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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' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL 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

Defendants do not dispute the key material facts in this action. They do not dispute that Secretary Ross, soon after taking office, made a "request that we include the citizenship question" on the 2020 Decennial Census ("Census"). (0003710.) They do not dispute that Ross's deputy at the U.S. Department of Commerce ("Commerce"), Earl Comstock, reached out first to the Department of Justice ("DOJ") and then to the Department of Homeland Security ("DHS") to ask them to request that the U.S. Census Bureau (the "Bureau") add the question. They do not dispute that each agency rebuffed Comstock. They do not dispute that Ross then called Attorney General Sessions, and that DOJ issued its December 12, 2017 letter to the Bureau (the "DOJ Request") only ***after*** Ross and Sessions spoke.

Further, Defendants proffer no evidence that the purported goal of the DOJ Request—obtaining block-level citizenship voting-age population ("CVAP") data—is better served by adding the citizenship question than by using administrative records. Every statistical expert, including Defendants' expert witness, has stated that administrative records would provide better data. Indeed, Defendants have not offered any evidence in support of Ross's conclusory statement in his March 26, 2018 decisional memorandum (the "Decisional Memo") that "the citizenship data provided to DOJ will be more accurate with the question than without it." (001319.) Defendants do not deny that Ross added the topic to the Census nearly a year after the statutory deadline, and provide no evidence of "new circumstances" that "necessitate" doing so, as the statute requires. 13 U.S.C. § 141(f)(3).

Instead, Defendants ground their opposition in a number of cases standing for the unremarkable proposition that courts treat agency decisions with deference in APA cases. While that may be so as a general matter, that deference is not absolute or unlimited. Defendants cite to no decision in which any court has upheld an administrative decision in which an agency head: (1) first requested a decision be made without stating a reason; (2) then sought out another agency to request that the decision be made; (3) was rejected by two different agencies; (4) reached out to another cabinet Secretary to order unwilling subordinates to make the request; (5) received a detailed expert opinion—not just differing "views"—that the decision would not achieve the

stated goal of the request, and that other available options would; (6) made the decision anyway, without citing to any evidence in support of the key conclusion; and (7) not only omitted any reference to the real history behind his decision, but did not testify truthfully about it to Congress. The foregoing facts are the undisputed facts in this case and are supported by the uncontroverted evidence in the administrative record. The notion that this Court must blindly defer to such manifestly arbitrary, capricious, and wrongful agency action finds no support in the law.

This is not a case about a "disagreement with the Secretary's policy choice." (Defs.' Opp. (Doc. 104) at 18.) And it is not a case about Secretary Ross's "subjective thought process." (*Id.* at 19.) Rather, Plaintiffs are entitled to summary judgment because the administrative record confirms beyond dispute that Defendants' ***actions*** breached nearly every conceivable norm of administrative procedure when they decided to add a citizenship question to the Census in violation of standard processes, procedures, and protocols.

Moreover, Defendants fail to rebut evidence of Plaintiffs' standing. In opposing Plaintiffs' allegations that they have spent money based on the substantial risk of an undercount, Defendants put forward a witness who has agreed under oath that those risks are real, and whose report and trial testimony confirm that local communities ***such as the City of San Jose*** must increase their outreach spending ***specifically because*** of the likelihood of an undercount resulting from the citizenship question. And Defendants do not even attempt to address, let alone rebut, the evidence of BAJI's members' well-founded fears that their personal data will be misused.

For all of the reasons set forth below and in Plaintiffs' opening memorandum, Plaintiffs' motion for partial summary judgment should be granted.

ARGUMENT

I. DEFENDANTS' OPPOSITION CONFIRMS PLAINTIFFS' STANDING.

A. Defendants Do not Challenge BAJI's Privacy-Based Standing.

Plaintiff Black Alliance for Just Immigration ("BAJI") alleges that "the inclusion of the citizenship question will instill fear and intimidation in Black immigrant communities. (Compl. (Doc. 1) ¶ 60.) BAJI's members have expressed fears that, if they answer the citizenship question, their personal information will not be kept confidential. (Declaration of Opal Tometi (Doc. 99-4)

¶¶ 9–11.) Plaintiffs explained that these fears are reasonable because CVAP data are public and census blocks are sometimes as small as a single household. (Pls.' Mot. (Doc. 99) at 18.) A loss of privacy, like other "noneconomic values," is sufficient to confer standing. *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 154 (1970); *see also Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1114 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 931 (2018).

Defendants have not proffered any evidence or legal argument disputing BAJI's members' fears. It is black letter law that, to defeat a motion for summary judgment, a non-moving party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Defendants have addressed standing only with regard to a potential undercount and have totally ignored BAJI's members' privacy fears.[1]

Since BAJI's standing based on its members' fears is unopposed, this Court need not even consider Defendants' reasonable efforts to mitigate the substantial risk of an undercount. *See Carey v. Population Services Int'l*, 431 U.S. 678, 682 (1977). But should the Court consider Defendants' opposition to Plaintiffs' other standing arguments, it should reject them.

