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14 IMMIGRATION

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16 **IN THE UNITED STATES DISTRICT COURT**  
17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

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

20 Plaintiffs,

21 vs.

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

26 Defendants.  
27  
28

3:18-cv-02279-RS

**PLAINTIFFS CITY OF SAN JOSE  
AND BLACK ALLIANCE FOR JUST  
IMMIGRATION'S PROPOSED POST-  
TRIAL FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

Ctrm: 3  
Judge: The Hon. Richard  
G. Seeborg

Trial Date: January 7, 2019  
Complaint Filed: April 17, 2018

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1 Plaintiffs City of San Jose and Black Alliance for Just Immigration hereby submit the  
2 following post-trial findings of fact and conclusions of law.

3 **PROPOSED POST-TRIAL FINDINGS OF FACT**

4 **I. PARTIES, WITNESSES, CLAIMS, AND BACKGROUND**

5 **A. Parties**

- 6 1. Plaintiff the City of San Jose (“San Jose”) incorporated in 1850, is the third-largest city in  
7 California. (UF 9).<sup>1</sup>
- 8 2. Plaintiff Black Alliance for Just Immigration (“BAJI”) is an Oakland-based nonprofit that  
9 educates and engages African American and Black immigrant communities in support of  
10 racial, social, and economic justice. (UF 10).
- 11 3. Defendant Wilbur Louis Ross, Jr. is the Secretary of the Department of Commerce. (UF  
12 11).
- 13 4. Defendant the United States Department of Commerce (“Commerce”) is a department of  
14 the United States Government. (UF 12).
- 15 5. Defendant Stephen Dillingham is the Director of the United States Census Bureau.
- 16 6. During the period at issue, Ron Jarmin was performing the non-exclusive functions and  
17 duties of the Director of the United States Census Bureau. (UF 13).
- 18 7. The United States Census Bureau (the “Bureau”) is a Bureau within the Department of  
19 Commerce charged with conducting the decennial census. (UF 14).

20 **B. Fact Witnesses**

- 21 8. Opal Tometi is the Executive Director of BAJI. In that role she oversees BAJI’s outreach  
22 efforts to engage and educate Black immigrant, refugee, and African American  
23

24  
25  
26 <sup>1</sup> Plaintiffs San Jose and BAJI cite to the Undisputed Facts (Exhibit A to the Joint Pretrial  
27 Statement and Proposed Order, Doc. No. 125) with the abbreviation “UF” and to the  
28 Administrative Record with the abbreviation “AR.” Plaintiffs San Jose and BAJI cite to exhibits  
admitted at trial outside of the Administrative Record (relied up on for standing and the  
Enumeration Clause claim only) as “PTX-”, and to trial transcript page and line numbers.

1 communities regarding the 2020 Decennial Census. (Trial Affidavit of Opal Tometi,  
2 (“Tometi Aff.”), Doc. No. 142, ¶ 3).

3 9. Jill Bourne is the director of the San Jose Public Library, a position she has held for five  
4 and a half years. (Trial Affidavit of Jill Bourne (“Bourne Aff.”), Doc. No. 131, ¶ 1).

5 10. Jeff Ruster is the Assistant Director in the Office of Economic Development of the City of  
6 San Jose. (Trial Affidavit of Jeff Ruster (“Ruster Aff.”), Doc. No. 130, ¶ 1).

7 11. Monique Melchor is the Director of work2future, Workforce Development Board, Office  
8 of Economic Development for the City of San Jose. (Trial Affidavit of Monique Melchor,  
9 Doc. 135, (“Melchor Aff.”), ¶ 2)

10 12. Kristen Clements is the Division Manager for the City of San Jose’s Department of  
11 Housing, overseeing the Policy and Planning Team, the Grants Management Team, and  
12 the Housing and Community Development Commissions. (Trial Affidavit of Kristen  
13 Clements, (“Clements Aff.”), Doc. No. 171 ¶ 1)

14 13. Raymond Riordan is the Director of the Office of Emergency Management (“OEM”) for  
15 the City of San Jose. (Trial Affidavit of Raymond Riordan, (“Riordan Aff.”), Doc. No.  
16 136 ¶ 1).

17 **C. Experts<sup>2</sup>**

18 14. Dr. Colm O’Muirheartaigh is a professor at the University of Chicago’s Harris School of  
19 Public Policy and a Senior Fellow at the National Opinion Research Center (NORC).  
20 (Trial Transcript (“Trial Tr.”) at 33:6–17). Dr. O’Muirheartaigh was admitted as an  
21 expert in survey methods, research design, statistical analysis, and the United States  
22 census. (Trial Tr. at 39:11–16).

23 15. Dr. Matthew A. Barreto is a professor of political science and Chicano studies at the  
24 University of California, Los Angeles. Dr. Barreto was admitted as an expert in survey  
25

26 \_\_\_\_\_  
27 <sup>2</sup> San Jose and BAJI rely on Dr. Barreto, Dr. O’Muirheartaigh, Dr. Reamer, Dr. Anderson, and  
28 Dr. Fraga to establish standing and for their Enumeration Clause claim. This evidence is not  
offered in support of their APA claims.

- 1 methodology, public opinion polling, and racial and ethnic politics. (Trial Tr. at 366:12–  
2 14; 372:8– 373:4).
- 3 16. Dr. Margo Anderson is a Distinguished Professor Emerita in History and Urban Studies at  
4 the University of Wisconsin, Milwaukee. She received a Ph.D. in History from Rutgers  
5 University in 1978. She has written numerous articles and books on the demographic  
6 history of the United States and on the Census. Dr. Anderson was admitted as an expert  
7 in the history of the Census. (Trial Affidavit of Margo Anderson (“Anderson Aff.”), Doc.  
8 No. 177-1, ¶ 1).
- 9 17. Dr. Bernard Fraga is a political data analyst and researcher. He is also an assistant  
10 professor of political science at Indiana University in Bloomington, Indiana. He received  
11 his Ph.D. in government and social policy from Harvard University in 2013, including  
12 coursework in statistics and data analysis. He received his Master of Arts from Harvard  
13 in political science and his undergraduate degree from Stanford University in political  
14 science and linguistics. (Trial Tr. at 615:11–21). Dr. Fraga was admitted as an expert in  
15 political data analytics, demographic analysis, and census data analysis. (Trial Tr. at  
16 616:25–617:7).
- 17 18. Dr. Andrew Reamer is a professor in the George Washington Institute of Public Policy  
18 (“GWIPP”) at the George Washington University in Washington, DC. He received his  
19 Ph.D. in Economic Development and Public Policy and a Master of City Planning from  
20 the Massachusetts Institute of Technology and a Bachelor of Science in Economics from  
21 the Wharton School, University of Pennsylvania. (Declaration of Dr. Andrew Reamer,  
22 Doc. 179-1 (“Reamer Decl.”), ¶ 2). Dr. Reamer was admitted as an expert in the  
23 relationship between census data and federal funding. (Trial Tr. at 661:17–22).
- 24 19. Dr. Stuart Gurree was admitted as an expert in economics, quantitative analysis of  
25 economic data, and impact evaluation. (Trial Tr. at 694:6–15).
- 26 20. Dr. John Abowd is the Chief Scientist and Associate Director for Research and  
27 Methodology at the Bureau, and was admitted as an expert in economics, econometrics,  
28 statistics, census operations, and census procedures. (Trial Tr. at 796:24–797:4).

1           **D.     Claims**

- 2           21.     On March 26, 2018, Secretary Ross issued a memorandum (the “Decisional Memo”)  
3           directing the Bureau to add a question on citizenship status to the 2020 Decennial Census  
4           (the “Census”). (AR001313).
- 5           22.     Plaintiffs claim that Ross’s decision to add a citizenship question to the Census violated  
6           the Enumeration Clause of the United States Constitution. U.S. Const., art. I, § 2, cl. 3.
- 7           23.     Plaintiffs claim that Ross’s decision to add a citizenship question to the Census violated  
8           the Apportionment Clause. U.S. Const. amend. XIV, § 2.
- 9           24.     Plaintiffs claim that Ross’s decision to add a citizenship question was “arbitrary,  
10          capricious, an abuse of discretion, or otherwise not in accordance with law” under the  
11          Administrative Procedure Act (“APA”) and must be set aside. 5 U.S.C. § 706(2)(A).
- 12          25.     Plaintiffs claim that Ross’s decision to add a citizenship question was made “in excess of  
13          statutory jurisdiction, authority, or limitations, or short of statutory right” under the APA,  
14          because the decision disregarded the statutory requirements of 13 U.S.C. § 6(c) and 13  
15          U.S.C. § 141(f) and must be set aside. 5 U.S.C. § 706(2)(C).

16           **E.     Decennial Census Overview**

17           1.       Census Purpose And Operations

- 18           26.     The U.S. Constitution requires the federal government to conduct a decennial census  
19           counting the total number of “persons”—with no specific reference to citizenship or  
20           immigration status—residing in each state. (UF 30).
- 21           27.     The Constitution provides that Representatives “shall be apportioned among the several  
22           States . . . according to their respective Numbers;” which requires “counting the whole  
23           number of persons in each State.” (UF 31).
- 24           28.     The Constitution requires that this count be an “actual Enumeration” conducted every ten  
25           years. (UF 32).
- 26           29.     Through the Census Act, Congress assigned the responsibility of making this enumeration  
27           to the Secretary of Commerce. (13 U.S.C. § 141(a); UF 33).
- 28



- 1 30. The Secretary of Commerce is charged with the responsibility to take a decennial census  
2 to create an actual enumeration of the United States population. (UF 34).
- 3 31. The central constitutional purpose of the decennial census is to conduct an enumeration of  
4 the total population. (UF 35).
- 5 32. The Bureau undertakes a number of steps to carry out the decennial census. First, the  
6 Bureau creates and maintains a “master address file,” which purports to include every  
7 residential unit in the United States. (Trial Tr. at 45:22–25).
- 8 33. To enable a person-by-person count, the Bureau sends a questionnaire to every housing  
9 unit in the master address file. (UF 36).
- 10 34. Any person over the age of eighteen living in the United States who refuses or willfully  
11 neglects to answer any part of the Census questionnaire sent to him or her is subject to a  
12 fine. (UF 37)
- 13 35. If the Bureau does not receive a response to the questionnaire from a particular housing  
14 unit on the master address file, that unit goes into the Non Response Follow Up  
15 (“NRFU”) workflow. The first step in NRFU is that a Bureau staffer known as an  
16 enumerator visits the housing unit to attempt to conduct an in-person interview in order to  
17 enumerate the individuals living there and collect requested demographic data. (UF 39).
- 18 36. In the 2020 Census, the Census Bureau has proposed using administrative records to  
19 enumerate a limited number of those households for which there is high quality  
20 administrative data about the household if the initial NRFU visit does not result in  
21 collecting complete data for that household. (UF 40).
- 22 37. If a housing unit does not respond to the mailed questionnaire, the enumerator fails to  
23 contact the household after three attempts, and no linkage to administrative records is  
24 possible, the household will become “proxy eligible” and the enumerator will seek  
25 information from a proxy (a nonresident such as a neighbor or landlord potentially  
26 knowledgeable of household’s residents) about the household. (UF 43–45).
- 27 38. For the 2010 Decennial Census, after three proxy attempts, a household became eligible  
28 for what is known as “whole-person imputation” or “whole household imputation,” in

1 which the Bureau imputed the characteristics of the household, including in some  
2 circumstances the household member count. (UF 46).

3 39. The Bureau will use imputation again for the 2020 Census, but it has not yet decided the  
4 imputation algorithm. In past censuses it used “hot-deck imputation,” or sampling from  
5 records of households that were successfully collected and applying those records to  
6 households that were not. (Trial Tr. at 48:7–14).

7 40. After the NRFU process is completed, the Bureau then counts the responses from every  
8 household, including those completed through the NRFU and imputation processes, to  
9 determine the population count in each state. (UF 47).

10 41. Data from the decennial census are reported down to the census block level, which often  
11 corresponds to a city block. (UF 48).

## 12 2. Census Data Used In Federal Funding

13 42. The federal government also uses decennial census data to allocate hundreds of billions of  
14 dollars in public funding each year, including to states and local governments. (UF 52).

15 43. Approximately 132 programs used Bureau data to distribute hundreds of billions of  
16 dollars in funds to states and local governments during fiscal year 2015. (UF 53).

17 44. California has a higher proportion of the Latino population than the nation as a whole and  
18 will thus be disadvantaged in the receipt of federal funds if the Latino population is  
19 undercounted. (Trial Tr. at 60:13–23; 376:13–377:7).

20 45. California has a higher proportion of the immigrant population than the nation as a whole,  
21 and will thus be disadvantaged in the receipt of federal funds if the immigrant population  
22 is undercounted. (Trial Tr. at 60:13–23; 376:13–377:7)

23 46. Any city that has a concentration of a particular population—for example, Latinos or  
24 immigrants—will be disadvantaged in the receipt of federal funds if that population is  
25 undercounted in the decennial census. (Trial Tr. at 60:24–61:15).

26  
27  
28

1 47. San Jose has a higher concentration of Latinos than the United States in the aggregate and  
2 a higher concentration of non-citizens than either the United States or California in the  
3 aggregate. (Judicially Noticed Facts, Doc. 180, ¶¶ 1, 5, 6 11).

4 3. Prior Undercounts And Hard-To-Count Populations

5 48. A successful census requires more than getting the right number for the population as a  
6 whole—it also means accurately describing the distribution of the population across the  
7 country. A census where a significant portion of the population (either by location or by  
8 parts of the population) is undercounted reflects a “differential undercount,” and is not a  
9 successful census. (Trial Tr. at 43:5–43:15).

10 49. After the 1990, 2000, and 2010 Decennial Censuses, the Bureau conducted a “census  
11 coverage measurement,” using more intensive methods to evaluate how successful the  
12 results of the Decennial Census were. (Trial Tr. at 49:2–9; AR0011390).

13 50. Some demographic groups have proven more difficult to count in the decennial census  
14 than others. The Bureau refers to these groups as “hard-to-count.” (UF 59).

15 51. Racial and ethnic minorities, immigrant populations, and non-English speakers have  
16 historically been some of the hardest groups to count accurately in the decennial census.  
17 (UF 60).

18 52. Individuals identifying as Hispanic were undercounted by almost 5% in the 1990  
19 decennial census. (UF 61).

20 53. In the 2010 Census Coverage Measurement, the Bureau concluded that it had correctly  
21 enumerated 94.7% of the population and omitted 5.3% of the population. (AR0011409).

22 54. In the 2010 Census Coverage Measurement, the Bureau concluded that it had erroneously  
23 duplicated 2.8% of the population, had erroneously enumerated .5% of the population for  
24 other reasons, and had counted 2.0% of the population through Whole-Person Census  
25 Imputations. (AR0011409).

1 55. While the Bureau concluded that the total count in 2010 was within 0.01% of the total  
2 population, this was the result of undercounts of minority groups that were mitigated by  
3 an overcount of the non-Hispanic White population. (AR0011408; Trial Tr. at 56:13–24).

4 56. According to the Census Coverage Measurement, the 2010 Decennial Census  
5 undercounted the Black population by 2.06% and the Hispanic population by 1.54%, each  
6 of which the Bureau determined to be significant. (AR0011408).

7 57. The 2010 Decennial Census undercounted on net a total of more than 1.5 million Hispanic  
8 and African American individuals. (UF 62).

9 58. The Bureau describes the undercounting of a particular racial and ethnic group in  
10 comparison to the overall net undercount or overcount of the population as a whole as a  
11 “differential undercount,” as distinct from a “net undercount” of the entire population.  
12 (UF 63).

13 59. The Bureau has developed a range of strategies to address the differential undercount of  
14 “hard-to-count” populations—including targeted marketing and outreach efforts,  
15 partnerships with community organizations, deployment of field staff to follow up with  
16 individuals who do not respond, and retention of staff with foreign language skills. (UF  
17 64).

18 60. In the 2000 and 2010 Decennial Censuses, the Bureau designed and implemented public  
19 advertising campaigns to reach hard-to-count immigrant communities, including using  
20 paid media in over a dozen different languages to improve responsiveness. (UF 65).

21 61. For the 2000 and 2010 Decennial Censuses, the Bureau also partnered with local  
22 businesses, faith-based groups, community organizations, elected officials, and ethnic  
23 organizations to reach these communities and improve the accuracy of the count. (UF  
24 66).

25 62. The Bureau concluded in 1980 that adding a citizenship question to a decennial census  
26 will “enhance the problems of enumerating minorities thereby exacerbating the  
27 undercount.” Defendants’ Reply Memorandum and Opposition to Plaintiffs’ Motion for  
28

1 Summary Judgment, *Federation for American Immigration Reform (FAIR), et al., v.*  
 2 *Philip M. Klutznick, et al.*, 79-3269 (D.D.C. Jan 3, 1980) 1980 WL 683642 at 22.

3 63. As recently as 2016, six former Bureau directors wrote that adding a citizenship question  
 4 to the decennial census would lead to a “reduced rate of response overall and an increase  
 5 in inaccurate response.” Brief of Former Directors of the U.S. Census Bureau as Amici  
 6 Curiae in Support of Appellees, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), 2015 WL  
 7 5675832 at 23–26.

8 4. *Census History, Census Instruments, And The Citizenship Question*

9 64. According to Dr. Anderson, while questions that relate in some way to citizenship have  
 10 appeared on a number of different Bureau instruments, the language, mode of  
 11 administration, and possible answers to these questions have changed repeatedly over the  
 12 course of American history. (Anderson Aff. ¶ 6).

13 65. From 1790 to 1960, the Bureau collected data directly from households through in-person  
 14 interviews. (UF 75).

15 66. Driven by innovations in survey methodology—primarily, sampling to obtain  
 16 demographic information in addition to the enumeration required by the U.S.  
 17 Constitution—the 1950 census was the last time a citizenship or naturalization question  
 18 appeared on the complete count census. (Anderson Aff. ¶¶ 7)

19 67. Unlike other questions appearing on the complete count census since 1960, citizenship  
 20 questions have been the subject of limited technical and cognitive research to reconcile  
 21 known problems and ambiguities in the data, and thus improve data quality. Indeed, the  
 22 only scientific evaluation of the quality of complete count data for a question on  
 23 citizenship in the U.S. census dates to the 1950 census. (Anderson Aff. ¶¶ 8).

