (along with the report) is reversed. *Id.*; *see also American Federation of Gov't Employees, AFL-CIO, Local 3669 v. Shinseki*, 821 F.Supp.2d 337, 350-51 (D.D.C. 2011) (striking a "Decision Paper" issued by the Secretary of Veterans' Affairs).

And even the decision whether to issue a report or not can be subject to review under 706(2)(C). The District of Maryland considered whether the Consumer Product Safety Commission's decision to publish a report on an infant's death was ultra vires under the APA. *Doe v. Tenenbaum*, 127 F. Supp. 3d 26, 440-44 (D. Md. 2012). And the District Court of the

[16] The March 2018 Report is *available at* https://www2.census.gov/library/publications/decennial/2020/operations/planned-questions-2020-acs.pdf.

District of Columbia applied the *Chevron* framework to determine whether the Bureau of Consular Affairs had violated Section 706(2)(C) by failing to issue a certificate documenting an immigration decision. *Farrell v. Tillerson*, 315 F. Supp. 3d 47, 67-68 (D.D.C. 2018). Here, the agency failed to issue a report required by Section 141(f)(3). While "the Secretary explained the basis for including a citizenship question" in the Decision Memo, that basis included nothing suggesting that new circumstances made the addition necessary. (Defs.' Mot. at 27.) Nor could it have. John Gore, who drafted the DOJ Request, admitted that the data purportedly sought by the question is not "necessary" to enforce the VRA. (Gore Dep. at 300:8-11.)

Ultimately, Defendants' arguments justifying Ross's addition of a citizenship question to the Census without determining whether "new circumstances" existed to necessitate the addition rest on a breathtaking view of executive power. Defendants' arguments amount to the following: (1) they are not required to follow the mandates of Congress; and (2) the judiciary cannot hold them accountable for violating the law. If accepted, Defendants' warped view of the APA will undermine the statute and dilute the very concept of separation of powers. In any event, even if this Court finds that Defendants' failure to abide by 13 U.S.C. § 141(f)(1)-(3) cannot be reviewed under Section 706(2)(C) of the APA, Defendants' actions only provide further evidence that the decision was arbitrary and capricious. *See Reed v. Salazar*, 744 F. Supp. 2d 98, 115-18 (D.D.C. 2010) (failure to issue report required by statute renders decision arbitrary and capricious).

CONCLUSION

Plaintiffs respectfully request that the Court deny Defendants' motion for summary judgment for the reasons stated above.

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Respectfully submitted,

Dated: November 16, 2018

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FILER'S ATTESTATION

Pursuant to Civil Local Rule 5-1(i)(3), regarding signatures, Ana G. Guardado hereby attests that concurrence in the filing of this document has been obtained from all the signatories above.

Dated: November 16, 2018

s/ Ana G. Guardado
Ana G. Guardado

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2018 I served the foregoing with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

/s/ Ana G. Guardado
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