B. Plaintiffs' Expenditures Are Warranted, and Defendants' Witnesses Agree.

Defendants concede that plaintiffs who face a "substantial risk" of harm and "reasonably incur costs to mitigate or avoid that harm" have standing to challenge the conduct that created the risk. (Defs.' Opp. at 4.) *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013). To establish the "substantial risk" that adding the citizenship question may result in an undercount, Plaintiffs cited the Bureau's own ***documented*** finding that adding the question will depress self-response rates, along with Defendants' public statements that local governments should conduct more outreach because of the addition of the question. (Pls.' Mot. at 10–11.) To demonstrate that they have reasonably incurred costs to mitigate this substantial risk, Plaintiffs have offered uncontroverted evidence regarding money and time that both San Jose and BAJI have expended on additional outreach to encourage participation in the Census—exactly the sort of expenditure encouraged by the Bureau to supplement its own efforts. (*Id.* at 12–14.)

[1] Defendants likewise ignore BAJI's argument that the burden of filling out the questionnaire itself provides it standing through its members. (Pls' Mot. at 18 n.2.)

Defendants discuss the "Census Bureau's efforts to obtain a complete enumeration," but do not and cannot question that there is a substantial risk of an undercount. (Defs.' Opp. at 5.) Indeed, their own evidence shows that much of the efforts they are undertaking—as well as the efforts they have directed San Jose to take—are aimed at mitigating that risk. Because "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party" with regard to standing, Plaintiffs have standing and this Court can proceed to the merits. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

1. Dr. Abowd Has Confirmed the Existence of a Substantial Risk of a Differential Undercount and Has Testified that Localities Should Divert Resources to Mitigate that Risk.

Defendants may have produced evidence suggesting that the Bureau has plans in place to mitigate the net undercount, or even that it is hard to predict the scale of the undercount. But their burden on this motion is to present evidence sufficient to create a genuine dispute as to the ***substantial risk*** of an undercount. And they have failed to meet that burden.

Defendants rely on the opinion of Dr. John Abowd, the Bureau's chief scientist, to try to dispute the fact that the citizenship question creates a substantial risk of a differential undercount. But Abowd's report and testimony actually ***confirm*** the existence of that risk. As the Bureau itself has concluded, the 2010 decennial census resulted in a differential undercount of both the Black and non-white Hispanic populations.[2] As recently as 2016, the Bureau's directors argued that adding a citizenship question would "exacerbate[e] the undercount."[3] Defendants' claim that there will be no differential undercount this time, despite this recent history, is implausible and requires them to "come forward with more persuasive evidence than otherwise would be necessary." *Wong v. Regents of Univ. of Cal.*, 379 F.3d 1097 (9th Cir. 2004), *as amended by* 410 F.3d 1052, 1055 (9th Cir. 2005) (citing *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147 (9th Cir. 1998)). Defendants have failed to meet that burden.

[2] *See* 2010 Census Coverage Measurement Memorandum Series #2010-G-01 ("Census Coverage Memo"), *available at* https://www.census.gov/coverage_measurement/pdfs/g01.pdf.
[3] Defendants' Reply Memorandum and Opposition to Plaintiffs' Motion for Summary Judgment, *Federation for American Immigration Reform (FAIR), et al., v. Philip M. Klutznick, et al.*, 79-3269 (D.D.C. Jan 3, 1980) 1980 WL 683642 at 22.

Recognizing that large groups of residents will not respond to the Census because of the addition of the citizenship question, Abowd himself concluded that because of the question, the "2020 Census could be expected to lower the self-response rate in an identifiable and large sub-population-households that may contain non-citizens." (Declaration of John M. Abowd, Ph.D. ("Abowd Decl."), Doc. 100-1 ¶ 12.) Abowd's claim that the Bureau did not develop "credible quantitative evidence that the addition of a citizenship question to the 2020 Census would increase the net undercount or increase differential net undercounts for identifiable sub-populations" speaks only to the precision with which one can predict an undercount—not to the ***substantial risk*** that the question will cause one. Abowd testified that the "credible quantitative evidence of the harmful effects of the citizenship question" include "degradation of the quality of the census data in terms of the coverage measurement," and that those "coverage measurement components enter into the computation of a net undercount in a very complicated way." (Expert Deposition of John M. Abowd, ("Abowd Exp. Dep."), Exhibit 1 to the Reply Declaration of Andrew Case ("Case Reply Decl.") at 39:14-40:2)

Moreover, Abowd agrees that the risk of an undercount is substantial. He testified that he had not sought "credible quantitative evidence" that adding the question would lead to a net undercount. But that is a specialized term, meaning a "measure of uncertainty associated with that estimate that is a direct estimate or a modeled estimate of the effect that you're trying to quantify." (Abowd Exp. Dep. at 244:13-21). He testified that "credible quantitative evidence" is used "in the social sciences" when "we produced estimates of an effect that can be modeled appropriately, done appropriate diagnostic checks on it and presented it, along with its associated standard error." (*Id.* at 245:20-246:1). After all, he testified that the Bureau has produced no "credible quantitative evidence" to support the conclusions in his report either. *See* Trial Transcript, *New York et al. v. Commerce et al.*, 18-cv-2921, November 14, 2018, ("N.Y. Trial Transcript"), Case Reply Decl. Ex. 2 at 1295:13-18.[4] (Q: [T]he Census Bureau has not produced credible quantitative evidence indicating whether or not NRFU will be sufficient to address the

[4] Abowd's trial testimony in the New York matter is admissible as a statement by a party opponent. Fed. R. Evid. 801(d)(2)(A).

marginal increase in nonresponse caused by the citizenship question, correct? A: . . . [T]hat's correct, yes.")