24 68. The citizenship question was only tested for inclusion only on the American Community  
 25 Survey (“ACS”) and, according to Dr. O’Muirheartaigh, nothing in the testing for the  
 26 ACS suggests that the question was well-tested for inclusion in the decennial census form.  
 27 (Trial Tr. at 64:7–9)  
 28

- 1 69. In 1970, the Bureau introduced the mail questionnaire for about 60% of the residential  
2 addresses in the country. The Bureau expanded the mail census in later decades as the  
3 address lists improved. It used a “short form” questionnaire, with few questions, to most  
4 households, and a “long form” questionnaire with additional questions to the remaining  
5 smaller number of households, ranging from 5% to 25% of households in different years.  
6 (Anderson Aff. ¶ 10).
- 7 70. A question concerning citizenship did not appear on the decennial census questionnaire  
8 sent to every household in the United States (commonly referred to as the “short form”) in  
9 1970, 1980, 1990, 2000, or 2010. (UF 77).
- 10 71. In the 1970, 1980, 1990, and 2000 Decennial Censuses, the long form decennial census  
11 questionnaire contained a question about citizenship status. (UF 80).
- 12 72. The citizenship data collected from the long form questionnaire was reported by the  
13 Bureau at the census block group level. (UF 82).
- 14 73. After the 2000 Decennial Census, the functions performed by the long form were replaced  
15 by the ACS. (UF 83).
- 16 74. The ACS began operating in 2000 and was at full sample size for housing units in 2005,  
17 and for group quarters in 2006. (UF 84).
- 18 75. The ACS is a yearly survey of approximately 2% of households—about 3.5 million—  
19 across the United States. (UF 85).
- 20 76. A question concerning citizenship status currently appears as among one of more than 50  
21 questions on the 28-page ACS questionnaire. (UF 86).
- 22 77. The citizenship status question on the ACS is preceded by a question asking where the  
23 person was born. (UF 87).
- 24 78. The citizenship question that appears on the ACS is not a binary yes/no question. (UF  
25 88).
- 26 79. The ACS citizenship question asks whether the person was born in the United States, a  
27 U.S. territory, or abroad. (UF 89).
- 28

1 80. The “framing”—or the presentation of the questionnaires—is entirely different from the  
2 ACS to the Decennial Census. The ACS is much longer and the respondent cannot view  
3 all the questions before she begins responding. As Dr. O’Muircheartaigh testified, these  
4 differences increase the impact the citizenship question may have on initial self-response  
5 rates because people could see the question immediately and “cause you not to have  
6 anything to do with the questionnaire as a result of that immediate visibility.” (Trial Tr. at  
7 143:8–144:13).

8 81. As Dr. O’Muircheartaigh testified, the citizenship question has not been tested in the  
9 context of the Census. (Trial Tr. at 78:14–16).

10 82. The data collected by the ACS allows the Bureau to produce estimates of Citizen Voting  
11 Age Population (“CVAP”). (UF 90).

12 83. CVAP data based on responses to the ACS are reported by the Bureau down to the census  
13 block group level. (UF 91).

14 84. Margins of error are reported with the ACS estimates and provide a measure of the  
15 sampling error associated with each estimate. (UF 92).

16 85. Because self-response mailers were not used until 1970, and no citizenship question has  
17 appeared on any “short form” census since before that census, a citizenship question has  
18 never been posed on a Census questionnaire mailed to every household that received a  
19 mail questionnaire. (Anderson Aff. ¶ 13).

20 86. Adding a citizenship question to the Census would break from historical census practice.  
21 (Anderson Aff. ¶ 14).

22 **II. PLAINTIFFS ARE BEING HARMED BY THE PROPOSED ADDITION OF THE**  
23 **CITIZENSHIP QUESTION AND WILL BE FURTHER HARMED UNLESS THE**  
24 **PROPOSED QUESTION IS REMOVED FROM THE 2020 CENSUS**

25 **A. Adding A Citizenship Question Will Cause A Differential Decrease In**  
26 **Response Rates, Will Degrade Census Data, And Will Ultimately Lead To A**  
27 **Differential Undercount Of Non-Citizen And Latino Households**

28 87. According to Dr. O’Muircheartaigh, the differential undercount of certain subpopulations  
will be exacerbated by the addition of a citizenship question because: 1) the introduction

1 of a citizenship question on the Census will exacerbate the differential non-response of  
2 non-citizens and Latinos, 2) the Bureau’s Non-Response Follow-up (“NRFU”) operations  
3 will be deleteriously affected by the introduction of a citizenship question into the  
4 decennial questionnaire, and 3) the Bureau’s other follow-up exercises, including the use  
5 of administrative records, proxy respondents, and various forms of imputation, will not  
6 remediate the damage caused by the introduction of the citizenship question. (Trial Tr. at  
7 40:5–41:17).

8 1. *Adding The Citizenship Question Will Increase The Non-Response Rate*

9  
10 88. On January 19, 2018, the Bureau sent to Commerce a memorandum (the “January 19  
11 Memo”) analyzing the impact of adding the citizenship question to the Decennial Census.  
12 (AR001277–85).

13 89. The January 19 Memo concluded, among other things, that adding a citizenship question  
14 to the Decennial Census would, conservatively, reduce response rates by households  
15 containing at least one non-citizen by at least 5.1%. (AR001280).

16 90. The January 19 Memo stated that this rate provides a “cautious” estimate of the decline in  
17 self-response that can be expected from adding a citizenship question to the Census.  
18 (AR001282)

19 91. On August 6, 2018, five Bureau scientists, including J. David Brown, wrote a study titled  
20 “Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census”  
21 (the “Brown Study”). (PTX-160).

22 92. The Brown Study was submitted to peer-reviewed journals for publication. (Trial Tr. at  
23 853:4–12, 858:5–6; PTX-160). The Brown Study was published by the Institute of Labor  
24 Economics in January 2019. See [https://www.iza.org/publications/dp/12087/estimating-  
25 the-potential-effects-of-adding-a-citizenship-question-to-the-2020-census](https://www.iza.org/publications/dp/12087/estimating-the-potential-effects-of-adding-a-citizenship-question-to-the-2020-census).

26 93. The Brown Study analyzed a so-called “natural experiment” by comparing the difference  
27 in the decline in non-response rates from the same households which responded to the  
28 2010 Decennial Census (which did not contain a citizenship question) to the 2010 ACS



- 1 (which did contain a citizenship question) for households containing at least one non-  
2 citizen compared to households that contain all citizens. (Trial Tr. at 161:24–163:22).
- 3 94. The analysis in the Brown Study, according to Dr. O’Muirheartaigh, is “very good, a  
4 very strong analysis” which takes into account “other characteristics of the households  
5 that might have some contaminating effect on the comparison.” (Trial Tr. at 164:11–17).
- 6 95. Dr. John Abowd, Chief Scientist and Associate Director for Research and Methodology at  
7 the Bureau, concluded that the Brown Study was “methodically appropriate” and that it  
8 “constitutes the best analysis that the Census Bureau can do of the consequences of  
9 adding the citizenship question to the 2020 census” given the available data. (Trial  
10 Transcript in lieu of Testimony for Dr. John M. Abowd (“NY Tr.”), Doc. No. 169-1 at  
11 897:4–15).
- 12 96. The Brown Study concluded that households with at least one non-citizen had a 5.8%  
13 greater decline in response than all-citizen households when responses to the 2010 ACS  
14 are compared to the 2010 Decennial Census. (PTX-160 at 38).
- 15 97. The Brown Study concluded that the 5.8% decline in response rates from households  
16 containing non-citizens represents a “conservative” estimate in the decline in self-  
17 response rates from non-citizen households that can be expected by adding a citizenship  
18 question to the Census. (PTX-160 at 39).
- 19 98. A “conservative” estimate, according to Dr. O’Muirheartaigh, means that the number  
20 represents the “minimal estimate of the impact” of adding the question. (Trial Tr. at  
21 165:3–8).
- 22 99. Dr. Abowd also concluded that the 5.8% estimate of the likely differential decline in self-  
23 response rates among non-citizen households if a citizenship question were added the  
24 2020 Census is “conservative,” considering any increase in sensitivity to a citizenship  
25 question due to the changed macro-environment after 2016 would not be captured in the  
26 5.8% estimate that is based on data up through 2016. (NY Tr. at 901:1–902:24; 944:2–  
27 945:4; Trial Tr. at 928:3–13).
- 28

- 1 100. Dr. O’Muircheartaigh further concluded that non-citizens will respond at lower rates in  
2 the census on the leading theory on survey response, the “leverage-salience theory,” put  
3 forward in an article by Robert Groves (the former director of the census), Eleanor Singer,  
4 and Amy Corning, suggesting that whether a participant will respond to a survey is based  
5 on multiple factors, some of which have a positive impact on whether a person will  
6 respond and some of which have a negative impact. (Trial Tr. at 126:6–127:19).
- 7 101. Under the leverage-salience theory, adding a citizenship question to the census will have  
8 severe negative connotations for non-citizens, and little or no impact on citizens, making  
9 it likely that it will negatively impact the responses of non-citizens more than it will those  
10 of citizens. (Trial Tr. at 127:11–128:9).
- 11 102. The “salience” of the citizenship question—or the impact it would have—is higher for the  
12 Decennial Census than it is on the ACS because the Decennial Census will have fewer  
13 questions, and no questions about nation of origin. Therefore, Dr. O’Muircheartaigh  
14 concluded that the citizenship question will have a greater impact on decennial census  
15 response than it would on ACS response, and that response will be “differentially for  
16 different parts of the population.” (Trial Tr. at 144:23–145:11).
- 17 103. There is no evidence that placing the question last will minimize its impact, according to  
18 Dr. O’Muircheartaigh. There has been no study of what impact the position of the  
19 question on the form may have on response rates, and placing it at the end may further  
20 decrease response rates because some respondents notice only the first and last question of  
21 a survey before beginning it. (Trial Tr. at 75:10–23).
- 22 104. Dr. Abowd is aware of credible, quantitative evidence, including the Bureau’s analysis,  
23 that the addition of a citizenship question to the 2020 census could be expected to lower  
24 the self-response rate in households that contain non-citizens and that data produced by  
25 lower self-response rates are less accurate. (NY Tr. at 876:8–13; 881:4–882:5).
- 26  
27  
28

2. *The Bureau's Non-Response Follow Up Operations ("NRFU"), Including Proxy Responses And Imputation, Will Not Remediate The Differential Undercount*

105. According to Dr. O'Muircheartaigh, NRFU and imputation responses will not only fail to eliminate the impact of the differential non-response, but may actually exacerbate it. (Trial Tr. at 40:7–41:17).
106. Dr. O'Muircheartaigh based his conclusions regarding NRFU on a number of sources. One source is the Bureau's observations of the ACS for the last six or seven years, and the other is the large and increasing body of qualitative evidence from the Bureau, and from carefully conducted focus groups and intensive interviews, that have shown unprecedented levels of concern, particularly in non-citizen and Latino communities and not others, regarding participation in the census. (Trial Tr. at 117:11–23).
107. While the Bureau's NRFU operation has, in the past, been successful in resolving many cases that did not self-respond, there have always been a substantial number of cases that moved on to the later stages of NRFU, including imputation. (Trial Tr. at 178:9–12).
108. According to Dr. O'Muircheartaigh, all of the factors that have an impact on the other aspects of data collection—the macro-environment, the framing, and the micro-environment—will have an impact on NRFU, which therefore will not be effective at the same rate for all subpopulations. (Trial Tr. at 178:16–23).
109. The Bureau records the "Computer-Assisted Personal Interviewing" ("CAPI") success rate for the American Community Survey; Dr. O'Muircheartaigh based some of his conclusions regarding NRFU on these data, which are in the administrative record. (Trial Tr. at 179:6–180:11; AR0010408).
110. The CAPI data show that interviewer non-response follow-up in the ACS, which is similar to the NRFU conducted by enumerators in the Decennial Census, has been becoming steadily less effective from 2010 through 2016. (Trial Tr. at 180:19–23).

- 1 111. The CAPI data further show that interviewer non-response follow-up in the ACS, has  
2 been differentially less effective in census tracts containing a high percentage of non-  
3 citizens. (Trial Tr. at 180:24–181:3).
- 4 112. The CAPI data finally show that the differential success rate for ACS non-response follow  
5 up between census tracts with relatively low and high numbers of non-citizens has been  
6 growing steadily over time. (Trial Tr. at 181:2–3).
- 7 113. According to Dr. O’Muircheartaigh, the relative lack of success in the ACS follow-up  
8 between census tracts with low and high percentages of non-citizens, combined with the  
9 fact that ACS follow-up has been growing less successful over time, suggests that NRFU  
10 will be less successful with non-citizen households than with citizen households. (Trial  
11 Tr. at 184:24–185:19).
- 12 114. On March 1, 2018, the Bureau sent a memorandum to Ross (the “March 1 Memo”).  
13 (AR001308).
- 14 115. In the March 1 Memo, the Bureau concluded that “Those refusing to self-respond due to  
15 the citizenship question are particularly likely to refuse to respond in NRFU as well,  
16 resulting in a proxy response.” (AR001311).
- 17 116. Dr. O’Muircheartaigh agrees with this statement and further notes that there are people  
18 who “will be even more antagonized by having a federal agent arrive in their  
19 neighborhood” than they would be by a survey request. (Trial Tr. at 189:22–190:5).
- 20 117. Dr. Abowd testified that proxy responses are likely to result in lower-quality enumeration  
21 data than self-responses. (Trial Tr. at 951:6–952:2).
- 22 118. The Bureau conducted an “end-to-end test” to evaluate the performance of its 2020  
23 Census operations in late 2018. (Trial Tr. at 93:22–94:1).
- 24 119. The General Accounting Office (“GAO”) conducted an evaluation of the 2018 end-to-end  
25 test that Dr. O’Muircheartaigh found “disturbing” because it “raises some serious  
26 concerns” about the Bureau’s operational readiness for the Census, particularly with  
27 regards to its NRFU operations. (PTX-272; Trial Tr. at 98:5–8).
- 28

- 1 120. For example, the GAO found that the Bureau did not have protocols for certain NRFU  
2 data collection methods in place, something that Dr. O’Muircheartaigh described as “a  
3 serious flaw.” (Trial Tr. at 99:1–7).
- 4 121. Also, the GAO found that the Bureau’s NRFU enumerators were, according to Dr.  
5 O’Muircheartaigh, “not properly prepared for the challenges that the enumerators faced in  
6 the field.” (Trial Tr. at 99:15–20).
- 7 122. According to Dr. O’Muircheartaigh, the GAO report suggests a “lack of preparation” for  
8 NRFU that “casts doubt” on whether the Bureau’s NRFU protocols will be “at least as  
9 good as they were in the past.” (Trial Tr. at 101:20–102:4).
- 10 123. According to Dr. O’Muircheartaigh, the “whole process of census data collection,”  
11 including staff training, presentation of materials, outreach, and other activities, will be  
12 complicated by adding a citizenship question, and will “make it more difficult  
13 differentially for different parts of the population.” (Trial Tr. at 125:1–19).
- 14 124. According to Dr. O’Muircheartaigh, proxy respondents are unlikely to remediate the  
15 impact of the decline in self-response because, for those people who failed to respond out  
16 of fear, “their neighbors are likely not to wish to supersede their preferences by providing  
17 information about them.” (Trial Tr. at 195:20–25).
- 18 125. According to Dr. O’Muircheartaigh, who was relying on a study conducted by the Bureau,  
19 the quality of administrative records is low for households in hard-to-count populations,  
20 suggesting that administrative records are unlikely to be useful as an accurate means of  
21 remediating the drop in self-response rates for such households. (Trial Tr. at 205:–  
22 206:19).
- 23 126. According to Dr. O’Muircheartaigh, imputation is “never neutral,” because it relies on the  
24 data that have been collected to fill in for the data that have not been collected, and the  
25 collected data will have “influence proportional to their presence in the data that you  
26 have.” (Trial Tr. at 210:16–25).
- 27  
28

1 127. Therefore, if a citizenship question is added to the 2020 Census, imputation will fail to  
2 mitigate the under-representation of Latinos because it will rely on the collected data that  
3 under-represents them. (Trial Tr. at 211:10:212:6).

4 128. There is no record evidence that directly contradicts any of Dr. O’Muirheartaigh’s  
5 opinions. Dr. O’Muirheartaigh’s testimony is highly credible.

6 3. *Regardless Of The Success Of NRFU In Obtaining A Complete Count,  
7 Adding The Citizenship Question Will Degrade The Quality Of Census  
8 Data*

9 129. It is the consensus of scientists within and outside of the Bureau that adding the  
10 citizenship question will depress self-response rates, particularly among Latinos and  
11 households containing non-citizens, and will also harm the quality of the census data  
12 generally. (Trial Tr. at 114:11–15).

13 130. In the January 2019 Memo, the Bureau concluded that “[l]ower self-response rates  
14 degrade data quality because data obtained from NRFU have greater erroneous  
15 enumeration and whole-person imputation rates.” (AR001281).

16 131. In the January 2019 Memo, the Bureau concluded that adding the citizenship question will  
17 result in, at minimum, 139,000 fewer correct enumerations. (AR001282).

18 132. In the Brown Study these numbers were updated to conclude that adding the Citizenship  
19 Question will result in at least 561,000 fewer correct enumerations. (PTX-160 at 42).

20 133. Dr. Abowd testified that the Bureau cannot mitigate data quality issues through NRFU or  
21 imputation processes. (Trial Tr. at 930:15–24; 934:10–935:9; 936:6–937:19; PTX-022).

22 4. *Dr. Matthew A. Barreto Showed That Adding The Citizenship Question  
23 Will Lead To A Differential Undercount Of Minorities And An Undercount  
24 Of San Jose*

25 134. Dr. Barreto reviewed social science literature on the topic of survey methodology, as well  
26 as social science research published by the Bureau. His review confirms that the addition  
27 of a sensitive question such as the citizenship question will erode trust and will lead to  
28 lower self-response rates. (Trial Tr. at 378:11–380:7).

- 1 135. According to Dr. Barreto's literature review, the main factors that impact participation in  
2 a survey are: trust in the survey administrator, both the person directly administering the  
3 survey and the agency or organization overseeing it; the sensitivity of the questions; and  
4 the macro-environment, meaning the social and political climate in which the survey is  
5 being administered to the public. (Trial Tr. at 381:5–384:18).
- 6 136. Absent trust, respondents will not participate in surveys. Respondents need to trust that  
7 they can give their full, honest answers and that those answers will be held in confidence,  
8 will be protected and not used against them. (Trial Tr. at 381:8–383:1; PTX-339).
- 9 137. Trust specifically influences census participation because the census is an official  
10 government survey. It is done on behalf of the federal government by the Bureau, and the  
11 public has to trust that the federal government is carrying out its job faithfully and using  
12 the information confidentially and only for census purposes. Furthermore, trust is  
13 particularly important to a citizenship question, as questions related to citizenship are ones  
14 to which many in Latino and immigrant communities are sensitive. (Trial Tr. at 385:3–  
15 387:23).
- 16 138. The Bureau conducted its own research that found that there was a very high level of  
17 concern over immigration and citizenship issues in Latino immigrant communities within  
18 the 1990 and 2000 censuses. It was particularly high among undocumented communities  
19 who were concerned that their participation in the census would put them at risk, and  
20 would disclose personal information. The Bureau concluded that this fear was one of the  
21 reasons that there were lower response rates, that there were problems and low  
22 participation rates for NRFU, and ultimately a net undercount in Latino immigrant  
23 communities. (Trial Tr. at 390:12–393:23; PTX-308, PTX-309).
- 24 139. The macro-environment is directly related to whether respondents perceive a question as  
25 sensitive and therefore related to the concomitant response rates. Where the macro-  
26 environment is perceived as threatening, it raises the stakes of participation; if respondents  
27 feel that participation will put them at risk, or that the information they provide will not be  
28

1 kept confidential and will be provided to other government agencies, self-response rates  
2 will decline. (Trial Tr. at 395:9–397:9).