When asked if there was any evidence—regardless of whether it included the appropriate standard error or met other scientific standards—that including the question would produce a net undercount, Abowd testified as follows:

> I am aware of considerable evidence that the addition of the citizenship question ***might affect the net undercount*** because analysts, ***including myself***, have produced ***credible evidence*** that ***self-response is directly related to the quality of components of that net undercount measurement*** and directly related to the quality of the dual system estimate that you are going to have to have to independently estimate the population you're trying to see whether you over or underestimated in the census.

(Abowd Exp. Dep. at 193:4-14 (emphasis added).) Abowd's only dispute was whether there is "credible qualitative evidence" that adding the question "will" affect the undercount. He stated that, "our statement should be it might affect the net undercount. ***And I agree***." (*Id.* at 194:9-10 (emphasis added).) But even if true, that does not affect the standing inquiry. Defendants continue to act as though Plaintiffs must prove an undercount with certainty to establish standing even though that is plainly not the law. And Defendants do not even acknowledge that their own expert, Abowd, testified as to the substantial risk of an undercount.[5]

And while Abowd stated, with regard to NRFU, that the Bureau "believes that those efforts will result in a complete enumeration," part of that belief is based on the notion that increased spending now will mitigate the decline in self-response. (Abowd Decl. ¶ 78.) An entire section of Abowd's expert report is devoted to an analysis of ***local efforts*** to increase self-response through outreach. In his report, using El Paso as an example, Abowd writes that efforts to lessen the decrease in self-response associated with the citizenship question will take the form of "targeted messaging for population sub-groups, ***local messaging*** and engagements ***through the***

[5] To the extent that any question remains in the Court's mind, Plaintiffs' experts have shown that not only is there a risk of an undercount, but the risk is overwhelmingly likely to materialize. (*See* Declarations of Matthew Barreto (Doc. 103-3) and Colm O'Muircheartaigh (Doc. 103-4).) This Court may consider all evidence submitted by both parties in cross-motions for summary judgment to determine whether there is a genuine dispute of material fact. *Fair Hous. Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1137 (9th Cir. 2001).

community-based partnership efforts." (Abowd Decl. ¶ 75 (emphasis added).) These are the very efforts that San Jose is currently undertaking, and which establish its standing in this action.

Plaintiffs need not prove that an undercount is certain or measure its magnitude. There is no "'highly attenuated' chain of possibilities" required for Plaintiffs to suffer injury here, as the Supreme Court found in *Clapper*. *See In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197, 1213 (N.D. Cal. 2014) (a data breach confers standing absent evidence that plaintiffs' data was misused based on the *risk* that it may be misused); *see also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010) (holding that a "reasonable probability" that an engineered gene would enter the crop pool created a "substantial risk of gene flow" and established standing).

2. Defendants' Expert, Dr. Stuart Gurrea, Fails to Create a Dispute that Adding the Citizenship Question Creates a Substantial Risk of Harm.

Once again misstating the relevant standard, Defendants contend that Plaintiffs cannot establish standing unless they "establish that they would actually be harmed by such an undercount." (Defs.' Opp. at 7.) But Plaintiffs need show only that they face a "substantial risk" of such harm, and they have demonstrated that any differential undercount of non-citizens will create such a risk. To the extent there is any question as to whether San Jose has a higher non-citizen population "relative to other areas," the Bureau's own data confirms that the San Jose-Sunnyvale-Santa Clara metropolitan area has among the highest such populations in the country.[6]

Defendants' own expert Dr. Gurrea fails to raise any dispute of fact as to the risk of harm to Plaintiffs. Although he performed calculations regarding how funding would be affected under certain conditions, when asked, Gurrea confirmed that he simply "took the number that was provided with [] and just applied it to the data that you were working with." (Expert Deposition of

[6] After Plaintiffs filed their original motion, the Bureau deleted citizenship percentages from the publicly available ACS website that Plaintiffs cited in their opening brief. *See* https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml. The Court can draw its own conclusions as to why Defendants did so. But because the website still reports the percentage of "foreign born" residents and the percentage of those foreign-born residents that are citizens, the citizenship rates remain available. Report DP02 from the ACS, which provides these data, confirms that San Jose's non-citizen population is 17.3% (38.9% foreign born, with 44.5% of those foreign born non-citizens) and trails only Miami, Santa Ana, and Los Angeles among major metropolitan areas with large foreign-born populations *See* Case Reply Decl. Ex. 4. San Jose's Hispanic population is not merely "larger" than the national average, but nearly double the national average. *See* Case Reply Decl. Ex. 5.

Stuart Gurrea ("Gurrea Dep."), Case Reply Decl. Ex. 3 at 122:2-5.) Gurrea was provided assumptions including "a NRFU success rate in 2020 equal to the 2010 Census NRFU success rate."[7] (Gurrea Decl. ¶ 11.) Gurrea provides no evidence regarding the risk that San Jose or BAJI will be harmed, only to the outcome ***if Defendants' unproven assumptions*** as to the effectiveness of NRFU come true. And he is not qualified to speak to those assumptions: he admits that he has no experience or expertise with respect to the census, apportionment or any of the issues relevant to this case. (Gurrea Dep. 32:15-33:18.) Further, Gurrea admits that he has no expertise in NRFU and doesn't even have "an independent opinion about what are the components of NRFU." (*Id.* at 103:23-104:4, 116:5-8.)

Even if there were evidence for the assumptions that were provided to Dr. Gurrea, his conclusions would nevertheless support Plaintiffs' allegations. Gurrea opines that—operating under the most optimistic assumptions possible, provided entirely by Defendants—there will be a net undercount that would translate to a loss of federal funding of 0.01%. (Gurrea Decl. ¶ 55.) Given the millions of dollars of funding at issue, ***any*** percentage loss, even a relatively small one, supports Plaintiffs' standing to challenge Ross's decision. Gurrea states that this estimate is made "before accounting for imputation" but Defendants provide no evidence regarding whether or how imputation will implicate this loss. (*Id.*)

C. Plaintiffs' Harm Is Directly Traceable to Ross's Decision to Add the Citizenship Question to the 2020 Census.

Because adding the citizenship question will depress self-response rates, which creates a risk of an undercount and lost funds, adding the question is traceable to Plaintiffs' harm. (Pls.' Mot. at 16-17.) *See Mendina v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014) (citing *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997)) ("[T]here's no requirement that the defendant's conduct comprise the last link in the chain"). In addition, San Jose has provided estimates of the dollar amounts spent and diverted on new outreach, and BAJI has provided descriptions of the programs from which funds have been diverted. (*See* Docs. 99-3 through 99-5.) This uncontroverted

[7] In 2010, as the Bureau has found, there was a differential undercount of both the Black population and the non-white Hispanic population. *See* Census Coverage Memo pp. 1–2.

evidence distinguishes this case from *Serv. Women's Action Network ("SWAN") v. Mattis*, where the court found that allegations of fielding complaints could not establish standing because "the complaint does not clearly allege whether SWAN typically takes any action or provides services beyond fielding complaints." 320 F. Supp. 3d 1082, 1100 (N.D. Cal 2018).

Indeed, this case is much more analogous to *Fair Housing. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012). There, the court found the plaintiff had offered sufficient evidence of harm to establish organizational standing where the defendants' conduct had caused plaintiff to investigate defendants' alleged violations and to start new education and outreach campaigns. *Id.* at 1219. The court did not require the plaintiff to identify "the volume of diverted funds and the specific plans" that the plaintiff planned to undertake. (Defs.' Opp. at 9.) It is sufficient for a plaintiff organization to testify that the defendant's actions have caused it to expend additional resources, and that "but for" the defendant's actions, the plaintiff would have directed those resources to accomplish other aspects of its organizational mission. *See Nat'l Council of La Raza v. Gegavske*, 800 F.3d 1032, 1040-41 (9th Cir. 2015).[8]

Indeed, Ross's own admissions expressly trace Plaintiffs' mitigation efforts to his decision to add the citizenship question. In his public statements, Ross specifically responded to "troubling reactions" to his decision to add the citizenship question to the Census. (Case Reply Decl. Ex. 6.) Ross was doing more than "reiterating the standard position" when he wrote to the United States Commission on Civil Rights ("USCCR"). (Defs.' Mot. at 12.) After all, the USCCR's letter addressed the citizenship question and only the citizenship question, and Ross responded with a letter about the decision to add "a citizenship question to the 2020 decennial census." (Case Reply Decl., Exs. 6, 7.) In its letter USCCR wrote that there was a "valid basis for concern with participating in a Census that includes such a question." (Case Reply Decl. Ex. 7.) In response, Ross replied that he was "asking Federal, state, and local leaders" to reassure the public that "[n]o

[8] Defendants' hearsay objections to Plaintiffs' declarations on this point should be rejected. The Tometi and Ruster declarations do not contain hearsay because they are being offered not for the truth of the matters asserted, but rather to show the effect on the listeners and to explain why San Jose and BAJI reasonably incurred costs to mitigate the substantial risk of an undercount. *See United States v. Payne*, 944 F.2d 1458, 1472 (9th Cir. 1991) (a statement introduced to show the effect on the listener and not for the truth of the matter asserted is not hearsay).

one should be afraid" of the participation in the Census. (Case Reply Decl. Ex. 6.) Defendants' contention that Ross was speaking in general terms and not about the citizenship question ignores the context of the exchange.

Equally unavailing is Defendants' contention that "Plaintiffs chose to take up the Census Bureau's invitation to perform outreach, there is no reason they needed to do so." (Defs.' Opp. at 12.) Their star witness disagrees. In his trial testimony on November 14—***before*** Defendants filed their opposition—Dr. Abowd testified under oath that the addition of the citizenship question has made increased outreach conducted by local officials "necessary":

> I believe that an important part of the mitigation of the decline in the self-response rate will be to modify components of the ***partnership and integrated partnership and communication program*** so that the message that the census data are confidential, that they are only used to produce statistical tabulations, that they are not given to any other government agency for the purposes of enforcing any law, will be an important message, and ***we acknowledge that the addition of the citizenship question has made it necessary to augment that part of the integrated communication and partnership program***.