3 140. The macro-environment on immigration issues affects immigrants and members of  
4 mixed-status households. The macro-environment has become more hostile towards  
5 immigrants since 2016 and this will decrease response rates both at the self-response  
6 phase and through the nonresponse follow-up efforts. (Trial Tr. at 396:22–409:20).

7 141. Accordingly, Dr. Barreto concludes that, given current trust issues arising from the macro-  
8 environment, the addition of a citizenship question is a particularly sensitive question and  
9 that the addition of this question in today’s macro environment will result in reduced  
10 participation in Latino and immigrant communities in 2020. (Trial Tr. at 411:5–14).

11 142. Survey research can reliably represent populations with millions of members and present  
12 a truly representative and unbiased picture of it. Survey research is relied on extensively  
13 by the federal government and the Bureau to understand public opinion and participation.  
14 (Trial Tr. at 414:2 –16; 422:10–14).

15 143. Dr. Barreto conducted a robust original national survey of 6,309 respondents from across  
16 the United States, with an additional oversample of Latinos, and geographic over-samples  
17 in San Jose, California and Cameron County and Hidalgo County, Texas. The survey was  
18 designed to determine the impact of the addition of a citizenship question on the 2020  
19 census, on both initial self-response as well as attitudes and understanding of  
20 confidentiality on the census. Dr. Barreto ascertained the impact of a citizenship question  
21 on the Census through posing a series of questions asking the respondent how she or he  
22 would act. (Trial Tr. at 419:24–420:7; 422:23–426:8; PTX-824).

23 144. Dr. Barreto’s survey met all the applicable criteria for ensuring accuracy and reliability  
24 that enabled him to extrapolate his results to the national population, including  
25 randomization, response rate, and sample size. (Trial Tr. at 415:17–417:20; 425:2–23).

26 145. Dr. Barreto’s survey created two different scenarios from which he estimated non-  
27 response rates for various population groups including the nation overall, California,  
28 Latinos, immigrants, and San Jose. The two non-response scenarios measured the rate at



1 which respondents detract from self-response participation in the census due to the  
2 citizenship question, i.e. the “drop-off rate.” In the first scenario, respondents who stated  
3 they planned to participate in the census (response to Question 1), later changed their  
4 answer to state that they did not plan to participate in the census when informed that a  
5 citizenship question will be added to the census in 2020 (response to Question 2). Dr.  
6 Barreto studied the reasons why respondents detracted from participation by asking  
7 whether the respondent “trust[s] the Trump administration to protect your personal  
8 information, including the citizenship of you and members of your household, or do you  
9 think they will share this information with other federal agencies” (Question 3). In the  
10 second scenario, Dr. Barreto simulated the NRFU process by following up with the same  
11 respondents who previously stated that they would not respond to the 2020 census after  
12 learning about the citizenship question and providing further assurances of confidentiality.  
13 Dr. Barreto implemented a randomized control trial which randomly assigned respondents  
14 to answer one of two questions: Question 7 asked whether the respondent would  
15 participate in the 2020 census if the government will not include a citizenship question,  
16 and Question 8 asked whether the respondent would participate in the 2020 census if the  
17 government will include a citizenship question. The drop-off rates are “useful for  
18 establishing the overall rates of nonresponse” because they measure individual change due  
19 to the citizenship question. (Trial Tr. at 440:8–451:22; PTX 824).

20 146. Dr. Barreto demonstrated through the survey that the expected drop-off rates nationwide  
21 for responses to the Census due to the citizenship question is between 7.1 and 9.7 percent,  
22 between 11.3 percent and 17.8 percent for immigrants, and between 14.1 and 16.6 percent  
23 among Latinos. For the state of California, the drop-off rate due to the citizenship  
24 question is between 12.3 percent and 18.0 percent, which is the highest drop-off rate of  
25 any state in the country. For the City of San Jose, the drop-off rate due to the citizenship  
26 question is between 12.7 percent and 20.3 percent. Black immigrants will likewise  
27 experience high rates of non-response due to a citizenship question in 2020. (Trial Tr. at  
28

1 457:11–465:9; 474:4–17; 478:1–481:3; 555:9–19; 560:7–562:10; 564:9–565:1; PTX-870,  
2 PTX-871, PTX-872, PTX-873, PTX-874, PTX-863, PTX-868, PTX-880, PTX-881).

3 147. Dr. Barreto found Latinos and immigrant communities are less likely to trust the federal  
4 government to protect their confidential information. Non-responders in California are  
5 less likely to trust the government than the rest of the country, and non-responders in San  
6 Jose are more distrustful than California overall. (Trial Tr. at 466:18–472:2; 474:4–  
7 477:16; 557:14–563:22; PTX-499A, PTX-865, PTX-866, PTX-867, PTX-868, PTX-869,  
8 PTX-875, PTX-876, PTX-877, PTX-878, PTX-879).

9 148. Dr. Barreto concluded that the Brown Study estimate of 5.8% as the drop-off rate in self-  
10 response among households with at least one non-citizen as a result of the citizenship  
11 question is low. Dr. Barreto identified five reasons why the Brown Study estimate is low:  
12 (i) The Bureau’s study used existing ACS and census data from prior census data  
13 collection to assess patterns present with older data, whereas Dr. Barreto’s study is more  
14 contemporary because it was conducted in the field in 2018; (ii) the macro environment  
15 has changed considerably since the 2016 ACS, 2010 ACS and 2010 Decennial Census,  
16 which data the Bureau used to determine the 5.8% estimate, and the current macro-  
17 environment is expected to generate higher rates of non-response; (iii) the Bureau’s 5.8%  
18 estimate refers to the drop-off of non-citizen households and does not include drop-off in  
19 mixed-status immigrant/citizen households or non-immigrant citizen households; (iv) the  
20 Bureau’s estimate does not account for any additional drop-off of people who are omitted  
21 from the household roster; and (v) the Bureau found the overall amount of drop-off  
22 between citizen households and non-citizen households was actually 11.9 % rather than  
23 5.8%, and the Bureau’s statistical model assumed variables other than the citizenship  
24 questions to account for the variance. (Trial Tr. at 481:11–488:8; PTX-160).

25 149. Dr. Abowd testified that the drop-off rates for the citizenship question on the ACS are  
26 much higher for Hispanics than for non-Hispanic whites. For the 2016 ACS, the drop-off  
27 rate for Hispanics was eight times what it was for non-Hispanic whites, and for the 2017  
28

- 1 ACS, the drop-off rate for Hispanics was twelve times what it was for non-Hispanic  
2 whites. (NY Tr. at 915:4–917:3).
- 3 150. Using the drop-off rates from the survey’s two scenarios, Dr. Barreto estimates that  
4 between 133,496 (using drop-off rate from Question 1 to Question 2) and 210,408 (using  
5 drop-off rate from Question 1 to Question 8) people in the City of San Jose will not be  
6 counted by the Census due to the citizenship question. (Trial Tr. at 555:9–557:4; PTX-  
7 863, PTX-864).
- 8 151. Dr. Barreto concluded that it is virtually certain that reduced self-response caused by the  
9 addition of the citizenship question will lead to a net undercount among those populations  
10 with lower rates of self-response. This is so, in part, because non-responding households  
11 are statistically different than responding-households on a number of dimensions, making  
12 imputation inaccurate and unreliable. For example, non-responding households are  
13 likelier to be larger in size, be renter-occupied, clustered in urban areas, be higher in  
14 population density, be foreign-born, have foreign-born parents, be non-white, be Latino,  
15 and report differences on average age and language. (Trial Tr. at 527:21–532:4; 534: 21–  
16 537:10; 538:22–539:6; PTX-888, PTX-889, PTX-890, PTX-468, PTX-469).
- 17 152. Additionally, trust and sensitivity concerns concerning the citizenship question will have  
18 differential impacts with respect to the Bureau’s NRFU process. For some groups, the  
19 NRFU process this year might be as successful in previous years. But for Latinos and  
20 immigrant communities who feel that the question is sensitive and places them at risk, it is  
21 expected to be far less successful and will exacerbate the gap created by the citizenship  
22 question at the self-response stage. As a result of a lack of trust, not only will overall  
23 NRFU be more challenging and less successful, but there will be a differential success  
24 rate, and in particular, NRFU is expected to have less success counting Latino and  
25 immigrant communities. (Trial Tr. at 489:15–493:15).
- 26 153. There is no credible evidence, quantitative or qualitative, that NRFU and imputation will  
27 be completely effective in 2020 so as to avoid a differential undercount when a citizenship  
28 question is added. (Trial Tr. at 980:3–981:7; 519:22–530:9; 983:15–988:14; PTX-344).

1 154. In fact, many aspects of the Bureau’s planned outreach efforts in 2020 could actually  
2 create more fear and anxiety in immigrant communities and further drive down response  
3 rates and increase the net undercount. Social science research finds that increased  
4 presence and visibility of government officials who appear to be collecting immigration  
5 information creates withdrawal and misreporting on government forms. Dr. Barreto’s  
6 survey results are consistent with the social science research indicating that there will be a  
7 worse NRFU success rate in California than other states. (Trial Tr. at 398:5–400:15;  
8 510:25–519:14; 522:14–523:17; PTX-882, PTX-883, PTX-884, PTX-885, PTX-886,  
9 PTX-887).

10 155. While Dr. Abowd agreed with Dr. Barreto’s overall findings, Dr. Abowd criticized Dr.  
11 Barreto’s survey because it asked respondents how they intended to act rather than  
12 conducting a random control trial (“RCT”) to collect actual responses to the citizenship  
13 question. Dr. Barreto credibly explained that only the Bureau would have been able to  
14 implement a full field RCT because respondents do not react to an anonymous survey  
15 with the same levels of concern and fear as they feel toward the census. (Trial Tr. at  
16 411:15–414:16; 869:22–870:14). Therefore, the Court does not find Dr. Abowd’s  
17 criticism of Dr. Barreto’s study to be credible.

18 156. Dr. Barreto credibly concluded that Latino and immigrant households would self-respond  
19 at a significantly lower rate than non-Hispanic Whites if the citizenship question is added  
20 to the Census, and such decrease in self-response will result in a differential undercount of  
21 San Jose residents and Black immigrants.

22 5. *Dr. Fraga Calculated Numerous Potential Enumeration Outcomes, All Of*  
23 *Which Resulted In Differential Undercounts For California And Non-*  
24 *Citizens*

25 157. Based on publicly available Bureau population data from July 1, 2010 to July 1, 2017 and  
26 July 1, 2000 to July 1, 2007, Dr. Fraga projected the population of California on April 1,  
27 2020 (“Census Day”) will be 40,393,990 (“Baseline Estimate”). (Trial Affidavit of  
28 Bernard L. Fraga (“Fraga Aff.”), Doc. No. 129 at ¶ 21.) Dr. Fraga’s Baseline Estimate is

1 a projection of the number of individuals who would be enumerated by the 2020 Census if  
2 it contains the same content as the 2010 Census, that is, without a citizenship question,  
3 including those individuals enumerated through self-response, NRFU or imputation.  
4 (Fraga Aff. ¶ 22).

5 158. Starting with the baseline 2020 population projections for each state, Dr. Fraga calculated  
6 four estimates of the undercount in the 2020 Census that would occur specifically due to  
7 the addition of the citizenship question based on four different scenarios of nonresponse  
8 and nonresponse follow-up (“NRFU”). (Fraga Aff. ¶¶ 24–26).

9 159. Scenario A determines the undercount using the estimate of specific nonresponse  
10 attributable to the addition of a citizenship question gathered from Dr. Barreto’s national  
11 survey data. Thus, Scenario A calculates the “projected population for each state, minus  
12 the mean rate of drop-off due to the citizenship question.” Under Scenario A, 12.51% of  
13 California’s population will not be counted due to the citizenship question. (Fraga Aff. ¶¶  
14 28–35, 57).

15 160. Scenario B builds on Scenario A by accounting for initial non-responders who later  
16 respond as a result of the Bureau’s follow-up efforts. Thus, Scenario B determines the  
17 undercount by reducing the size of the drop-off population in Scenario A by the mean  
18 share of individuals who changed their minds and decided to reply to the Census after the  
19 survey-taker conducted follow-up. Under Scenario B, 8.48% of California’s population  
20 will not be counted due to the citizenship question. (Fraga Aff. ¶¶ 36–40, 57).

21 161. Scenario C reflects the estimate of nonresponse due to the addition of the citizenship  
22 question contained in the Brown Study (PTX-160). The Brown Study estimates a 5.8%  
23 difference in rate of initial non-response for non-citizen households versus citizen  
24 household, which the Bureau’s modeling does not attribute to other factors. Notably, this  
25 estimate only captures part of the non-response for non-citizen households, and 5.8% is  
26 not an estimate of the overall non-response for non-citizen households. Under Scenario C,  
27 1.68% of California’s population will not respond to the Census due to the citizenship  
28 question. (Fraga Aff. ¶¶ 43–46, 57).

1 162. Scenario D builds on Scenario C, by factoring in estimates of the success rate of the  
2 Bureau's NRFU efforts. Thus, Scenario D calculates the undercount by reducing  
3 population estimate by 5.8% drop estimate for non-citizen households from Scenario D,  
4 and applies a NRFU success rate of 86.63%, which reflected data from the 2016 ACS in  
5 census tracts with higher than national average share of households containing at least one  
6 non-citizen. Under Scenario D, 0.22% of California's population will not be counted due  
7 to the citizenship question. (Fraga Aff. ¶¶ 47–49, 57).

8 163. Dr. Fraga concluded that under any of the four scenarios he analyzed, California will  
9 experience a greater differential undercount of its population than any other state if a  
10 citizenship question is added to the 2020 Census because it has the most non-citizen  
11 households. (Fraga Aff. ¶¶ 64–65).

12 164. Dr. Stuart Gurrea criticized Dr. Barreto's coding of certain responses as representative of  
13 non-responses. However, Dr. Gurrea's criticisms are not credible because they are based  
14 on his personal opinion regarding how the questions should be interpreted and Dr. Gurrea  
15 does not cite any authority to support his alternative interpretation. (Trial Tr. at 703:2–  
16 705:12; 707:9–708:13).

17 165. Moreover, Dr. Gurrea's experience in designing surveys is limited to helping design two  
18 surveys regarding financial costs, one of which involved the valuation of an asset by  
19 business jet aircraft professionals and the other involved the cost of audit services.  
20 Neither survey involved general public opinion. (Trial Tr. 755:13–756:25).

21 166. Therefore, the Court does not find Dr. Gurrea's criticisms of Dr. Barreto's survey to be  
22 credible.

23 167. Dr. Gurrea criticized Dr. Fraga's undercount scenarios as overstated because they do not  
24 specifically account for imputation and Dr. Gurrea did not believe that the NRFU success  
25 rates assumed in Scenario B and D are accurate. However, Dr. Gurrea's conclusions are  
26 not credible because he is not an expert in the Bureau's NRFU practices, Dr. Gurrea does  
27 not have any personal knowledge regarding the effectiveness of the Bureau's mitigation  
28 efforts, and therefore Dr. Gurrea cannot and does not offer any opinion regarding how

1 effective NRFU will be in 2020 to mitigate the drop in self-response rate due to the  
 2 citizenship question across different geographic areas or for different demographic  
 3 groups. Dr. Gurrea failed to take into account any potential differential impact of  
 4 mitigation efforts across geographic areas or demographic groups. Dr. Gurrea limited his  
 5 analysis to the overall population count and did not consider any differential impacts on  
 6 Latinos or immigrants specifically. (Trial Tr. at 695:2–696:11; 710:9–713:6; 733:3–11;  
 7 742:13–743:22; 746:25–748:2; 759:2–7; 775: 3–11). Therefore, the Court does not find  
 8 Dr. Gurrea’s conclusions to be credible.

9 168. Dr. Fraga credibly concluded that will be a differential undercount of non-citizens in the  
 10 2020 Census specifically due to the addition of the citizenship question.

11 **B. Adding The Citizenship Question Is Harming And Will Harm San Jose**

12 1. The Differential Undercounts Will Reduce The Funding San Jose Receives  
 13 Through Federal Programs

14 a. Dr. Andrew Reamer Demonstrated That For Certain Federal  
 15 Programs, A Differential Undercount Of A Geographic Area  
 16 Compared To The Nation Will Lead To Reduced Funding

16 169. As a Fellow at Brookings, Dr. Reamer was responsible for encouraging a strong, well-  
 17 functioning federal statistical system that met the data needs of public and private  
 18 stakeholders. To that end, he was instrumental in ensuring the commencement and  
 19 continued existence of the ACS. (Reamer Decl. ¶ 4)

20 170. Dr. Reamer identified approximately 320 federal domestic assistance programs, and from  
 21 this list identified 24 large federal financial assistance programs that use “geographic  
 22 allocation formulas that rely in whole or in part on census-derived data.” (Reamer Decl. ¶  
 23 11).

24 171. From these 24 large federal financial assistance programs, Dr. Reamer identified 18 “state  
 25 share” programs, which are programs that rely in whole or in part on state share of a U.S.  
 26 population total.” (Reamer Decl. ¶ 11).

27 172. Among the 18 “state share” programs are grants authorized under the Workforce  
 28 Innovation and Opportunity Act (“WIOA”), including the Youth Activities Program

1 (Catalog of Federal Domestic Assistance (“CDFA”) 17.259, 29 U.S.C. § 3163) the Adult  
2 Activities program (CFDA #17.258, 29 U.S.C. § 3173(b)(2)(A)), and the Dislocated  
3 Workers Program (CFDA) #17.278, 29 U.S.C. § 3173(b)(2)(B)). (Reamer Decl. ¶ 67;  
4 Trial Tr. at 677:19–22; 678:11–13).

5 173. Also among the 18 “state share” programs are grants distributed via the Community  
6 Development Block Grant (“CDBG”) Entitlement Program. (CFDA #13,218). (Reamer  
7 Delc. ¶ 71; Trial Tr. at 677:15–18).

8 174. Using three of the 24 programs he identified as examples, Dr. Reamer performed  
9 calculations using two of Dr. Fraga’s projections to determine the size of the funding loss  
10 for the State of California under the three identified programs. (Reamer Decl. ¶¶ 14–15).

11 175. Dr. Reamer’s calculations demonstrated that under either of the identified scenarios, the  
12 differential undercount of California would lead to funding losses for the state. (Reamer  
13 Decl. ¶ 16).

14 176. Based on his demonstration using the three example programs, Dr. Reamer concluded that  
15 states “with an undercount rate greater than that for the U.S. as a whole would lose share,  
16 and thus funding, relative to their actual population.” (Reamer Decl. ¶ 17). California is  
17 among the states he specifically identified. (Reamer Decl. ¶ 17).

18 177. Based on his calculations, Dr. Reamer concluded with a strong degree of professional  
19 certainty that for “programs with allocation formulas based on a state’s population relative  
20 to the nation, and under the assumption that allocation formulas and funding levels remain  
21 similar, a differential decennial census undercount of non-citizens would lead to  
22 measurable fiscal losses for those states with percentages of non-citizens above the  
23 nationwide average.” (Reamer Decl. ¶ 18).

24 178. Even if the formulas change, so long as the formulas “retain a degree of state-share-based  
25 calculation” states whose populations are undercounted relative to the nation would lose  
26 money. (Reamer Decl. ¶ 19).