(N.Y. Trial Transcript at 1077:22-78:7 (emphasis added).)[9] Defendants' legal arguments are at odds with the sworn testimony of their own key witnesses.

II. DEFENDANTS HAVE FAILED TO REBUT THE EVIDENCE THAT ROSS'S DECISION WAS ARBITRARY AND CAPRICIOUS.

To establish Defendants' violation of the APA, Plaintiffs need not discern the "subjective thought process" that led Ross to add the citizenship question to the 2020 Census. (*See* Defs.' Opp. at 19). Rather, it is readily apparent from Defendants' ***actions*** that Ross's decision was arbitrary and capricious because he (1) failed to disclose and explain the true bases of his decision; (2) failed to consider all relevant factors and to articulate a "rational connection between the facts found and the choice made," and (3) offered "an explanation for [his] 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*

[9] And while Abowd thinks that this outreach "can help reduce the net undercounts," he believes it is "highly unlikely" to eliminate the net undercount or a differential undercount. (Abowd Exp. Dep. 296:13-297:1.)

Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Ross's purported rationale for the decision was pretextual, so the decision must be set aside without further inquiry. *See e.g. Pub. Citizen v. Heckler*, 653 F. Supp. 1229, 1237 (D.D.C. 1986) (when agencies "say one thing" and "do another" it is "the essence of arbitrary action"). But even aside from pretext, the uncontroverted evidence establishes that Defendants violated the APA on each of the *State Farm* grounds.

Defendants cite cases in support of the unremarkable principle that APA review is deferential. But those cases only emphasize the departure from ordinary processes here. Two of Defendants' cited cases involved the Fish and Wildlife Service's weighing of the "relevant factors" in a four-factor test to determine whether a species is endangered. *Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007); *see also In Ctr. for Biological Diversity v. Zinke*, 868 F.3d 1054, 1058 (9th Cir. 2017). In another case cited by Defendants, *FERC v. Electric Power Supply Association*, 136 S. Ct. 760 (2016), *as revised* (Jan. 28, 2016), the Supreme Court deferred to the agency's endorsement of the views of "an eminent regulatory economist" over other technical opinions. *Id.* at 782. And Defendants cite *Pacific Dawn LLC v. Pritzker*, 831 F.3d 1166 (9th Cir. 2016), but that was a challenge to agency rulemaking after a notice-and-comment process in which the Ninth Circuit deferred to the agency's determination of end dates for fishing quotas, a fact of which "participants were on notice." *Id.* at 1179.

Inexplicably, Defendants cite *Encino Motorcars, LLC v Navarro*, 136 S. Ct. 2117 (2016), for the proposition that "the agency's explanation is clear enough that its 'path may reasonably be discerned,'" without noting that in *Encino Motorcars*, the Supreme Court vacated a Department of Labor decision revoking past practice because "a lack of reasoned explication for a regulation that is ***inconsistent with the Department's longstanding earlier position*** results in a rule that cannot carry the force of law." *Id.* at 2127 (emphasis added). None of these cases suggests that courts defer to an agency's secretive efforts to browbeat other agencies into making requests for agency action, and *Encino Motorcars* in particular mandates a finding in Plaintiffs' favor.

A. Ross Failed to Disclose a Plausible, Non-Pretextual Basis for His Decision.

The APA requires an agency decision-maker to "disclose the basis of its" decision. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (internal quotation marks

omitted). The purported basis of an agency decision must be rejected where, as here, the function of that statement is to "provide a pretext for the ulterior motive" of the decision-maker. *Woods Petroleum Corp. v. U.S. Dep't of Interior*, 18 F.3d 854, 859 (10th Cir. 1994) (invalidating agency decision as arbitrary and capricious where action was pretext for ulterior motive). Because the record establishes that the stated basis for the Ross's decision is pretextual, Plaintiffs are entitled to partial summary judgment on their APA claim.

Pub. Citizen v. Heckler, 653 F. Supp. 1229, in particular, confirms that even when an agency decision does not rise to the level of misconduct shown here, the decision may be set aside as pretextual. *Id*. at 1237. There, the Food and Drug Administration ("FDA") had found that raw milk was linked to the outbreak of serious disease. *Id.* at 1232. The FDA requested that the Health and Human Services ("HHS") Secretary ban the interstate sale of all raw milk products. *Id*. Despite overwhelming evidence in support of the ban, the HHS Secretary denied the FDA's request on the basis that raw milk is most appropriately dealt with at the state and local level. *Id*. at 1235. The court found that "for an agency to say one thing—that all raw milk is a known public health risk, and do another—refuse to ban all types of raw milk, is the essence of arbitrary action" and "indicates that the Secretary's stated reason may very be pretextual." *Id*. at 1237.

B. Ross Decided to Add the Citizenship Question Long Before the DOJ "Requested" Citizenship Data from the Decennial Census.

Defendants claim that the facts set forth by Plaintiffs present a "fanciful narrative" that is "unsupported." (Defs.' Opp. at 19.) But the evidence supporting Plaintiffs' position is all in the administrative record, and Defendants have failed to dispute that evidence in any way. The uncontroverted evidentiary record demonstrates that Ross asked for the citizenship question long before the December 12, 2017 DOJ Request, and no contemporary evidence before that date suggests any reference to the Voting Rights Act ("VRA"). The Decisional Memo references past events for which there is no record evidence, and the post-hoc explanation set forth in the "Supplemental Memorandum" (001321) creates more questions than it answers.

It is undisputed that DOJ only submitted the DOJ Request after multiple demands and interventions by Commerce:

- Ross began considering whether to add a citizenship question "[s]oon after [his] appointment as Secretary of Commerce." (0001321.)
- Ross asked Comstock to determine whether non-citizens are included in the census count and how to add a citizenship question to the 2020 Census questionnaire. (0002521, 0003705, 0003710.)
- In early April 2017, Ross demanded of Comstock that "we must get our [Census] issue resolved" by month's end. (0003694 (emphasis in original).)
- Ross complained in May 2017, that he was "mystified why nothing [has] been done in response to my months['] old request that ***we include the citizenship question***." (0003710 (emphasis added).) Comstock responded that "we need to work with Justice to get them to request that citizenship be added." *Id.*
- Both Ross and Comstock acknowledged that they would need to be "very careful" to create a defensible administrative record for future litigation. (0012476.)
- In May 2017, Commerce asked DOJ to support its request for a citizenship question. (0003710, 0003701, 0002462, 0012756.)
- Before September 2017, DOJ refused to become involved with the citizenship question. (0012756.) Commerce then turned to DHS, which also refused to participate in Commerce's effort to add the citizenship question. (0012756.)
- Ross reached out directly to a fellow political appointee, then-Attorney General Jeff Sessions, whose staff agreed to "do whatever you need us to do." (0002651.)
- In November 2017, Ross feared that "[w]e are out of time" because the Bureau was scheduled to proceed with Census preparations as planned. (0011193.)
- The DOJ Request was issued in December, months after it had refused to send it but shortly after Ross contacted Sessions. (000663–000665.)
- DOJ provided no empirical data to support its claim that "a question on citizenship will best enable the [DOJ] to protect all American citizens' voting rights." (000663.)

All of this evidence comes solely from the administrative record. Nevertheless, Defendants continue to mischaracterize Ross's decision to add the citizenship question as having

been made "in response" to the DOJ's request for block-level CVAP data. But the charade is over. The undisputed facts speak for themselves, and they establish as a matter of law that Defendants violated the APA.

In arguing that Ross's decision did not "emerge[] from a vacuum," Defendants contend that "the inclusion of a citizenship question has been common both historically and in comparative international perspective." (Defs.' Opp. at 19.) In support of this proposition, Defendants cite only the Decisional Memo itself. They present no evidence that Ross had even seen the "historically and in comparative international perspective" use of citizenship questions when he wrote, in May 2017, that he had issued a months-old "request that we include the citizenship question." (0003710.) The only pre-May 2017 evidence in the administrative record that suggests ***any*** reason for adding the question are Ross's conversations with Kris Kobach and Steve Bannon. (000763–000764.)

C. Ross Entirely Ignored the Bureau's Requirements That All Questions Undergo Field Testing and Cognitive Testing.

Defendants acknowledge that Ross mentioned testing in the Decisional Memo, but do not address the fact that he failed to "adhere to voluntarily adopted, binding policies that limit [his] discretion." *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987). They fail totally to address the fact that rejecting the testing protocols was "inconsistent with the Department's longstanding earlier position." *Encino Motorcars*, 136 S. Ct. at 2127. While Ross acknowledged that the Bureau conducts cognitive and field testing of a new question, he analyzed only the Bureau's recommendations for ***cognitive*** testing. (001296.) Ross omitted any consideration of whether prior ***field*** testing had been performed, and whether such testing was adequate. (001297.)

Moreover, the undisputed facts demonstrate that the Bureau advised Ross of the cognitive and field testing requirements. Ross asked the Bureau, "What was the process that was used in the past to get questions added to the decennial Census or do we have something similar where a precedent was established?" (0009832.) The Bureau, through Abowd, provided a detailed

response setting for the Bureau's "well-established process" for changing content "on the census or ACS."[10] (0009832–0009833.)

Defendants argue that Commerce's revisions to the Bureau's answers were "approved for inclusion by Census Bureau leadership." (Defs.' Opp. at 23.) But that statement is not supported anywhere in the record. Christa Jones, Deputy Chief of the Bureau, wrote on February 24, 2018, that she was "fine with" one revision to the answer, authored by Sahra Park-Su. (013023.) But the Bureau did not include Park-Su's proposed answer when it sent its final response to Ross on March 1, 2018, which continues to reference the "well-established process." (0009812; 0009832.)