27 179. A difference in the differential undercount from those that Dr. Reamer analyzed will not  
28 change the fact that some geographic areas will lose money, only the amount of funding



1 that will be lost. As Dr. Reamer testified, “[i]f there’s a change in the census count . . .  
2 these formulas will reflect that even if it’s a 10<sup>th</sup> of a percent or a 100<sup>th</sup> of a percent.”  
3 (Trial Tr. at 677:7–14).

4 180. According to Dr. Reamer, because for “all of these programs, the money is allocated on  
5 the bases of a state and in some instances a state and then a locality share” of certain  
6 populations, a differential undercount that affects “states in this case and local areas,  
7 certainly for CDBG and WIOA,” will result in a loss of funding. (Trial Tr. at 68:1–10).

8 181. Dr. Reamer is highly credible.

9 b. San Jose’s Local Workforce Development Program, Funded Under  
10 WIOA, Will Suffer a Funding Loss Due to the Addition of a  
11 Citizenship Question

12 182. Under WIOA, San Jose operates a workforce development program called “work2future”  
13 that serves a Local Workforce Development are (“LWD”) comprised of the cities of San  
14 Jose, Campbell, Morgan Hill, Los Altos Hills, Gilroy, Los Gatos, Saratoga, and Monte  
15 Sereno, along with the unincorporated areas of Santa Clara County. (Trial Affidavit of  
16 Monique Melchor, (“Melchor Aff.”) ¶ 2).

17 183. The cities that comprise work2future’s LWD have a combined population of 1,243,043  
18 residents, of whom at least 197,663, or 16.00%, are non-citizens. (Judicially Noticed  
19 Facts, Doc. 180, ¶ 14).

20 184. Of the 321,004,407 residents of the United States, 22,337,765, or 6.96%, are non-citizens.  
21 (Judicially Noticed Facts, Doc. 180, ¶ 5)

22 185. Of the 38,982,847 residents of California, 5,250,604, or 13.47%, are non-citizens.  
23 (Judicially Noticed Facts, Doc. 180, ¶ 6)

24 186. Among the funding programs that use Bureau data are programs administered by the  
25 Department of Labor under the Workforce Innovation and Opportunity Act (WIOA),  
26 which use Bureau data as part of the allocation formulas set forth in 29 U.S.C. §§ 3162(C)  
27 and § 3172(C). (UF 56).  
28

- 1 187. WIOA provides funding to work2future under a two-part formula: first funding is  
2 delivered to a state (the “State Allotment”) and the State of California distributes the State  
3 Allotment among the LWD’s (the “Sub-State Allotment”). (Melchor Aff. ¶ 5).
- 4 188. Based on his calculations regarding the three example programs, and the fact that WIOA  
5 is one of the 18 “state share” programs he identified, Dr. Reamer concluded with a high  
6 degree of certainty that California’s State Allotment under WIOA will be lower under  
7 each of the scenarios set forth by Dr. Fraga because California’s percentage of non-  
8 citizens is higher than the national average. (Reamer Decl. ¶ 68).
- 9 189. Monique Melchor, the director of work2future, is tasked with ensuring that the program  
10 operates in compliance with federal law and regulations and to ensure that it is properly  
11 funded. As part of her duties, she regularly uses the WIOA formula for calculating the  
12 Sub-State Allotment for work2future’s LWD to ensure it was properly delivered.  
13 (Melchor Aff. ¶¶ 5, 8).
- 14 190. Melchor uses publicly available Bureau data to make these calculations, which are based  
15 on the LWD’s relative share of the total unemployed, the relative share of the excess  
16 unemployed, and the local area’s share of disadvantaged adults or youth. (Melchor Aff. ¶  
17 10).
- 18 191. Because the LWD, mainly including San Jose, has a higher percentage of non-citizens  
19 than California as a whole, a differential undercount of non-citizens, according to Dr.  
20 Barreto, will “be particularly severe in San Jose and other plaintiffs’ jurisdictions.” (Trial  
21 Tr. 375:6–7; Judicially Noticed Facts, Doc. 180, ¶ 14).
- 22 192. If the population of the LWD (including its disadvantaged adults and disadvantaged  
23 youth) is undercounted relative to the State of California, then the LWD’s share of the  
24 Sub-State Allocation will decrease. (Melchor Decl. ¶¶ 12–13).
- 25 193. Therefore, if there is a differential undercount of non-citizens in the 2020 Census,  
26 California will receive a lower State Share of WIOA funding, and the work2future LWD,  
27 which includes San Jose, will receive a smaller proportion of the State Share in its Sub-  
28 State Allocation, resulting in a double funding loss for the City of San Jose.

c. San Jose's CDBG Program Will Lose Funding Due To The Addition Of A Citizenship Question

194. The CDBG program, administered by the U.S. Department of Housing and Urban Development (“HUD”) provides funding to eligible “entitlement communities” including the City of San Jose. (Reamer Decl. ¶ 71; Judicially Noticed Facts, Doc. 180, ¶ 16).
195. One of the programs that uses Bureau data is the Home Investment Partnership Program (“HOME”), run by the Department of Housing and Urban Development (HUD), which uses Bureau data as part of its allocation formula under 42 U.S.C. § 12747(b). (UF 54).
196. The statutory formula for HOME grants is required to reflect “each jurisdiction’s share of total need among eligible jurisdiction for an increased supply of affordable housing for very low-income and low-income families of different size, as identified by objective measures of inadequate housing supply, substandard housing, the number of low-income families in housing likely to be in need of rehabilitation, the costs of producing housing, poverty, and the relative fiscal incapacity of the jurisdiction to carry out housing activities eligible under section 12742 of this title without Federal assistance. Allocation among units of general local government shall take into account the housing needs of metropolitan cities, urban counties, and approved consortia of units of general local government.” 42 U.S.C. § 12747(b)(1)(A).
197. One of the programs that uses Bureau data is the Community Development Block Grant Program (“CDBG”), run by HUD, which uses Bureau data as part of its allocation formula under 42 U.S.C. § 5306(b). (UF 55).
198. The CDBG program provides funds to the entitlement communities according to a set of formulas prescribed in law and that include data on population, poverty rates, and housing conditions. (Reamer Decl. ¶ 71).
199. The statutory formula for CDBG grants considers “the average of the ratios between the population of that city and the population of all metropolitan areas; the extent of poverty in that city and the extent of poverty in all metropolitan areas; and the extent of housing

1 overcrowding in that city and the extent of housing overcrowding in all metropolitan  
2 areas.” 42 U.S.C. § 5306(b)(1)(A).

3 200. HUD awards the City of San Jose, an entitlement jurisdiction, an annual allocation of  
4 CDBG and HOME funding; the amount of this funding is directly tied to data from the  
5 Census. (Clements Aff. ¶ 10).

6 201. Of San Jose’s 1,023,031 residents, 176,345, or 17.24%, are non-citizens. (Judicially  
7 Noticed Facts, Doc. 180, ¶ 11). Thus San Jose’s percentage of non-citizens is nearly two-  
8 and-a-half times the national percentage of 6.96%.

9 202. According to Dr. Barreto, San Jose will be undercounted relative to the population as a  
10 whole if the citizenship question is added to the Decennial Census. (Trial Tr. 546:6 –17).

11 203. Because CDBG is one of the 18 programs that Dr. Reamer identified as sensitive to  
12 changes in population, and because Dr. Reamer concluded that any such program would  
13 provide less funding to geographic areas that are undercounted relative to the population  
14 as a whole, San Jose will receive less CDBG funding if is undercounted relative to the  
15 nation as a whole. (Reamer Decl. ¶ 18; Trial Tr. at 677:7–14)

16 204. Therefore San Jose will receive less CDBG funding if a citizenship question is added to  
17 the Census.

18 d. San Jose’s Office of Emergency Management Faces A Substantial  
19 Risk Of Losing Funding Based On The Addition Of The  
20 Citizenship Question

21 205. Director of OEM Ray Riordan has applied for funding on behalf of San Jose, and in his  
22 prior positions, from the Federal Emergency Management Agency (“FEMA”).  
23 (Supplemental Affidavit of Raymond Riordan (“Supp. Riordan Aff.”) Doc. No. 156, ¶ 2).

24 206. When applying for funding from FEMA, Riordan completes a “Preliminary Damage  
25 Assessment” in accordance with FEMA guidelines as provided in its Damage Assessment  
26 Operations Manual and its Preliminary Damage Assessment for Individual Assistance  
27 Operations Manual. These manuals require Riordan to supply census data for areas  
28 affected by a disaster. (Supp. Riordan Aff. ¶¶ 4–5).

- 1 207. Through his interactions with FEMA on grants for which he has applied, and his general  
2 familiarity with FEMA regulations (including 44 CFR § 206.33 and 44 CFR § 206.48) ,  
3 Riordan has learned that the total number of people who live in an affected area, provided  
4 to FEMA through Census data, is one of the factors FEMA uses when evaluating whether  
5 to grant assistance and the amount of assistance granted. (Supp. Riordan Aff. ¶¶ 3, 6, 10).
- 6 208. Riordan has personally worked on funding proposals to FEMA that were denied because  
7 FEMA determined that not enough people lived in the affected area to qualify for funding.  
8 (Supp. Riordan Aff. ¶¶ 7–10).
- 9 209. San Jose is in a region prone to natural disasters, including earthquakes, floods, and fires,  
10 and must remain prepared to serve its residents through emergency preparedness and  
11 through an ability to seek appropriate funding when disaster strikes. (Supp. Riordan Aff. ¶  
12 13).
- 13 210. Because the total number of individuals affected by a disaster is a key factor in most  
14 applications for disaster funding, and because Riordan provides this number based on data  
15 from the United States Census Bureau, a net undercount of San Jose’s population will  
16 impede the City of San Jose’s ability to obtain adequate funding when the next disaster  
17 strikes. (Supp. Riordan Aff. ¶ 14).

18 2. *San Jose Has Diverted Resources To Mitigate The Substantial Risk Of*  
19 *Harm Created By Adding The Citizenship Question*

- 20 211. Dr. Abowd believes that the addition of the citizenship question has made it reasonable  
21 for cities to increase their outreach expenditures to encourage participation in the census,  
22 such as the outreach being conducted by San Jose. (Trial Tr. at 979:16–25).
- 23 212. San Jose’s population has been undercounted in prior censuses and San Jose is taking  
24 steps to mitigate the likely undercount of its population that adding a citizenship question  
25 on the 2020 Census will cause. (Ruster Aff. ¶¶ 4, 11–19).
- 26 213. San Jose, along with other cities, has partnered with the County of Santa Clara to form a  
27 “Complete Count Committee” to encourage participation in the Census by hard-to-count  
28

- 1 communities. (Ruster Aff. ¶¶ 3, 8). Such partnerships among localities are encouraged by  
2 the Bureau to ensure an accurate and complete count. (Trial Tr. 799:23–800:14).
- 3 214. San Jose’s preparations for the Census are being conducted in concert with the Bureau’s  
4 integrated partnership and communication program. (Ruster Aff. ¶¶ 3–5, 11; Trial Tr. at  
5 799:21–800:14).
- 6 215. San Jose has dedicated approximately \$300,000 in resources towards performing  
7 outreach, and expects to allocate approximately \$300,000 more before the Census is  
8 conducted. (Ruster Aff. ¶¶ 13, 15).
- 9 216. San Jose has dedicated staff resources, including Jeff Ruster, the Assistant Director in the  
10 Office of Economic Development, and a full-time consultant, to prepare for the Census.  
11 (Ruster Aff. ¶¶ 3, 14, 19).
- 12 217. Consistent with recommendations from the Bureau and Commerce, these preparations  
13 include targeted outreach that is being performed specifically because Ross has decided to  
14 add a citizenship question to the Census. (Ruster Aff. ¶¶ 10–11, 16; Trial Tr. at 1017:22–  
15 1018:17).
- 16 218. The targeted outreach being conducted by San Jose is designed specifically to mitigate the  
17 impact that adding the citizenship question to the Census will have on hard-to-reach  
18 populations in San Jose. (Ruster Aff. ¶¶ 16, 17).
- 19 219. Therefore, in light of the substantial risk posed by the addition of the citizenship question,  
20 it is reasonable for San Jose to spend additional time and money on the outreach that Dr.  
21 Abowd believes is reasonable to address concerns about the addition of the citizenship  
22 question. (Trial Tr. at 979:16–25).
- 23 220. San Jose is diverting time and resources that could be used for other purposes specifically  
24 because of the proposed addition of a citizenship question to the Census. (Ruster Aff. ¶¶  
25 16–19).
- 26 221. If the citizenship question were to be removed from the Census, San Jose would be able to  
27 use the time and resources it is currently specifically devoting to address the risks posed  
28 by the citizenship question for other purposes. (Ruster Aff. ¶ 19).



1 229. If the data provided by the Census Bureau are not accurate, the LEP Plan would reflect  
2 that inaccuracy and work2future would face a substantial risk of not hiring language-  
3 appropriate staff to serve its community. (Melchor Aff. ¶¶ 19).

4 c. San Jose's Department of Housing Requires Accurate Data To  
5 Address Housing Needs

6 230. As a third example, the San Jose Department of Housing is legally mandated to create an  
7 Assessment of Fair Housing, and also creates an annual Action Plan, and a five year  
8 Consolidated Plan. These assessments identify key locations within the City of San Jose  
9 to address housing issues. The San Jose Department of Housing uses Census data on race,  
10 income, and housing conditions from the Decennial Census and the ACS to create these  
11 assessments and plans. (Clements Aff. ¶¶ 7–9).

12 231. Family size is a key factor in housing assessments because housing needs are based on  
13 income levels calculated with family size taken into account; a household with more  
14 members may fall into a lower income level than another household with the same income  
15 but fewer household members. (Clements Aff. ¶ 23).

16 232. The San Jose Department of Housing uses the annual Action Plan and the five-year  
17 Consolidated plan to identify areas, including specific blocks and buildings, to use  
18 funding from the Community Development Block Grant (“CDBG”) program. The types  
19 of programs that the Department of Housing implements include adding neighborhood  
20 infrastructure improvements such as curb cuts and LED lighting, targeted code  
21 enforcement, and ‘green’ alleyway improvements to promote safety, walkability and  
22 sustainability; community-serving capital projects such as community gardens, libraries  
23 and community centers; emergency home rehabilitation for low-income homeowners;  
24 rehabilitation of nonprofit facilities such as homeless shelters and services spaces; and  
25 land acquisition and infrastructure supporting affordable housing creation. (Clements Aff.  
26 ¶ 23)

27 233. Once the Department of Housing identifies key locations through census data, it uses  
28 funding it receives from HOME, including development of new affordable rental housing,



1 acquisition and rehabilitation of existing market-rate housing to create newly affordable  
2 rental housing, homebuyer loans for low-income homebuyers, and tenant-based rental  
3 subsidies for vulnerable populations including formerly homeless individuals and  
4 families. (Clements Aff. ¶ 26)

5 234. If the data from the decennial census and the ACS are of lower quality, then the  
6 Department of Housing will not have accurate information with which to determine which  
7 locations to target for improved housing conditions in San Jose. (Clements Aff. ¶ 25, 29).

8 235. The Department of Housing is planning a major longitudinal study on housing trends with  
9 the University of California at Berkeley's Urban Displacement Project at some point in  
10 the next decade. The project will rely on census data and if the census data are less  
11 accurate, the quality of the study will be compromised. (Clements Aff. ¶ 28).

12 d. San Jose's Office Of Emergency Management Requires Accurate  
13 Data To Assist San Jose Residents During Emergencies And  
14 Evacuations

15 236. As a fourth example, the San Jose OEM uses census data to allocate resources prior to and  
16 during emergencies to protect San Jose residents. (Riordan Aff. ¶ 13).

17 237. Of particular concern to OEM is the location of areas with high concentrations of senior  
18 citizens. Understanding the locations of senior citizens is critical to emergency  
19 management work because the elderly are less mobile and therefore require specialized  
20 resources to evacuate. (Riordan Aff. ¶ 14).

21 238. Riordan relies on census data regarding age, and other considerations, to identify potential  
22 vulnerable populations to make deployment decisions, including personnel and  
23 specialized equipment, such as wheelchair-accessible buses for evacuation. (Riordan Aff.  
24 ¶ 15).

25 239. If the age data in the census are not accurate, Riordan will not have accurate information  
26 to deploy the right type and quantity of resources in an emergency and the lives of San  
27 Jose residents will be jeopardized. (Riordan Aff. ¶ 16).

28

e. The Bureau Admits That Adding The Citizenship Question Will Degrade Data Quality

240. In a memorandum to Ross on January 19, 2018, Dr. Abowd, chief scientist of the Bureau and Defendants’ expert witness, concluded on behalf of the Bureau that adding the citizenship question to the Census will lower response rates and thereby lower the quality of all data collected and reported by the Census, emphasizing that “[l]ower self-response rates degrade data quality because data obtained from NRFU have greater erroneous enumeration and whole-person imputation rates.” (AR001281).

241. In the March 1 Memo, Dr. Abowd concluded on behalf of the Bureau that adding the citizenship question and supplementing the responses with administrative records will have “all the negative cost and quality implications” of adding the question alone, including degraded data quality. (AR001312).

242. Dr. Abowd testified that an increase in proxy responses, which will result from the addition of a citizenship question, would reduce data quality. (Trial Tr. at 887:20–24).

243. Dr. Abowd testified that adding the citizenship question will result in more ACS edit and imputation modules which will “results in lower data quality because of the statistical errors in these allocation modules.” (Trial Tr. at 92:11–21).

C. BAJI And Its Members Will Be Harmed By The Addition Of A Citizenship Question To The 2020 Decennial Census

1. BAJI Has Spent And Will Spend Time And Resources To Address The Harm Caused By Adding The Citizenship Question

244. For the 2020 Census in particular, BAJI’s Executive Director, Opal Tometi, has reviewed and received feedback from impacted communities, has engaged with Census officials, has formed coalitions with other immigration groups, has spoken to members of BAJI, and has participated in a number of events, panels, and town halls where concerns have been raised about the proposed addition of a citizenship question to the 2020 Census. Additionally, she has worked with Black immigrant, refugee, and African American communities since 2010, and she is familiar with the context in which census counts play

1 a critical role for these communities, and the harms of heightened census undercount for  
2 immigrant communities and communities of color. (Tometi Aff. ¶ 3).

3 245. To ensure that BAJI’s members are properly counted in the 2020 Census, BAJI plans to  
4 conduct additional outreach to these communities to encourage them to participate in the  
5 2020 Census questionnaire. (Declaration of Opal Tometi, (“Tometi Decl.”) Doc. 99-4, ¶¶  
6 14–15).

7 246. BAJI has determined that, due to the citizenship question, such outreach will require the  
8 expenditure of additional resources, such as money, staff time, and operational expenses,  
9 including, but not limited to, materials, computers, telephones, and other office  
10 equipment. (Tometi Decl. ¶¶ 12–14).

11 247. To date, BAJI has expended many hours of additional staff time and related financial  
12 resources to field phone calls, provide updates, and answer questions from its  
13 constituents, and other community members, about the addition of a citizenship question  
14 to the Census. Given the nature of the census taking process, BAJI is reserving the  
15 majority of the expenditure it will use to address the addition of the citizenship question—  
16 resources that will likely be diverted from its other essential services—for its efforts to  
17 bolster census participation among its members and other underrepresented minority  
18 communities who are fearful about responding to the citizenship question. Accordingly,  
19 BAJI expects to allocate at least an additional \$200,000 in the next two (2) years to  
20 addressing the addition of a citizenship question to the Census and attempting to mitigate  
21 its harmful effects. (Tometi Decl. ¶ 20).

22 248. BAJI has taken these actions because an undercount of non-citizens would  
23 disproportionately affect BAJI members because BAJI’s membership has a high  
24 proportion of immigrants and is concentrated in immigrant-rich metropolitan areas.  
25 (Tometi Decl. ¶¶ 9–10).

26 249. The impact of the addition of a citizenship question to the Census, and BAJI’s diversion of its  
27 resources to address the same, has therefore impaired BAJI’s ability to carry out its mission to  
28

1 fostering racial, economic, and social equality for Black immigrants and other historically  
2 underrepresented communities. (Tometi Decl. ¶ 19).

3 2. *BAJI's Members Are Afraid That Their Responses To The Citizenship*  
4 *Question Will Be Shared With Law Enforcement, And These Fears Are*  
5 *Reasonable*

6 250. Ms. Tometi has heard from several of BAJI's members who have expressed concerns  
7 about the inclusion of a citizenship question on the Census. Many have expressed  
8 reluctance about participating in the Census because of the addition of this question. The  
9 fears expressed by BAJI's members about responding to a citizenship question have been  
10 further heightened by the current political environment, including a perceived increase in  
11 relentless anti-immigrant rhetoric. Several more have expressed apprehensions about the  
12 effects of the question, such as a decline in their political representation and, with that, a  
13 decrease of critical federal funding. BAJI's members have expressed concerns that such  
14 an impact can exacerbate the inequality experienced by their communities which have  
15 already been historically underrepresented. (Tometi Decl. ¶ 11).

16 251. Additionally, the fear of BAJI members and other communities has been exacerbated by  
17 news reports indicating that the government may try to change the law so as to allow the  
18 sharing of 2020 census information. (Tometi Aff. ¶ 5).

19 252. The fears of BAJI's members about responding to a citizenship question have been further  
20 heightened by news reports suggesting that the Department of Justice is considering  
21 challenging the confidentiality mandate for census data. (Tometi Aff. ¶ 6).

22 **III. ADDING THE CITIZENSHIP QUESTION WILL UNREASONABLY  
23 JEOPARDIZE A COMPLETE ENUMERATION**

24 **A. Questions That Provoke Fear Will Reduce Response Rates**

25 253. According to Dr. O'Muircheartaigh, people who feel under threat or fear that providing  
26 certain information will make them vulnerable in some way are much less likely to  
27 respond to requests for that information. (Trial Tr. at 71:4-7).

- 1 254. Social scientists have looked at many of the contexts that lead people to respond to  
2 surveys, and have concluded that fear is a factor that influences a final decision as to  
3 whether a person responds to a survey. (Trial Tr. at 71:11–19).
- 4 255. The inclusion of a citizenship question in the censuses of other countries does not have an  
5 impact on whether or not adding the question to the United States Decennial Census will  
6 reduce response rates or ultimately produce a net or differential undercount. (Trial Tr. at  
7 73:20–74:3).
- 8 256. Dr. O’Muircheartaigh’s core conclusion is that adding the citizenship question will  
9 exacerbate the differential undercount of Latinos and non-citizens, as set forth above in  
10 paragraphs 87-128.
- 11 257. Dr. O’Muircheartaigh concluded that because in the current macro environment “non-  
12 citizens and by association, much of the Latino population, feels that they’re being  
13 targeted for deleterious treatment by the Trump Administration,” they will be less likely  
14 to respond to a citizenship question based on fear that doing so “could be damaging to  
15 themselves or to others.” (Trial Tr. at 130:3–12).
- 16 258. According to Dr. O’Muircheartaigh, research going back to 1990 has shown that concerns  
17 about confidentiality are an issue in census response. While the Bureau has reassured  
18 respondents that census data is protected, “[i]f people begin to distrust the whole  
19 government, then such assurances are much less likely to be believed.” (Trial Tr. at  
20 131:8–132:2).
- 21 259. There is no evidence in the record contradicting Dr. O’Muircheartaigh’s opinions on this  
22 point, and his testimony is corroborated by Dr. Abowd’s. The Court finds Dr.  
23 O’Muircheartaigh’s testimony on this point credible.
- 24 260. As set forth above in paragraphs 134-156, Dr. Barreto likewise concluded that, given the  
25 current trust issues arising from the macro-environment, adding a citizenship question will  
26 be particularly sensitive and result in reduced participation by Latino and immigrant  
27 communities. His survey confirmed these conclusions and suggested that between  
28

1 133,496 and 210,408 people in the City of San Jose will not be counted by the Census if  
2 the citizenship question is included.

3 261. Dr. Fraga likewise concluded that adding a citizenship question to the Census will lead  
4 directly to a differential undercount of non-citizens specifically, as set forth in paragraphs  
5 158-163.

6 262. On January 26, 2018, six former directors of the Bureau wrote that “adding a citizenship  
7 question to the 2020 Census will considerably increase the risks to the 2020 enumeration”  
8 because, among other things, “there is a great deal of evidence that even small changes in  
9 survey question order, wording, and instructions can have significant, and often  
10 unexpected consequences for the rate, quality, and truthfulness of response.” (AR001057).

11 263. The six former directors are, in the words of Dr. O’Muircheartaigh, “among the most  
12 informed people about the execution and process of censuses in the country.” (Trial Tr. at  
13 81:25:82:2).

14 **B. The Trump Administration Has Fostered A Climate Of Fear Among Non-**  
15 **Citizens**

16 1. *The Center For Survey Measurement’s Memorandum Documented*  
17 *Concerns Related To The Administration’s Policies*

18 264. On September 20, 2017, the Center for Survey Measurement issued a memorandum on  
19 “Respondent Confidentiality Concerns” (the “CSM Memo”) raising “concerns in the  
20 population in particular about confidentiality of data collected by the census.” (Trial Tr.  
21 1/7/2017 at 112:4–10); (AR0010386).

22 265. The CSM Memo stated that its researchers had “noticed a recent increase in respondents  
23 spontaneously expressing concerns about confidentiality in some of our pretesting studies  
24 conducted in 2017.” (AR0010386).

25 266. The respondents referred to in the CSM Memo had specifically mentioned that their  
26 concerns were based on Trump Administration policies, including the “Muslim ban,” the  
27 “dissolution of the ‘DACA’ (Deferred Action for Childhood Arrival) program” and  
28 “repeated references to Immigration and Customs Enforcement (ICE).” (AR0010386).

- 1 267. Dr. O’Muircheartaigh concluded that the findings in the CSM Memo suggest that the  
2 impact of adding a citizenship question are “not neutral to the whole population” but that  
3 it “suggests that there will be more difficulty with that part of the population in obtaining  
4 responses in 2020 than there has been in the past.” (Trial Tr. at 112:13–22).
- 5 268. Dr. O’Muircheartaigh concluded that the CSM Memo suggests that “things are getting  
6 worse differentially in the part of the population where things have always been  
7 differentially most difficult.” (Trial Tr. at 112:25–113:3).
- 8 269. According to Dr. O’Muircheartaigh, these fears will lead to incomplete “rostering” of  
9 households—household members may respond to the census but leave off information  
10 regarding some household members—which creates undercount errors that the Bureau has  
11 no means of remediating. When a household does self-respond, but omits one or more  
12 household members from its response, the Bureau will assume it has counted everyone at  
13 that address and the household is not included in the NRFU workflow. (Trial Tr. at 147:4–  
14 16; 939:3–20).
- 15 270. According to Dr. O’Muircheartaigh, these rostering errors are more likely to occur based  
16 upon the addition of the citizenship question because the question provides “a strong  
17 motivation in certain circumstances, especially households containing non-citizens, of  
18 simply not listing these people on the form.” (Trial Tr. at 168:14–19).
- 19 271. Dr. Abowd corroborated Dr. O’Muircheartaigh’s testimony in this regard and testified that  
20 if a household responds to the census but leaves off of the household roster one or more  
21 persons who reside at that address, that household will not go into NRFU and that it is  
22 possible that those individuals will not be counted. (Trial Testimony at 939:3–20).
- 23 272. According to Dr. O’Muircheartaigh, fears as to confidentiality will cause those who do  
24 not self-respond to the census because of concerns about the citizenship question to  
25 further decline to participate in NRFU operations. (Trial Tr. at 149:12–18).
- 26 273. Additionally, according to Dr. O’Muircheartaigh, rostering errors will disproportionately  
27 impact Latino households further because Latino households contain disproportionately  
28

1 more young children in the hardest to count age group (under five years old). (Trial Tr. at  
2 168:21–169:7; 173:5–9).

3 2. *The Bureau’s National Advisory Committee on Racial, Ethnic, And Other*  
4 *Populations Documented Respondent Concerns Tied To Administration*  
5 *Policies*

6 274. In September of 2017, Mikelyn Meyers, a behavioral scientist and research sociologist at  
7 the Bureau who worked in the Center for Survey Measurement (now called the Center for  
8 Behavioral Science Methods) reported findings on unusual respondent behaviors to Dr.  
9 Abowd, who suggested she make a presentation to the Bureau’s National Advisory  
10 Committee on Racial, Ethnic, and Other Populations (the “National Advisory  
11 Committee”). (Trial Tr. 904:9–17).

12 275. Meyers delivered a report to the National Advisory Committee on November 2, 2017.  
13 (PTX-326).

14 276. Meyers had not set up a study to measure confidentiality concerns. The confidentiality  
15 concerns documented in the Meyers Report had been raised spontaneously by members of  
16 focus groups that had been set up for other purposes. (Trial Tr. at 906:12–17).

17 277. The Meyers report documented that the current political climate had fostered a belief that  
18 “certain immigrant groups are unwelcome,” and that researchers observed “increased rates  
19 of unusual respondent behaviors” including data falsification, item non-response, and  
20 break-offs. (PTX-326 at 2).

21 278. The Meyers Report noted that respondents appeared “visibly nervous” and required  
22 “extensive explanations about redacting PII and data access.” (PTX-326 at 7).

23 279. The Meyers Report described “unusual respondent behavior during pretesting interviews”  
24 such as respondents intentionally providing incomplete or incorrect information about  
25 household members; respondents leaving members off of the household roster, meaning  
26 they did not enumerate them; respondents providing false names, incorrect dates of birth,  
27 or other nonspecific details; and some respondents trying to break off interviews and stop  
28 the interview altogether. (Trial Tr. 494:14–22; PTX-326 at 7).



1 280. Respondents expressed fears regarding the use of their data, and explicitly referenced “our  
2 current political climate” and policies including the “Muslim ban.” (PTX-326 at 8).

3 281. The Meyers Report noted that members of focus groups stated that they would not open  
4 their doors to Bureau employees who came to their residences, and that they would not  
5 trust Bureau employees. A census worker observed one household that decided to move  
6 after the census worker visited their home because they were afraid of being deported.  
7 (Trial Tr. 497:7–17; PTX-326 at 9).

8 282. The Meyers Report concluded that its findings showed that there was an “unprecedented  
9 ground-swell in confidentiality and data sharing concerns, particularly among immigrants  
10 or those who live with immigrants,” that could “impact data quality and coverage for the  
11 2020 Census.” (PTX-326 at 15).

12 283. The Meyers Report was presented on November 2, 2017, before Ross announced his  
13 intention to add a citizenship question to the 2020 Census. (PTX-326 at 1).

14 3. *The Census Barriers, Attitudes And Motivators Study (“CBAMS”),*  
15 *Commissioned By The Bureau, Confirmed That These Fears Will Be*  
*Exacerbated By Adding The Citizenship Question*

16 284. The Bureau commissioned Young and Rubicam (“Y&R”) to conduct a Census Barriers,  
17 Attitudes Study (“CBAMS”) in 2018. Y&R produced a report dated August 29, 2018  
18 setting forth its “High-Level Findings.” (PTX-161).

19 285. The Bureau has gone through the CBAMS process in recent censuses to gauge the  
20 attitudes of potential respondents and look for motivations to respond. (Trial Tr. at  
21 150:24–151:7).

22 286. Y&R conducted 42 focus groups in March and April 2018, including 16 non-English  
23 focus groups, as part of the study. (PTX-161 at 15; PTX-15).

24 287. Only 67% of those surveyed said they were likely to respond to the 2020 Census. In the  
25 2008 CBAMS, 86% of those surveyed said they were likely to respond, but only 63.5% of  
26 those surveyed did so, 22.5% lower than those who said they would respond in the survey.  
27 (PTX-161 at 5).  
28

- 1 288. Twenty-eight percent of those who responded stated that they did not believe that the  
2 Bureau will keep their answers confidential, and 22 % of respondents (including 32% of  
3 Hispanic respondents and 34% of the foreign-born respondents) said they were extremely  
4 concerned or very concerned that their answers would be used against them. (PTX-161 at  
5 6).
- 6 289. Y&R reported that the challenges of the Census include “[o]vercoming the new barriers,  
7 principally the impact of the Citizenship question.” (PTX-161 at 13).
- 8 290. The CBAMS Focus Group Audience Summary Report found that Spanish-speaking  
9 residents of the U.S. Mainland “honestly expressed fears of participating in the census  
10 given their or others’ immigration status. Even if they personally are citizens or legal  
11 residents, they said that filling out the census form can adversely affect their relatives or  
12 people in their community who do not have secure immigration status.” (PTX-15 at 22).
- 13 291. According to Dr. O’Muircheartaigh, this conclusion suggests that even Latinos who are  
14 citizens would “also feel constrained” from participating because they may fear their  
15 family members would be harmed if they responded. (Trial Tr. at 152:17–25).
- 16 292. Dr. Barreto concluded that the CBAMS findings show that not only non-citizens  
17 themselves feel at risk but that other people, including their relatives, their children, even  
18 other community members also feel anxiety and risk over participating, which suggests  
19 that the effect of the citizenship question on response rates will be more widespread than  
20 just those non-citizen households analyzed by the Bureau. (Trial Tr. at 505:12–506:13)
- 21 293. The CBAMS Focus Group Audience Summary Report found that for Spanish-speaking  
22 residents of the U.S. Mainland, “there does not seem to be a single trusted voice that could  
23 mitigate their distrust of the government to uphold the promise of confidentiality.” (PTX-  
24 15 at 22).
- 25 294. According to Dr. O’Muircheartaigh, this conclusion suggests that the Bureau’s main tactic  
26 for mitigating census non-response—relying on community leaders and “trusted voices”  
27 to encourage participation by telling respondents their responses will be confidential—  
28 will not be effective in 2020. (Trial Tr. at 153:10–154:4).

- 1 295. The CBAMS Focus Group Audience Summary Report noted that the citizenship question  
2 “is a determining factor for participation” in the Census, and that focus group members  
3 brought up the citizenship question before the focus group members asked about it. (PTX-  
4 15 at 22).
- 5 296. Y&R released its CBAMS “Key Findings for Creative Strategy” on October 31, 2018.  
6 (PTX-465).
- 7 297. One of the key findings of the CBAMS confirmed that the citizenship question itself may  
8 be a major barrier to participation. Respondents believe that the purpose of the citizenship  
9 question is to find undocumented immigrants and that the political discourse is targeting  
10 their ethnic group. (Trial Tr. at 509:8–510:6; PTX-465 at 43).
- 11 298. Dr. Abowd testified that the key findings of the CBAMS show major barriers to  
12 participation in the 2020 census, including respondents’ fear of repercussions, concerns  
13 about data confidentiality and privacy, and distrust in government. These major barriers  
14 affect each stage of the process from self-response through NRFU. (Trial Tr. at 971:12–  
15 972:1).
- 16 299. Dr. Abowd testified that CBAMS research showing “nearly 1 in 4 respondents fear that  
17 their answers to the 2020 Census will be used against them” represents a significant  
18 barrier to the success of the 2020 Census. (Trial Tr. at 972:4–973:25).

19 **IV. THE ADMINISTRATIVE RECORD ALONE SHOWS THAT ROSS AND**  
20 **COMMERCE DECIDED EARLY IN THE TRUMP ADMINISTRATION TO ADD**  
21 **THE CITIZENSHIP QUESTION AND ENGAGED IN A SCHEME TO DEMAND**  
22 **ANOTHER AGENCY TO MAKE THE REQUEST**

23 **A. Ross And His Deputy, Earl Comstock, Planned To Add The Question Early**  
24 **In 2017, After The Statutory Deadline To Modify Census Topics Had Passed**

- 25 300. On March 2017, consistent with its statutory obligations under 13 U.S.C. § 141(f)(1), the  
26 Bureau reported to Congress the five “topics” that would be on the 2020 Census,  
27 including gender, age, race, ethnicity, and homeownership status. It reported on the many  
28 other topics that would only be on the ACS, including citizenship. (AR000194).

- 1 301. On March 10, 2017, the Commerce Department’s Director of Policy and Strategic  
2 Planning, Earl Comstock, emailed Ross an answer to “Your Question on the Census,” to  
3 confirm that non-citizens are indeed counted on the census. (AR0002521).
- 4 302. On April 5, 2017, Ross’s executive assistant wrote an email directed to Ross indicating  
5 that “Steve Bannon<sup>3</sup> has asked the Secretary to talk to someone about the census.”  
6 (AR0002561).
- 7 303. As described in paragraph 316 below, sometime during this period, Ross had a  
8 conversation with then Secretary of State Kris Kobach, who was also Vice-Chair of the  
9 Presidential Special Commission on Election Integrity, about adding a citizenship  
10 question to the Census.
- 11 304. On May 2, 2017, Ross emailed Comstock that he was “mystified why nothing [has] been  
12 done in response to my months[’] old *request that we include the citizenship question*.  
13 Why not?” (AR0003710) (emphasis added).
- 14 305. Also on May 2, 2017, in reference to the statutory requirement that the topics for the  
15 Census be submitted by March 2017, Ross wrote to Comstock that “Worst of all they  
16 emphasize that they have settled with congress on the questions to be asked.”  
17 (AR0003710).
- 18 306. In response to Ross’s statement about the statutory deadline for submitting the topics,  
19 Comstock wrote back that “The broad topics were what were sent to Congress earlier this  
20 year as required. It is next March—in 2018—when the final decennial Census questions  
21 are submitted to Congress. We need to work with Justice to get them to request that  
22 citizenship be added back as a census question.” (AR0003710).
- 23 307. On May 24, 2017, David Langdon of Commerce wrote to the Bureau that “the Secretary  
24 seemed interested on subjects and puzzled why citizenship is not included in 2020.”  
25 (AR0003702).
- 26  
27  
28

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<sup>3</sup> At the time, Bannon was the White House Chief Strategist.