And in any event, the version that Jones saw was revised ***yet again*** before the administrative record was produced in this matter, specifically to replace the phrase "Consistent with longstanding practice for adding new questions" with "Because no new questions have been added to the Decennial Census (for nearly 20 years), the Census Bureau did not fee[l] bound by past precedent." (001296.) Nothing in the record suggests that anyone from the Bureau saw this answer or confirmed that the Bureau did not in fact "feel bound by past precedent." Defendants simply ignore the record evidence and, therefore, fail to dispute that Commerce "so distort[ed] the record that an agency decisionmaking body can no longer rely on [it] in meeting its obligations under the law." *Nat'l Small Shipments Traffic Conference, Inc. v. I.C.C.*, 725 F.2d 1442, 1450-51 (D.C. Cir. 1984).

D. Ross's Decision-Making Was Not Reasoned Where He Discounted Agency Expertise and Deferred to Facially Invalid Rationale.

The voluminous evidence contained in the administrative record runs counter to the explanation Ross offered for his decision. This is fatal to Defendants' defense that Ross's decision was objectively reasonable. While Ross paid lip-service to the Bureau's expertise by acknowledging "concerns" that adding a citizenship question "would negatively affect the response rate for non-citizens," he irrationally deferred to the facially invalid rationale set forth in

[10] Defendants' made-for-litigation position that the process applies only to the ACS because no one had suggested a move so radical as changing the short-form census questionnaire is not supported by the record. They offer no explanation why the ACS, sent to a sample of households, would have a more robust process for adding content than the short form census sent to every household. And the process refers to changes in "the census or ACS." (0009832–0009833.)

the DOJ Request over the scientific expertise of the Bureau. (001313–001320.) In so doing, he ignored important consequences of adding a citizenship question identified by his own agency experts. *See, e.g.*, *United States v. F/V Alice Amanda*, 987 F.2d 1078, 1085 (4th Cir. 1993) (agency action is arbitrary and capricious when the agency "had actual knowledge of the problems" associated with its decision).

The administrative record contains ample scientific evidence to support a finding that adding the citizenship question would conflict with Ross's stated goal of "obtaining ***complete and accurate data***" (001313 (emphasis in original)), including the following findings from the Bureau's own January 19, 2018 memorandum:

- The question will provide "substantially less accurate citizenship status data than are available from administrative sources." (001277.)
- The breakoff rate for Hispanics is nine times higher than for non-Hispanic Whites for the citizenship question. (001281.)
- Every respondent would be burdened by the question, and it would lead to a larger decline in self-response for noncitizen households. (001281.)
- Responses to the citizenship question on the ACS results in a high amount of false self-reporting. (001317.)

By contrast, the only evidence Ross relied upon was the DOJ Request itself. (001313–001320.) The DOJ Request states that (1) the DOJ needs CVAP data on the census block level to enforce the VRA; and (2) asking a citizenship question on the Census is the best way to get that data. The record does not support the first statement and affirmatively disproves the second.[11] Reliance on a facially deficient recommendation renders a decision arbitrary and capricious. *See Ergon-W. Virginia, Inc. v. U.S. Env. Prot. Agency*, 896 F.3d 600, 613 (4th Cir. 2018).

None of the cases cited in the DOJ Request actually support the DOJ's request for such data to enforce the VRA. *See Reyes v. City of Farmers Branch*, 586 F.3d 1019, 1023–24 (5th Cir.

[11] Defendants erroneously state that it is "undisputed" that DOJ needs block-level CVAP data to enforce the VRA. Plaintiffs absolutely dispute this claim, and specifically did so in their opening brief. (Pls.' Mot. at 29, n.31.) Indeed Plaintiffs have stated since the commencement of this litigation that the purported rationale was pretextual. (*See* Compl. ¶¶ 67–70.)

2009) (while CVAP data is appropriate evidence to prove minority-majority district, no mention of need for block-level CVAP data and Plaintiffs did not rely on ACS citizenship data); *Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998) (affirms use of CVAP data for determining proportional equality of voting power, but rejects use of decennial census to obtain such data: "To verify the age and citizenship of the population would enormously complicate the decennial census and open the census-taker to charges of manipulation."); *Negron v. City of Miami Beach*, 113 F.3d 1563, 15 67–69 (11th Cir. 1997) (plaintiffs relied unsuccessfully on voting-age population to draw illustrative districts and never attempted to proffer districts based on CVAP data); *Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989), *overruled in part on other grounds by Townsend v. Holman Consulting* Corp., 914 F.2d 1136, 1141 (9th Cir. 1990) (affirms that "eligible minority voter population, rather than total minority population, is the appropriate measure of geographical compactness"); *LULAC v. Perry*, 548 U.S. 399, 423-442 (2006) (no discussion of block-level CVAP data).

Ross relied on the DOJ Request for his finding that "having [citizenship] data at the census block level will permit more effective enforcement of the Act." (001313.) While Ross was not required "to undertake an independent analysis" of another agency's conclusions, he also could not "blindly adopt [those] conclusions." *City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006). Finally, Defendants have proffered no evidence whatsoever to support Ross's conclusory statement that "the citizenship data provided to DOJ will be more accurate with the question than without it." (001319.) This central conclusion of the Decisional Memo is "counter to the evidence before the agency." *State Farm*, 463 U.S. at 43.