1           **B. Comstock Asked DOJ And DHS To Request The Question But Both Agencies**  
2           **Refused, Leading Ross To Reach Out To The Attorney General**

- 3           308. Ross's May 2, 2017 email led to immediate action by Comstock. After receiving the  
4           email, Comstock wrote to him that "[o]n the citizenship question we will get that in  
5           place." (AR0003710).
- 6           309. On May 3, 2017, Eric Branstad, a Senior White House Advisor, reached out on  
7           Comstock's behalf to Matthew J. Flynn, Senior Director of Cabinet Affairs at the  
8           Executive Office of the President, to find "the best counterpart to reach out to at DOJ  
9           regarding Census and Legislative issue?" (AR 0003701)
- 10          310. Flynn directed him to Mary Blanche Hankey, who was the White House liaison within the  
11          Department of Justice, and who had come to DOJ with Sessions after working with  
12          Sessions in his senate office. (AR 0003701, AR0012756).
- 13          311. Branstad passed Ms. Hankey's contact information back to Comstock at 8:10 pm on May  
14          3, and Comstock thanked him for the information a little after midnight. (AR 0003701)
- 15          312. Sometime in May 2017, Comstock met with Ms. Hankey in person to discuss the  
16          citizenship question. A few days after the in-person meeting, Ms. Hankey directed  
17          Comstock to speak with James McHenry, the director of the Executive Office of  
18          Immigration Review at DOJ. (AR0012756).
- 19          313. McHenry and Comstock spoke several times, and eventually McHenry told Comstock that  
20          "Justice staff did not want to raise the question given the difficulties Justice was  
21          encountering in the press at the time (the whole Comey matter)." (AR0012756).
- 22          314. McHenry referred Comstock to Gene Hamilton, then Senior Counselor to the Secretary of  
23          Homeland Security and Deputy Chief of Staff for Policy. (AR0012756).
- 24          315. On May 24, 2017, David Langdon, a Senior Policy Advisor within the Office of Policy  
25          and Strategic Planning, who reported to Comstock, sent an email to Comstock stating  
26          "Long story short is that the counting of illegal immigrants . . . has a solid and fairly long  
27          legal history." (AR0012456).
- 28

- 1 316. On July 21, 2017, Kansas Secretary of State Kris Kobach emailed Ross that he was  
2 writing “at the direction of Steve Bannon,” and reminded the Secretary of their prior  
3 conversation on the topic (“following up on our telephone discussion from a few months  
4 ago”) and stated that the lack of a citizenship question on the decennial census “leads to  
5 the problem that aliens who do not actually ‘reside’ in the United States are still counted  
6 for congressional appointment purposes.” (AR000763). Kobach sent Ross the language  
7 for a citizenship question to be added to the census.
- 8 317. Meanwhile, Comstock had several phone calls with Gene Hamilton at the Department of  
9 Homeland Security (“DHS”). Eventually Mr. Hamilton stated to Comstock that “DHS  
10 really felt that it was best handled by the Department of Justice.” (AR0012756).
- 11 318. On August 8, 2017, Ross wrote to Comstock, “Were you on the call this morning about  
12 census? . . . where is the DOJ in their analysis? If they still have not come to a conclusion  
13 please let me know your contact person and I will call the AG.” (AR0003984).
- 14 319. On September 1, 2017, Ross complained to Comstock that “I have received no update, nor  
15 has there been an update [redacted], nor the issue of the census question.” (AR0002424).
- 16 320. Sometime before September 8, 2017, Comstock asked James Uthmeier in the Office of  
17 General Counsel at the Department of Commerce, to determine how Commerce could add  
18 the question to the Census itself. (AR0012756).
- 19 321. On September 17, 2017, Danielle Cutrona in the Office of the Attorney General wrote to  
20 Wendy Teramoto, Ross’s Chief of Staff, to say that “[t]he Attorney General is available  
21 on his cell,” and that “it sounds like we can do *whatever you all need* us to do and the  
22 delay was due to a miscommunication.” (AR0002637) (emphasis added).
- 23 322. On or before September 18, 2017, Ross spoke with Attorney General Sessions and asked  
24 that he instruct his subordinates at DOJ to request that a question on citizenship be added  
25 to the Census. (AR0002637).
- 26 323. On November 27, 2017, Ross wrote to Peter Davidson at the Department of Commerce  
27 that “Census is about to begin translating the questions into multiple languages and has let  
28 the printing contract. We are out of time. Please set up a call for me tomorrow with

- 1           whoever is the responsible person at Justice. We must have this resolved.” On  
2           November 28, 2017, Davidson wrote back that “I can brief you tomorrow . . . no need for  
3           you to call. I should have mentioned it this afternoon when we spoke.” (AR0011193).
- 4   324.   No evidence in the Administrative Record supports an inference that Ross or Comstock  
5           asked DOJ merely to consider the possibility of adding a citizenship question. Instead the  
6           Administrative Record shows that Ross issued a “request that we include the citizenship  
7           question,” (AR0003710), that Comstock assured him that “we will get that in place,”  
8           (AR0003710), and that Ross intervened with the Attorney General when career staff at  
9           DOJ and DHS refused to ask the question.
- 10   325.   Prior to December 12, 2017, there is no evidence in the Administrative Record to suggest  
11           any reason for adding a citizenship question to the Census other than to remove non-  
12           citizens from apportionment counts for congressional representation, as suggested by  
13           Steve Bannon and Kris Kobach. Whether that was the reason that impelled Ross to want  
14           the citizenship question added to the Census cannot be ruled out based on the  
15           Administrative Record.
- 16   326.   What is abundantly clear from the Administrative Record is that the reason given in  
17           Ross’s Decisional Memo of March 26, 2018, was not the reason behind Ross’s months-  
18           long effort to add the citizenship question to the Census. Specifically, the Administrative  
19           Record does not permit an inference that the motivation behind Ross’s insistence on  
20           adding a citizenship question to the Census had anything to do with DOJ’s needs. No  
21           document in the Administrative Record reflects any person communicating to Ross that  
22           the citizenship question could be used to enforce the Voting Rights Act prior to December  
23           12, 2017. There is no evidence in the Administrative Record that any person mentioned  
24           to Ross the use of citizenship questions by other countries prior to the issuance of the  
25           Decisional Memo. Most important, Ross’s direction to his staff to get an agency to ask  
26           him to add the citizenship question, and Ross’s knowledge that his staff was asking DHS  
27           as well as DOJ to ask the question, and Ross’s knowledge that the staff’s efforts at DOJ  
28           were not limited to the Division of Civil Rights belies any notion that Ross’s motivation

1 was to meet DOJ's needs. Rather, it was DOJ, as was communicated by Attorney General  
2 Session's staff to Ross, that was meeting **Ross's** needs.

3 327. The Court finds that the Administrative Record permits only the following inferences  
4 from the undisputed facts covering the period from March 2017 through December 2017,  
5 and that is that Ross, before he was asked by DOJ to add the citizenship question, had  
6 decided that he wanted the citizenship question asked; that his reasons for wanting the  
7 question asked were completely unrelated to DOJ's alleged need for citizenship data at the  
8 census block level to enforce the Voting Rights Act; that he directed his staff to find a  
9 way to get the citizenship question added to the Census; that, when he was told that he  
10 needed to have an agency ask him to add the question, he directed his staff to find an  
11 agency to ask him; and that he did not care who asked for the question or the reasons for  
12 asking the question, so long as some agency asked.

13 **C. When The DOJ Reluctantly Submitted Its Request, The Bureau Studied The**  
14 **Issue And Showed The Harm That Adding A Citizenship Question Would**  
15 **Create**

16 1. DOJ Had Previously Decided Not To Ask For A Citizenship Question To  
17 Be Added To The Census

18 328. In June 2014, Arthur Gary of DOJ wrote to the General Counsel of the Department of  
19 Commerce to indicate what census-derived data the DOJ uses and to confirm that it  
20 continued to use such data. (AR000278–83).

21 329. Gary indicated that DOJ used citizenship data collected by the ACS to enforce the Voting  
22 Rights Act, and that the “lowest geography” for which DOJ needed citizenship data was  
23 the “Census block group” level. (AR000280).

24 330. Gary did not indicate that DOJ needed citizenship data at the census block level, or that it  
25 needed a citizenship question on the Decennial Census. (AR000278–83).

26 331. In July 2016, Gary wrote to the Bureau to confirm that the DOJ “had no needs to amend  
27 the current content and uses or to request new content” for the 2020 Census. In November  
28 of 2016, Gary supplemented that letter to “formally request[] that the Census Bureau  
consider a new topic in the ACS relating to LGBT populations.” (AR000311). At no time



1 prior to December 2017 did Gary express a need for more granular citizenship data or a  
2 citizenship question on the Census.

3 2. *The DOJ Request Does Not Provide Evidence That A Citizenship Question*  
4 *Is “Necessary,” As Defendants Concede*

5 332. On December 12, 2017, DOJ’s Arthur Gary signed a letter (the “DOJ Request”) to Census  
6 Director Ron Jarmin “to formally request that the Bureau reinstate on the 2020 Census  
7 questionnaire a question regarding citizenship, formerly included in the so-called ‘long  
8 form’ census.” While the DOJ Request states that “reinstating a question on citizenship  
9 will best enable the Department to protect all American citizens’ voting rights under  
10 Section 2,” it provides no evidence that DOJ has faced any barriers in enforcing Section 2  
11 of the Voting Rights Act without block-level citizen voting-age population data.  
12 (AR000663).

13 333. There is no evidence in the Administrative Record that anyone at the Bureau was notified  
14 that Ross was considering adding a citizenship question to the 2020 Census prior to the  
15 issuance of the DOJ Request.

16 334. While the DOJ Request cites a number of Voting Rights Act cases and concludes that  
17 “[t]hese cases make clear that, in order to assess and enforce compliance with Section 2’s  
18 protection against discrimination in voting, the Department needs to be able to obtain  
19 citizen voting-age population for census blocks, block groups, and counties, towns, and  
20 other locations,” as set forth in paragraph 95 of the Conclusions of Law below, none of  
21 the cases cited suggest that census block-level data is required to enforce the Voting  
22 Rights Act. (AR000664).

23 335. There is no evidence in the Administrative Record that census block-level data on citizen  
24 voting-age populations is required to enforce the Voting Rights Act.

25 336. It has never been DOJ’s position that CVAP data from the decennial census (rather than  
26 the ACS or another source) is “necessary” to enforce Section 2 of the Voting Rights Act.  
27 (Defendants’ Reply in Support of Their Motion for Summary Judgment, ECF No. 106,  
28 13:26–14:1).



1 343. The Bureau further based its recommendation on its conclusion that the 5.1% differential  
2 increase in non-response rates would impose additional estimated NRFU costs of \$32  
3 million. (AR0011647).

4 344. The Bureau further based its recommendation on the fact that there is “good evidence that  
5 citizenship is accurately reported by citizens, but less accurately self-reported by  
6 household responders.” (AR0011648).

7 345. In the December 22 Recommendation, the Bureau concluded that “acquiring citizenship  
8 status from administrative records is very likely to produce more accurate and timely data  
9 overall than asking the question directly.” (AR0011648).

10 4. *The Bureau Presented More Evidence That Adding The Citizenship*  
11 *Question Would Harm the Quality Of The Census Count Without Providing*  
*Better Citizenship Data On January 3, 2018 And January 19, 2018*

12 346. Following the December 22 memo, the Bureau continued to study the impact of adding a  
13 citizenship question to the Census. Dr. Abowd delivered a memo to Acting Director  
14 Jarmin on January 3 (the “January 3 Memo,” AR0011650).

15 347. The January 3 Memo considered three alternatives for meeting the DOJ Request: A) do  
16 not change data collection and instead provide CVAP tables to the DOJ based on data  
17 collection already conducted, B) add a citizenship question to the 2020 Census  
18 questionnaire and provide CVAP tables based on responses to the question, and C) do not  
19 add a citizenship question to the census instrument, but use citizenship data from  
20 administrative records to provide CVAP tables to DOJ. (AR0011650).

21 348. In the January 3 Memo, Dr. Abowd recommended using Alternative C because it was far  
22 less costly than adding a citizenship question to the 2020 Census, and would not harm the  
23 quality of the census count. (AR0011652).

24 349. In the January 3 Memo, Dr. Abowd wrote that “Alternative C delivers higher quality data  
25 than Alternative B for DOJ’s stated uses.” (AR0011652).

26 350. The Bureau sent an additional memo to Ross and Commerce on January 19 (the “January  
27 19 Memo,” AR001277–85).

28

- 1 351. In the January 19 Memo, the Bureau concluded that “Alternative C best meets DoJ’s  
2 stated uses, is comparatively far less costly than Alternative B, does not increase response  
3 burden, and does not harm the quality of the census count.” (AR001277).
- 4 352. In the January 19 Memo, the Bureau concluded that “Alternative B is very costly, harms  
5 the quality of the census count, and would use substantially less accurate citizenship status  
6 data than are available from administrative sources.” (AR001277).
- 7 353. In the January 19 Memo, the Bureau recommended against Alternative B because it  
8 would cause “Major potential quality and cost disruptions,” and that even if the block-  
9 level citizenship data were improved, there would be “serious quality issues remaining.”  
10 (AR001281).
- 11 354. In the January 19 Memo, the Bureau further identified the following “Shortcomings”  
12 associated with adding a citizenship question: “[c]itizenship status is misreported at a very  
13 high rate for noncitizens, citizenship status is missing at a high rate for citizens and  
14 noncitizens due to reduced self-response and increased item nonresponse, nonresponse  
15 followup costs increase by at least \$27.5M, erroneous enumerations increase, whole-  
16 person census imputations increase.” (AR001278).
- 17 355. In the January 19 Memo, the Bureau found that the item non-response rate—the rate at  
18 which a question is skipped even if the form is partially completed—was nearly twice as  
19 high for Hispanics on the citizenship question as it was for non-Hispanic Whites.  
20 (AR001280).
- 21 356. The January 19 Memo found that the item non-response rate for the citizenship question  
22 on the ACS (that is, the rate at which individuals who complete the form nevertheless  
23 failed to respond to the citizenship question specifically), had increased by 2.5 percentage  
24 points from 2013 to 2016 for Hispanic respondents. (AR001280).
- 25 357. The January 19 Memo found that while 4% of the Non-Hispanic White respondents broke  
26 off from completing the ACS at the citizenship question, non-Hispanic nonwhites broke  
27 off at a rate of 27% and Hispanic respondents broke off at a rate of 36%. (AR001281).
- 28

1 358. The January 19 Memo found that “[i]n 2010 and 2016, individuals for whom the  
2 administrative data indicate noncitizen respond citizen in 32.7% and 34.7% of the ACS  
3 questionnaires, respectively.” (AR001284).

4 **D. DOJ’s Refused To Meet With The Bureau About Its Request**

5 359. In his December 22, 2017, correspondence, Jarmin suggested a “meeting of Census and  
6 DOJ technical experts to discuss the details of this proposal.” (AR006659).

7 360. In January, Jarmin and Gary agreed to meet, and to include the “technical folks from the  
8 DOJ side.” (AR0005489).

9 361. On February 16, 2018, almost two months after Jarmin had first suggested the technical  
10 meeting to DOJ, he reported the Census and Commerce staff that Arthur Gary “has  
11 spoken to DOJ leadership. They believe the letter requesting citizenship to be added to  
12 the 2020 Census fully describes their request. They do not want to meet.” (AR0009074).

13 362. A scheduled meeting was cancelled and never took place. (AR0009193).

14 **E. Ross Sought Out Stakeholders Who Would Support The Decision To Add  
15 The Question But Still The Vast Majority Of Those Who Met With Him  
16 Opposed It**

17 363. During the early part of 2018, Ross conferred with multiple external stakeholders,  
18 including academics and representatives of interest groups, regarding the addition of a  
19 citizenship question to the Census. (AR001198–AR001209).

20 364. Defendant Jarmin specifically reached out to conservative organizations, including the  
21 American Enterprise Institute, to find people “who can speak to the pros of adding such a  
22 question,” noting that “[m]ost stakeholders will speak against the proposal.” The  
23 American Enterprise Institute representative responded by writing that “[n]one of my  
24 colleagues at AEI would speak favorably about the proposal.” When Jarmin wrote to  
25 Christa Jones at the Bureau to report on AEI’s response, she suggested that he write to  
26 Mark Krikorian and Steven Camorrota of the Center for Immigration Studies, which has  
27 long advocated for adding a citizenship question as a means of excluding non-citizens  
28 from apportionment counts. (AR0008325).

- 1 365. Eventually Ross met with numerous stakeholders. The majority of such stakeholders did  
2 not favor adding a citizenship question to the Census. Of those who did support adding  
3 the question, the majority either had historically opposed including non-citizens in  
4 Congressional apportionment counts or were elected Republican officials. (AR001198–  
5 AR001209).
- 6 366. For example, on January 26, 2018, six former directors of the Bureau wrote that “adding a  
7 citizenship question to the 2020 Census will considerably increase the risks to the 2020  
8 enumeration” because, among other things, “there is a great deal of evidence that even  
9 small changes in survey question order, wording, and instructions can have significant,  
10 and often unexpected consequences for the rate, quality, and truthfulness of response.”  
11 (AR001057).
- 12 367. On January 5, 2018, Eduardo Bonilla-Silva, the president of the American Sociological  
13 Association, wrote that if the question were added “the integrity of the 2020 Census data  
14 will be fundamentally compromised.” (AR000787).
- 15 368. On January 23, 2018, the Population Association of America, a scientific association of  
16 population scientists who rely on timely and accurate and timely data from the federal  
17 statistical agencies to produce research findings, wrote that adding a citizenship question  
18 to the decennial census would produce “harmful effects, including increased costs,  
19 suppressed response rates, and unreliable data.” (AR001053).
- 20 369. A number of stakeholders emphasized that a citizenship question is not necessary to  
21 enforce Section 2 of the Voting Rights Act because, for example, “Estimates of the citizen  
22 voting-age population derived from the ongoing American Community Survey, and the  
23 so-called census ‘long’ or sample form before that, have been and continue to be suitable  
24 for purposes of civil rights and Voting Rights Act enforcement.” (AR000799, Letter from  
25 the Leadership Conference on Civil and Human Rights). *See also* AR0001122-23 (letter  
26 from various Jewish organizations); AR3605-06 (letter from the Constitutional  
27 Accountability Center on behalf of Asian Americans Advancing Justice, NAACP Legal  
28 Defense and Education Fund, and other organizations).

1 370. Among the few people who met with Ross who spoke in favor of adding the citizenship  
2 question was Dr. Steven Camarota, the Director of Research for the Center for  
3 Immigration Studies who suggested that Commerce ask further questions about foreign  
4 born respondents on future decennial censuses. (AR001206).

5 **F. Ross Met With The Bureau Staff Once And Demanded Further Study Of**  
6 **Ways To Include A Citizenship Question**

7 371. On January 30, 2018, Comstock asked the Bureau to respond to 35 “questions that are  
8 raised by the memo.” (AR0005216).

9 372. Bureau staff had a single meeting with Ross on February 12, 2018, to discuss the January  
10 19 Memo. The only record of the meeting in the Administrative Record is a February 13,  
11 2018 email from James Treat of the Bureau to other Bureau employees, including Jarmin  
12 and Abowd, identifying five “actions from yesterday’s meeting with the Secretary.”  
13 (AR009450).

14 373. At some point after that meeting, and before March 1, 2018, Ross requested analysis of a  
15 fourth option, Alternative D, which would involve “combining Alternative B (asking the  
16 citizenship question of every household on the 2020 Census) and Alternative C (do not  
17 ask the question, link reliable administrative data on citizenship status instead).”  
18 (AR009813).

19 374. The Bureau provided its response to the request for analysis of Alternative D and its  
20 response to the 35 questions on March 1, 2018 (the “March 1 Memo”). (AR009812).

21 375. In the March 1 Memo, the Bureau concluded that because self-response rate would drop  
22 as a result of adding a citizenship question, regardless of whether administrative records  
23 were later used to add further information, “Alternative D would result in poorer quality  
24 citizenship data than Alternative C” and “would still have all the negative cost and quality  
25 implications of Alternative B” set forth in the January 19 memorandum. (AR0009812).

26 376. In the March 1 Memo, the Bureau concluded that under Alternative D, it would not  
27 receive a response to the citizenship question from 35.4 million people, and would likely  
28 be able to observe citizenship status for 21.5 million people and impute citizenship status

- 1 for 13.8 million people, concluding that “there will be an need for imputing many cases  
2 across either alternative.”) (AR009818–19).
- 3 377. Further, the March 1 Memorandum explains: “Under Alternative C, there will be error in  
4 the administrative records, but we believe these to be relatively limited due to the  
5 procedure following by SSA, USCIS and State. In both Alternatives, the modeled cases  
6 will be subject to prediction error. ... Alternative D has an additional source or error,  
7 response error. This is where 2020 respondent give the incorrect status. Statisticians  
8 often hope these errors are random and cancel out. However, we know from prior  
9 research that citizenship status responses are systematically biased for a subset of  
10 noncitizens. Response error is only an issue in alternative D.” (AR00098189).
- 11 378. The Bureau concluded in the March 1 Memorandum that the citizenship data that would  
12 be provided to DOJ under Alternative C (through administrative records alone) would be  
13 more accurate than under Alternative B or D. (AR0009819).
- 14 379. The Bureau concluded in the March 1 Memorandum that, under Alternative D, for the  
15 group of 22 million people for which the Bureau has both a census response and  
16 administrative records, but they do not match, the citizenship data will be less accurate  
17 than under Alternative C, due to response errors. (AR0009819).
- 18 380. The March 1 Memo also includes the Bureau’s response to the thirty-five questions posed  
19 by Comstock on January 30. (AR001286; AR009812).
- 20 381. In response to questions regarding the use of administrative records, the Bureau stated that  
21 “The data in these administrative records are used to substitute for direct responses in the  
22 economic censuses for the unsampled entities. They are also used as part of the review,  
23 edit, and imputation systems for economic censuses and surveys,” and that they are  
24 “sufficient to meet DoJ’s request.” (AR001293).
- 25 382. The thirty-first of the thirty-five questions (“Question 31”) asked “[w]hat was the process  
26 that was used in the past to get questions added to the decennial Census or do we have  
27 something similar where a precedent was established?” (AR0009832).
- 28 383. The Bureau responded to this question, in part, as follows:



1 The Census Bureau follows a well-established process when adding or  
 2 changing content on the census or ACS to ensure the data fulfill legal and  
 3 regulatory requirements established by Congress. Adding a question or  
 4 making a change to the Decennial Census or the ACS involves extensive  
 5 testing, review, and evaluation. This process ensures the change is necessary  
 6 and will produce quality, useful information for the nation.

7 The Bureau further noted that the Bureau and OMB “have laid out a formal  
 8 process for making content changes.” (AR009832–33).

- 9 384. The Bureau concluded in the March 1 Memorandum that the inclusion of a citizenship  
 10 question is not necessary to provide complete and accurate data in response to the  
 11 December 12 Letter, and in fact that adding the citizenship question would result in  
 12 “poorer quality citizenship data than Alternative C. It would still have all the negative  
 13 cost and quality implications of Alternative B outlined in the draft January 19, 2018  
 14 memo to the Department of Commerce.” (AR009816).

15 **V. ROSS ISSUED A DECISIONAL MEMO ORDERING THAT THE CITIZENSHIP  
 16 QUESTION BE ADDED WITHOUT DISCLOSING HIS TRUE REASONS AND IN  
 17 SPITE OF THE EVIDENCE IN THE RECORD**

18 **A. The Decisional Memo Does Not Include Ross’s Real Reasons For Adding The  
 19 Citizenship Question**

- 20 385. On March 26, 2018, Ross issued the Decisional Memo directing the Bureau to add a  
 21 citizenship question to the 2020 Census. (AR001313).
- 22 386. In the Decisional Memo, Ross wrote that “[f]ollowing receipt of the DOJ request, I set out  
 23 to take a hard look at the request and ensure that I considered all facts and data relevant to  
 24 the question so that I could make an informed decision on how to respond.” (AR001313).
- 25 387. There is no evidence anywhere in the Administrative Record that Ross was presented with  
 26 any reason for adding a citizenship question to the 2020 Census prior to December 2017  
 27 other than excluding non-citizens from congressional apportionment counts.
- 28 388. Although the Decisional Memo mentions a United Nations recommendation and the  
 practices of some other nations, there is no evidence that the experience in other countries  
 was a reason for Ross’s desire for the question, and no mention of the United Nations  
 recommendation in documents that predate the Decisional Memo. (AR001319).

1 389. The Decisional Memo does not mention any of Ross and Commerce’s efforts to get DOJ,  
2 or any agency, to request a citizenship question prior to December 12, 2017.

3 390. The DOJ Request does not state that adding a citizenship question was either necessary or  
4 essential to enforcement of the Voting Rights Act, and Defendants’ position has never  
5 been that adding the question was necessary. (Defendants’ Reply in Support of Their  
6 Motion for Summary Judgment, Doc. 106, 13:26–14:1)

7 391. Although the Administrative Record, as eventually produced, shows that Ross pursued the  
8 addition of a citizenship question beginning in early 2017, the Decisional Memo provides  
9 no discussion of this process.

10 392. The Decisional Memo does not set forth all of the material reasons that Ross wanted the  
11 citizenship question added to the 2020 Census.

12 393. The reasons set forth in the Decisional Memo to support the addition of the citizenship  
13 question to the 2020 Census are pre-textual.

14 **B. The Supplemental Memorandum Does Not Provide The Real Reasons For**  
15 **Ross’s Decision**

16 394. After this litigation began, on June 21, 2018, Commerce supplemented the Administrative  
17 Record with a one-page memorandum authored by Ross acknowledging that the question  
18 of adding a citizenship question had been raised by “senior Administration officials” and  
19 that he had discussed adding a question with “other governmental officials,” including  
20 reaching out to the Department of Justice to ask if they would “would support, and if so  
21 would request, inclusion of a citizenship question as consistent with and useful for  
22 enforcement of the Voting Rights Act.” (AR001321).

23 395. The June 21, 2018 memorandum does not acknowledge that Comstock initially reached  
24 out to the DOJ’s Executive Office for Immigration Review and DHS, neither of which  
25 enforces the Voting Rights Act.

26 396. The June 21, 2018 memorandum does not provide all the material reasons that Ross had  
27 for wanting the citizenship question added to the 2020 Census.  
28

1 397. The June 21, 2018 memorandum does not provide all material reasons that Ross had for  
2 adding the citizenship question to the 2020 Census.

3 **C. The Decisional Memo Sets Forth A Rationale That Is Contradicted By The**  
4 **Evidence In The Record**

5 398. Ross wrote in the Decisional Memo that when the Department and the Bureau reviewed  
6 the DOJ request they “prioritized the goal of obtaining *complete and accurate data*.”  
7 (AR001313) (emphasis in original).

8 399. There is no evidence in the Administrative Record that adding the citizenship question  
9 will result in obtaining complete and accurate data, and substantial evidence that adding  
10 the question will result in less complete and less accurate data. (AR001277, AR009816).

11 400. In the Decisional Memo, Ross wrote that “[i]t is my judgment that Option D will provide  
12 DOJ with the most complete and accurate CVAP data in response to its request. Asking  
13 the citizenship question of 100 percent of the population gives each respondent the  
14 opportunity to answer.” (AR001317).

15 401. This statement is contradicted by the record, which contains no evidence that “giving each  
16 respondent the opportunity to provide an answer” improves Census quality, and  
17 substantial evidence that adding a citizenship question to the Census would reduce data  
18 quality. (AR001277, AR009816)

19 402. In the Decisional Memo, Ross wrote that “[t]he citizenship data provided to DOJ will be  
20 more accurate with the question than without it which is of greater importance than any  
21 adverse effect that may result from people violating their duty.” (AR001319).

22 403. Ross cited to no evidence for this conclusion, and it is contrary to the evidence in the  
23 Administrative Record. There is no evidence in the Administrative Record to suggest that  
24 the data provided to DOJ will be more accurate with the question than without it, and  
25 substantial evidence in the Administrative Record that the citizenship data will be less  
26 accurate with the question than it would be if obtained through administrative records.  
27 (AR001277, AR009816).  
28

1 404. In the Decisional Memo, Ross wrote “I find that the need for accurate citizenship data and  
2 the limited burden that the reinstatement of the citizenship question would impose  
3 outweighs fears about a potentially lower response rate.” (AR001317).

4 405. This statement is contrary to the Administrative Record, which contains no evidence that  
5 adding the citizenship question will produce accurate citizenship data and substantial  
6 evidence that adding the question will create less accurate citizenship data. (AR001277,  
7 AR009816).

8 406. In the Decisional Memo, Ross wrote that “even if there is some impact on responses, the  
9 value of more complete and accurate data . . . outweighs such concerns.” (AR001319).

10 407. This statement is contrary to the evidence because the Administrative Record contains no  
11 evidence that that adding the citizenship question will result in “more complete and  
12 accurate data” and substantial evidence that it will produce incomplete and inaccurate  
13 data. (AR001277, AR009816).

14 **D. The Rationale Of The Decisional Memo Ignores Important Aspects Of The**  
15 **Question**

16 408. Ross wrote that the Bureau found there would be an “increased burden” on those who  
17 answered the question but also that there would be no “additional imposition” unless the  
18 respondent is a non-citizen. (AR001317).

19 409. Ross cited no evidence for his statement that there would be no additional imposition  
20 unless the respondent is a non-citizen. The Bureau had concluded that adding the question  
21 “would make the 2020 Census modestly more burdensome in the direct sense, and  
22 potentially much more burdensome in the indirect sense that it would lead to a larger  
23 decline in self-response for noncitizen households.” (AR001281).

24 410. When discussing Option C in the Decisional Memo, Ross wrote that the Bureau would  
25 have to correct for inaccurate responses, noting the Bureau’s finding that, when asked a  
26 citizenship question, a significant number of non-citizens “inaccurately mark ‘citizen.’”  
27 (AR001316).

28

1 411. Ross made no mention of inaccurate responses when discussing Option D, although the  
2 Bureau had noted that adding the citizenship question would result in inaccurate answers  
3 because “[c]itizenship status is misreported at a very high rate for noncitizens.”  
4 (AR001277, AR001317).

5 412. Ross wrote that the citizenship question had been “well tested” because it had been  
6 included on the ACS. (AR001314).

7 413. There is no evidence in the Administrative Record that the citizenship question has ever  
8 been tested without being preceded by a question on nationality or place of birth.

9 414. In the Decisional Memo, Ross wrote that “for the approximately 70 percent of noncitizens  
10 who already answered this question accurately on the ACS, the question is no additional  
11 imposition since census responses by law may only be used anonymously and for  
12 statistical purposes.” (AR001317).

13 415. This statement is not accurate because only 2% of the population even receive the ACS  
14 each year, and the question is an “additional burden” on the vast majority of citizens and  
15 non-citizens alike who have never been asked their citizenship status on the ACS because  
16 they have never received it. (UF 85)

17 416. In the Decisional Memo, Ross wrote that “[t]he reinstatement of a citizenship question  
18 will not decrease the response rate of residents who already decided not to respond.”  
19 (AR001317).

20 417. There is no evidence in the Administrative Record regarding any households who have  
21 “already decided not to respond.”

22 418. In the Decisional Memo, Ross wrote that “[t]o minimize any impact on decennial census  
23 response rates, I am directing the Census Bureau to place the citizenship question last on  
24 the decennial census form.” (AR001320).

25 419. There is no evidence in the Administrative Record that placing the citizenship question  
26 last on the form will minimize the impact of response rates.

27  
28

1           E.     **Ross's Overall Conclusion That Providing DOJ With Citizenship Data**  
2                   **Outweighs Any Possible Damage To The Census Is Implausible**

- 3     420.    Repeatedly, throughout his Decisional Memo, Ross states that providing DOJ with  
4           accurate citizenship data is more important than any concerns raised as to the quality of  
5           the Census. For example, he writes that in considering the question, he “prioritized the  
6           goal of obtaining *complete and accurate data*,” that it is incumbent upon Commerce to  
7           “provide a complete and accurate decennial census,” and that “the need for accurate  
8           citizenship data and the limited burden that the reinstatement of the citizenship question  
9           would impose outweigh fears about a potentially lower response rate.” (AR001313,  
10          AR001317) (emphasis in original).
- 11    421.    Ross concludes his analysis by stating that the “citizenship data provided to DOJ will be  
12          more accurate with the question than without it, which is of greater importance than *any*  
13          adverse effect that may result from people violating their legal duty to respond.”  
14          (AR001319) (emphasis added).
- 15    422.    When Ross wrote that, he knew that DOJ had expressed no need for a citizenship question  
16          on the Decennial Census when it had originally responded to the Bureau’s inquiry  
17          regarding questions in 2016; that DOJ had not come to him with the request, but that he  
18          had directed his staff to go to DOJ and ask that they make the request; that DOJ had  
19          initially told Ross’s staff that they did not want to ask for the question because they had  
20          other political problems; that DOJ only asked for the question when Ross personally  
21          intervened with Attorney General Sessions; that the Census Bureau had told Ross that  
22          adding the citizenship question to the Census would result in providing *less* accurate  
23          citizenship data to DOJ; and that the Census Bureau had told Ross that adding the  
24          citizenship question to the Census would increase the non-response rate, increase NRFU  
25          burdens and costs, and inevitably impair the quality of the Census data.
- 26    423.    In light of these undisputed facts, all gleaned from the Administrative Record, Ross’s  
27          conclusion that providing DOJ with accurate citizenship data through a citizenship  
28          question added to the Census is implausible.

1           **F. Ross Had An Unalterably Closed Mind On The Issue Of Adding The**  
2           **Citizenship Question To The Census**

- 3           424. Throughout the period from March through November 2017, Ross clearly indicated that  
4           he wanted the citizenship question added to the Census. Throughout this period, Ross  
5           used language that was clearly interpreted by his staff as a demand to get the citizenship  
6           question added,” that “I will call the AG,” and that “[w]e must have this resolved.”  
7           (AR0003984, AR0011193).
- 8           425. Throughout this period, Ross repeatedly used language indicating his frustration that his  
9           demand was not being met, stating he was “mystified why nothing [has] been done,” and  
10          asking “Why not?” (AR0003710).
- 11          426. Throughout this period, Ross and his staff used language indicating that the conclusion  
12          was a *fait accompli*. For example, in August 2017, Comstock wrote to Ross that “[s]ince  
13          this issue *will go to the Supreme court* we need to be diligent in preparing the  
14          administrative record,” even though the issue would only go to the Supreme Court (or any  
15          court) if the question were in fact added. (AR0012476, *emphasis added*).
- 16          427. Even after DOJ’s request, Ross’s actions indicate that he would not take no for an answer.  
17          He sent the Bureau back to the drawing board when the first answer the Bureau gave was  
18          contrary to Ross’s desire to add the citizenship question. (AR009813) His Decisional  
19          Memo made key conclusions directly contrary to the Bureau’s analysis, without  
20          acknowledging key aspects of that contrary analysis. (AR001313–20).
- 21          428. Ross’s Decisional Memo, his testimony before Congress, and his Supplemental  
22          Memorandum all omitted any discussion of the history of Ross’s efforts to add the  
23          citizenship question revealed in the Administrative Record, a record fully disclosed only  
24          as a result of this litigation.
- 25          429. For all of these reasons, this Court finds that Ross had an unalterably closed mind on the  
26          decision of whether to add a citizenship question to the Census.
- 27  
28

1           **G.    Ross Added the Question Without Relying On Administrative Records To**  
2           **The Maximum Extent Possible And Without Submitting A Report To**  
3           **Congress Explaining That The Additional Question Was Necessary**

- 4           430.    In the December 22 Memo, the Bureau concluded that consulting administrative  
5           records—including drivers’ licenses, FHA loan applications, and Medicare and Medicaid  
6           applications, would be a more effective and reliable means of identifying citizenship  
7           status for census respondents. (AR0010438).
- 8           431.    In the January 19 Memo and the March 1 Memo, the Bureau proposed using  
9           administrative records and demonstrated that doing so would provide citizenship  
10          information that was more accurate than would be obtained by adding a citizenship  
11          question to decennial census. (AR001277, AR001312).
- 12          432.    The Decisional Memo does not address the statutory requirement that “[t]o the maximum  
13          extent possible and consistent with the kind, timeliness, quality and scope of the statistics  
14          required, the Secretary shall acquire and use information available from any source  
15          referred to in subsection (a) or (b) of this section [that is, administrative records] instead  
16          of conducting direct inquiries.” 13 U.S.C. § 6(c).
- 17          433.    The Decisional Memo provides no evidence to contradict the Bureau’s findings regarding  
18          administrative records.
- 19          434.    In March 2017, the Bureau submitted its “Subjects Planned for the 2020 Census and  
20          American Community Survey” to Congress. Citizenship was not identified as one of the  
21          subjects for the 2020 Census. (AR000194–96).
- 22          435.    The Decisional Memo does not set forth any “new circumstances” that “necessitate”  
23          adding a citizenship question to the 2020 Census, and it has never been Defendants’  
24          position that adding the question to the Decennial Census is necessary to enforce Section  
25          2 of the Voting Rights Act. (Defendants’ Reply in Support of Their Motion for Summary  
26          Judgment, ECF No. 106, 13:26–14:1).
- 27  
28



1 436. On March 29, 2018, the Bureau submitted its planned questions to Congress for the 2020  
2 Census. The questions included a citizenship question. *See*

3 <https://www.census.gov/library/publications/2018/dec/planned-questions-2020-ac.html>.

4 437. Ross has never submitted a report to Congress setting forth any “new circumstances” that  
5 “necessitate” adding citizenship as a topic to the 2020 Census.

6 438. No evidence in the Administrative Record supports the conclusion that there were any  
7 “new circumstances” that “necessitated” adding citizenship as a topic to the 2020 Census.

8 **VI. DEFENDANTS PROVIDED FALSE STATEMENTS, HID DOCUMENTS,  
9 FAILED TO DISCLOSE THEIR TRUE MOTIVES, AND DOCTORED CENSUS  
10 BUREAU COMMUNICATIONS**

11 439. Although Ross and his staff had worked for months to get DOJ, then DHS, then DOJ  
12 again, to add the citizenship question to the Census, when asked about the potential to add  
13 a citizenship question during his testimony before Congress on March 22, 2018, he said  
14 that “Department of Justice, as you know, *initiated the request for inclusion of the*  
15 *citizenship question*. ... Because it is from the Department of Justice, we are taking it  
16 very seriously, and we will issue a fulsome documentation of whatever conclusion we  
17 finally come to.” (emphasis added). Hearing with Commerce Secretary Ross: Hearing  
18 Before the H. Comm. on Ways and Means, 115th Cong. 1 (2018) (PTX-346)

19 440. There is no evidence in the Administrative Record that Ross, Comstock, or anyone from  
20 Commerce notified the Bureau of their plans to ask DOJ or DHS to request a citizenship  
21 question before the DOJ Request was issued on December 12, 2017.