III. DEFENDANTS HAVE FAILED TO REBUT THE EVIDENCE THAT ROSS'S DECISION WAS BEYOND HIS STATUTORY AUTHORITY.

A. This Court May Review Ross's Decision.

Plaintiffs rely on a single case decided on standing grounds to assert that "congressional reporting requirements" are beyond the jurisdiction of a court. (Defs.' Mot. at 13). But the issue in *Guerrero v. Clinton* was whether a "better report" regarding the Compact of Free Associations Act of 1985 would have provided any relief to Guam. 157 F.3d 1190, 1195 (9th Cir. 1998). By

contrast, the Census Act governs the process by which the Secretary must disclose the content of the ACS and the Decennial Census to prevent exactly the type of abuse that took place here. The "agency action" at issue is Ross's decision to add the question nearly a year after the deadline for changing census content had passed, without stating that any new circumstances made that change necessary. *See, e.g., NRDC v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 113 (2d Cir. 2018) (vacating agency decision because agency improperly delayed implementation of a rule beyond a statutorily-mandated deadline).

Defendants claim that the only remedy for violating the Census Act is for Congress "to respond to the missing report in the manner of Congress's choosing." (Defs.' Opp. at 16.) It is not clear what Defendants mean. Members of Congress have previously tried to mandate census content by denying the Bureau funding if it fails to ask certain questions, but this tactic requires successfully amending appropriations legislation.[12] If courts could not enforce acts of Congress, there would be no need for Section 706(2)(C). Public reports that codify agency decision-making are subject to ultra vires review, whether sent to Congress or anyone else. *See, e.g.*, *Motion Picture Ass'n of Am., Inc. v. F.C.C.*, 309 F.3d 796, 799–800 (D.C. Cir. 2002).

B. Defendants "New Circumstances" Do not "Necessitate" Adding the Question.

Defendants do not claim that their interpretation of the Census Act is entitled to *Chevron* deference, and because the Decisional Memo does not constitute rulemaking, deference is only due based upon the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) And under *Skidmore* deference, Defendant's construction of the Census Act—which allows them to add, remove, or modify topics at any time without any explanation, "fails to address the particular interplay among" relevant provisions of the Act. *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (refusing to apply *Skidmore* deference to EEOC manual). The law that added Section 141(f) also added 13 U.S.C. § 6(c), requiring the Secretary to use other data sources "to the

[12] Such efforts have not typically been successful. *See* Vitter-Bennet Amendment No. 2644 to Commerce, Justice Science and Related Agencies Appropriations Act of 2010, *available at* https://www.congress.gov/congressional-record/2009/10/13/senate-section/article/S10339-2.

maximum extent possible" instead of "conducting direct inquires." PL 94–521 (HR 11337) October 17, 1976.[13]

Defendants contend that the DOJ Request consists of "new circumstances," but ignore the fact that it was issued only after Ross met with Sessions. Defendants do not and cannot explain how the DOJ Request "necessitates" adding the question. (Defs.' Opp. at 16.) And bizarrely, Defendants argue that they should not be held accountable for failing to follow the Census Act now, because they could theoretically submit a compliant report before 2020, even as they admit they have not done so now and cannot explain how a new report would comply with the law.

And should this Court find that Defendants' failure under 13 U.S.C. § 141(f)(1)-(3) cannot be reviewed under § 706(2)(C) of the APA, Defendants' failure to meet required deadlines further show that the decision to add the question was arbitrary and capricious. *See Reed v. Salazar*, 744 F. Supp. 2d 98, 115-18 (D.D.C. 2010) (holding a decision arbitrary and capricious, in part, because of the failure to issue an Environmental Impact Statement).

IV. THE BUREAU SHOULD MAKE ANY DECISION ON REMAND.

Defendants suggest that if Plaintiffs prevail Ross should be allowed to "remed[y] any procedural errors" even though those "errors"—consisting of an obvious cover-up, false statements under oath, and blown deadlines—are neither errors nor remediable. (Defs.' Opp. at 29.) Should this Court find that remand is necessary, Defendants incorrectly state that Plaintiffs do not "present an alternative" to remanding this decision to Ross himself. (Defs.' Opp. at 30.) Plaintiffs' alternative is to bar Ross and Commerce from considering any agency action so that any further consideration "be undertaken by the Bureau alone." (Pls.' Mot. at 30.) Defendants do not address this alternative and thereby concede that it is an appropriate remedy should this Court decline vacatur without remand. *See Samica Enters. LLC v. Mail Boxes Etc., Inc.*, 460 F. App'x 664, 666 (9th Cir. 2011) ("Arguments not raised in opposition to summary judgment or in the opening brief before this court are waived.")

[13] The final conference report on the law confirmed its purpose was "reducing respondent burden" and providing reports to Congressional committees "for their review *and recommendations*." HR Conf. Rep. 94-1719, Case Reply Decl. Ex. 8 (emphasis added).

CONCLUSION

Plaintiffs respectfully request that the Court set aside Ross's decision to add the citizenship question and enjoin Defendants from taking steps to add the question to the Census.

Respectfully submitted,

Dated: November 26, 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 26, 2018

s/ Ana G. Guardado
Ana G. Guardado

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 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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