22 441. Although Ross and his staff had worked for months to get DOJ, then DHS, then DOJ  
23 again, to add the citizenship question to the Census, in the Decisional Memo he wrote that  
24 “[f]ollowing receipt of the DOJ request, I set out to take a hard look” at the request,  
25 without mentioning his prior months-long effort to procure the request. (AR001313).

26 442. Commerce produced the original Administrative Record in this matter on June 8, 2018.  
27 (ECF Nos. 38-1 through 38-4).  
28

- 1 443. The original Administrative Record did not include any documents relating to Ross and  
2 Comstock's months-long plan to add a citizenship question to the 2020 Census.
- 3 444. The original Administrative Record did not include the Bureau's response to Question 31  
4 but instead substituted a revised answer that had been drafted by an unknown individual at  
5 Commerce. (AR001296).
- 6 445. Nothing in the Administrative Record suggests that anyone from the Bureau drafted the  
7 answer to Question 31 that is included in the Administrative Record despite the fact that it  
8 states that "the Census Bureau did not [feel] bound by past precedent." (AR001296).
- 9 446. Defendants have since stipulated to the inclusion of additional documents in the  
10 Administrative Record. (Joint Pretrial Statement, Doc. 144, Ex. B).

### **PROPOSED CONCLUSIONS OF LAW**

#### **I. PLAINTIFFS' HAVE STANDING TO CHALLENGE SECRETARY ROSS'S DECISION TO INCLUDE A CITIZENSHIP QUESTION IN THE 2020 DECENNIAL CENSUS**

##### **A. Standing Requires An Injury In Fact That Is Fairly Traceable To The Challenged Action And Will Be Redressed By A Favorable Decision**

- 16 1. To satisfy Article III's "irreducible constitutional minimum" of standing, a plaintiff must  
17 have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of  
18 the defendant, and (3) that is likely to be redressed by a favorable judicial decision."  
19 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) citing *Lujan v. Defenders of Wildlife*,  
20 504 U.S. 55, 560–61 (1992).
- 21 2. An association has standing to bring suit on behalf of its members when "(a) its members  
22 would otherwise have standing to sue in their own right; (b) the interests it seeks to protect  
23 are germane to the organization's purpose; and (c) neither the claim asserted nor the relief  
24 requested requires the participation in the lawsuit of each of the individual members."  
25 *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 343 (1977).
- 26 3. The "presence of one party with standing is sufficient to satisfy Article III's case-or-  
27 controversy requirement." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*,  
28 547 U.S. 47, 53 (U.S. 2006).

1           **B.     Plaintiffs Have Suffered Injuries In Fact**

2           1.     *A Plaintiff Shows Injury-In-Fact If A Procedural Act Is “Reasonably*  
 3           *Probable” To Cause Harm, If A Future Event Poses A “Substantial Risk”*  
 4           *Of Harm, Or If It “Reasonably Incur[s] Costs” To Mitigate A Risk*

5           4.     To establish injury-in-fact, a plaintiff must demonstrate it “has sustained or is immediately  
 6           in danger of sustaining a direct injury” as a result of the challenged action. *Spokeo, Inc. v.*  
 7           *Robins*, 136 S. Ct. 1540, 1552 (2016) (quotation omitted).

8           5.     This injury or threat of injury must be “concrete and particularized” rather than  
 9           conjectural or hypothetical. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)

10          6.     When suing over an action that will cause future harm plaintiff need not “demonstrate that  
 11          it is literally certain that the harms they identify will come about” to demonstrate injury-  
 12          in-fact. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 414 n.5 (2013).

13          7.     Rather, for standing purposes, “allegation of future injury may suffice if the threatened  
 14          injury is ‘certainly impending,’ or there is a ‘substantial risk’ that the harm will occur.”  
 15          *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (U.S. 2014) *quoting Clapper*, 568  
 16          U.S. at 414 n.5.

17          8.     An APA Plaintiff establishes an injury-in-fact when he shows “(1) that he has a  
 18          procedural right that, if exercised, could have protected his concrete interests, (2) that the  
 19          procedures in question are designed to protect those concrete interests, and (3) that the  
 20          challenged action’s threat to the plaintiff’s concrete interests is reasonably probable.”  
 21          *California v. Azar*, 911 F.3d 558, 570 (9th Cir. 2018).

22          9.     In addition, Plaintiffs demonstrate that they have suffered an injury-in-fact when they  
 23          “identify a ‘substantial risk’ of harm and ‘reasonably incur costs to mitigate or avoid that  
 24          harm”” because those costs themselves constitute an injury-in-fact. *Clapper*, 568 U.S. at  
 25          414 n.5; *see also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153 (2010).

26          10.    When the government has a statutory responsibility to provide accurate information,  
 27          providing inaccurate or incomplete information instead constitutes an injury-in-fact to the  
 28          recipient. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982) (holding

1 that because the Fair Housing Act created a statutory right to truthful information  
 2 concerning the availability of housing, “testers” who were misinformed had standing to  
 3 sue without demonstrating any further injury).

4 11. A government agency’s failure to provide information that is public by statute “constitutes  
 5 a sufficiently distinct injury to provide standing to sue.” *Public Citizen v. U.S. Dept. of*  
 6 *Justice*, 491 U.S. 440, 449 (1989).

7 12. Those who challenge “a census undercount on the basis, inter alia, that improper  
 8 enumeration will result in loss of funds to their city have established both an injury fairly  
 9 traceable to the Census Bureau and a substantial probability that court intervention will  
 10 remedy the plaintiffs’ injury.” *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980).

11 13. For standing purposes, “a loss of even a small amount of money is ordinarily an injury.”  
 12 *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) (quotation marks omitted).

13 14. An individual has standing to challenge government action that requires that individual to  
 14 take action or be subject to a fine. *Thomas More Law Center v. Obama*, 651 F.3d 529, 537  
 15 (6th Cir. 2011) (Individual subject to Affordable Care Act’s mandate to purchase health  
 16 insurance has standing to challenge the law because either purchasing insurance or being  
 17 subject to a fine for not purchasing insurance constitutes injury-in-fact) *abrogated on the*  
 18 *merits without reversal on standing grounds by National Federation of Independent*  
 19 *Business v. Sebelius*, 567 U.S. 519, 612 (U.S. 2012). *See also Liberty University, Inc. v.*  
 20 *Geithner*, 753 F. Supp. 2d 611, 626 (W.D.Va. 2010) (same), *Goudy-Bachman v. U.S.*  
 21 *Dept. of Health and Human Services*, 811 F. Supp. 2d 1086, 1091 (M.D.Pa. 2011) (same).

22 2. *San Jose Has Suffered And Will Suffer An Injury-In-Fact*

23 a. Outreach Spending

24 15. San Jose has spent and will continue to spend additional money on additional outreach  
 25 specifically because Ross directed that a citizenship question be added to the Census.  
 26 (Findings of Fact, “FOF”, ¶¶ 214-219). Because there is a substantial risk that adding the  
 27 citizenship question will cause a net or differential undercount, which in turn would harm  
 28

1 San Jose through a loss of funding, and the additional spending to prevent that harm is  
 2 “reasonable” according to Dr. John Abowd, Chief Scientist of the Census Bureau and  
 3 Defendants’ expert, San Jose has suffered injury-in-fact based on its additional outreach  
 4 spending. *Clapper*, 568 U.S. at 414 n.5.

5 b. Decline in Data Quality.

- 6 16. The Bureau concedes that adding the citizenship question will degrade the quality of data  
 7 provided after the Census is conducted. (FOF ¶¶ 129–133). The harm that will be caused  
 8 by this lower-quality data—to San Jose’s library system (FOF ¶¶ 223–225), its  
 9 Department of Housing (FOF ¶ 234), its work2future program (FOF ¶¶ 226–229), and its  
 10 Office of Emergency Management (FOF ¶¶ 237–239) is “certainly impending.” *Clapper*,  
 11 568 U.S. at 401. The inaccurate data will make it harder for the City of San Jose to  
 12 provide basic services to those in the city that depend up on it.
- 13 17. Defendants have a constitutional and statutory obligation to convey accurate demographic  
 14 information to San Jose, and San Jose has a right to receive accurate information. *See*  
 15 *Utah v. Evans*, 536 U.S. 452, 478 (2002) (explaining Framers’ “strong constitutional  
 16 interest in accuracy” in the census); *Wisconsin v. City of N.Y.*, 517 U.S. 1, 20 (1996) (the  
 17 conduct of the census must bear a “reasonable relationship to the accomplishment of an  
 18 actual enumeration of the population, keeping in mind the constitutional purpose of the  
 19 census,” namely, obtaining an accurate count of the population in each state); 13 U.S.C. §  
 20 141; see also Pub. L. No. 105–119, § 209(a)(6), 111 Stat. at 2481 (“Congress finds that . .  
 21 . [i]t is essential that the decennial enumeration of the population be as accurate as  
 22 possible, consistent with the Constitution and laws of the United States.”)
- 23 18. Because of the constitutional and statutory obligations set forth above, Plaintiffs will be  
 24 injured by Defendants’ failure to provide accurate census data even excluding the harm  
 25 that the inaccurate data will cause. *See Havens Realty*, 455 U.S. at 373–74 (1982); *Pub.*  
 26 *Citizen*, 491 U.S. at 449–51 (1989).
- 27  
 28

c. Substantial Risk of Financial Loss Associated With A Differential Undercount.

19. The Census Bureau concedes that there will be at least a 5.8% reduction in responses to the Census as a result of the addition of the citizenship question, and that NRFU operations will be more difficult and less likely to be completely successful with those who do not respond to the Census because of the citizenship question. The Census Bureau acknowledges that those non-respondents are likely to be disproportionately immigrants and Latinos, who have been undercounted in past censuses. This in itself is sufficient evidence upon which to conclude that there is a “substantial risk” of a differential undercount that in jurisdictions, like San Jose, with significant Latino and immigrant populations. *Susan B. Anthony List*, 573 U.S. at 158.
20. The testimony of Dr. Barreto and Dr. O’Muirheartaigh further supports not only the conclusion that there is a substantial risk of a differential undercount in San Jose, but indeed supports the conclusion that there will be a differential undercount. (FOF ¶¶ 87-156).
21. Because the State of California has a higher percentage of non-citizens than the nation as a whole, there is a substantial risk that California’s State Allocation of WIOA funding, which is based on what Dr. Reamer calls a “state share” formula, will be diminished by the differential undercount caused by adding the citizenship question. (FOF ¶¶ 188-193). *See Carey*, 637 F.2d at 838 (holding that those “who challenge a census undercount on the basis . . . that improper enumeration will result in loss of funds to their city have established . . . an injury”).
22. Because San Jose’s Local Workforce Development area (“LWD”) has an even higher percentage of non-citizens than California as a whole, there is a substantial risk that San Jose’s work2future program will have a lower proportional sub-state allocation of an already smaller State Allocation, effectively twice lowering its funding level. (FOF ¶¶ 191–192).

- 1 23. Because San Jose has a substantially higher percentage of non-citizens than the nation as a  
2 whole, there is a substantial risk that San Jose will suffer a reduction of its grant under the  
3 CDBG program, which is based in part on the population of the grantee city compared to  
4 other such cities across the country. (FOF ¶¶ 200–204).
- 5 24. Because San Jose’s Office of Emergency Management uses census data to report on the  
6 number of people affected by a disaster, the substantial risk of even a net undercount (as  
7 opposed to a differential undercount) will create a “substantial risk” of harm. *Susan B.*  
8 *Anthony List*, 573 U.S. at 158.
- 9 25. These direct funding harms constitute an injury-in-fact sufficient to convey standing. *See*  
10 *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1172 (9th Cir. 2002) (explaining that loss of  
11 money is the prototypical “concrete, actual injury.”).
- 12 26. While the evidence shows that there is a substantial risk of these harms, San Jose has  
13 suffered an injury-in-fact even if the court concludes that they are merely “reasonably  
14 probable” because San Jose is suing to protect its procedural rights under the APA to have  
15 its residents counted properly. *Azar*, 911 F.3d. at 570.

16 3. *BAJI Has Suffered And Will Suffer An Injury-In-Fact*

17 a. *Some BAJI Members Will Not Complete The Census And Will Be*  
18 *Subject To The Injury-In-Fact Of A Fine*

- 19 27. Because the Bureau acknowledges that a significant number of non-citizens will fail to  
20 complete the Census specifically because of the Citizenship question, and a high portion  
21 of BAJI’s membership is made of up non-citizens, a significant portion of BAJI’s  
22 membership will not complete the Census because of the addition of the citizenship  
23 question, subjecting them to a fine. (UF 37)
- 24 28. The prospect of this fine provides these BAJI members—who cannot at this point be  
25 individually identified—with an injury-in-fact. *Thomas More*, 651 F.3d at 537.
- 26 29. Because this fine provides members with an injury-in-fact, and the interests that BAJI  
27 seeks to protect by bringing this suit are germane to BAJI’s purpose, and BAJI members’  
28 individual participation is not required, BAJI may bring suit on behalf of its members so

1 long as the injury is fairly traceable to the addition of the citizenship question and would  
2 be redressed by its removal. *Hunt*, 432 U.S. at 343.

3 30. The burden of filling out the question on the form itself is sufficient to establish an injury-  
4 in-fact on behalf of BAJI's members, and through them, BAJI itself. *Van Patten v.*  
5 *Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (receipt of two unwanted  
6 text messages qualifies as an injury-in-fact).

7 b. BAJI Has Been Injured By Spending Its Resources

8 31. Because, as detailed above in the discussion of San Jose's standing, there is a substantial  
9 risk of, if not outright certainty, of immigrants not responding to the Census because of  
10 the citizenship question, and BAJI has therefore diverted resources to encourage its  
11 constituents to participate in the census and to counteract the chilling effects of the  
12 citizenship question, it has suffered an injury-in-fact and has standing to sue on its own  
13 behalf. An injury-in-fact is established where a nonprofit organization shows "a drain on  
14 its resources from both a diversion of its resources and frustration of its mission." *Fair*  
15 *Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002); *Havens Realty Corp. v.*  
16 *Coleman*, 455 U.S. 363, 378 (1982).

17 c. BAJI Members Legitimately Fear That The Question Infringes On  
18 Their Privacy.

19 32. Harm caused by infringement on "noneconomic values," such as a loss of privacy, also  
20 provides standing through its members. *Ass'n of Data Processing Serv. Orgs., Inc. v.*  
21 *Camp*, 397 U.S. 150, 154 (1970).

22 33. The fears that BAJI members have that their private responses to the citizenship question  
23 will not remain confidential are reasonable in light of the public anti-immigrant rhetoric  
24 that was cited in the Meyers Report (PTX-326) and the climate of anti-immigrant  
25 sentiment fostered by the Trump Administration. (FOF ¶¶ 274-278, 250-252).

26 34. These facts provide BAJI standing to sue on behalf of its members. *Robins v. Spokeo, Inc.*,  
27 867 F.3d 1108, 1114 (9th Cir. 2017), cert. denied, 138 S. Ct. 931 (2018) (holding a  
28



1 plaintiff suffers injury-in-fact based on a loss of “reputational and privacy interests that  
2 have long been protected in the law.”).

3 35. While the evidence shows that there is a substantial risk of these harms, BAJI has suffered  
4 an injury-in-fact even if the court concludes that they are merely “reasonably probable”  
5 because BAJI is suing to protect its members’ procedural rights under the APA to be  
6 counted properly. *Azar*, 911 F.3d. at 570.

7 **C. Plaintiffs’ Injuries Are Fairly Traceable To Secretary Ross’s Decision**

8 36. The “fairly traceable” standard is less demanding than a proximate cause standard.  
9 *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 (U.S. 2014)  
10 (“Proximate causation is not a requirement of Article III standing, which requires only  
11 that the plaintiff’s injury be fairly traceable to the defendant’s conduct.”).

12 37. While an injury is not fairly traceable if it is “‘th[e] result [of] the *independent* action of  
13 some third party not before the court,’ . . . that does not exclude injury produced by  
14 determinative or coercive effect upon the action of someone else.” *Bennett v. Spear*, 520  
15 U.S. 154, 169 (U.S. 1997) *quoting Lujan*, 504 U.S. at 560 (emphasis in original).

16 38. When harm is caused by multiple actions, for the purposes of traceability “what matters is  
17 not the length of the chain of causation, but rather the plausibility of the links that  
18 comprise the chain.” *Mendina*, 768 F.3d at 1012–13 (quotation and citation omitted);  
19 *Presidio Golf Club v. Nat’l Park Serv.*, 155 F.3d 1153, 1160 (9th Cir. 1998) (finding that  
20 harm to a golf club, in the form of losing membership, is “fairly traceable” to agency  
21 building a rival clubhouse that lured members away).

22 39. A defendant cannot defeat evidence that its conduct is “fairly traceable” to the harm  
23 caused merely if it “promises that it will ensure that the harm is avoided, yet offers no  
24 specific or concrete plan of action for doing so.” *Central Delta Water Agency v. U.S.*, 306  
25 F.3d 938, 950 (9th Cir. 2002).

26 40. Even when some links in the chain of causation are illegal acts by third parties, the injury  
27 is still “fairly traceable” to the original challenged action. *See Attias v. Carefirst, Inc.*, 865  
28

- 1 F.3d 620, 629 (D.C. Cir. 2017) (harm caused by a data breach is “fairly traceable” to  
2 company’s inadequate security standards even though data was stolen by third party  
3 hackers).
- 4 41. When considering the relationship between census counts and funding for the purposes of  
5 traceability, “[i]t is undisputed, however, that many federal programs do disburse funds  
6 based upon population figures as reported in the decennial census,” and therefore “[a]s a  
7 matter of law, allegations of decreased federal and state funding is fairly traceable to  
8 population counts reported in the decennial census.” *Glavin v. Clinton*, 19 F. Supp. 2d  
9 543, 550 (E.D.Va. 1998) *aff’d*, *Dep’t of Commerce v. U.S. House of Representatives*, 525  
10 U.S. 316 (2002).
- 11 42. Because there is, at least, a substantial risk that adding the citizenship question will lead to  
12 the drop in self-response rates, which in turn will lead to a net undercount and a  
13 differential undercount of San Jose and of non-citizens, adding the question is fairly  
14 traceable to San Jose’s and BAJI’s additional spending to mitigate that risk. *See Mendina*,  
15 768 F.3d at 1012–13.
- 16 43. Because adding the question will directly lead to a drop in data quality, as the Bureau  
17 concedes, adding the question is fairly traceable to the harm to San Jose’s Public Library,  
18 Housing Department, Office of Emergency Management, and work2future program that  
19 the decrease in data quality will produce. *See Mendina*, 768 F.3d at 1012–13.
- 20 44. Because adding the question will produce the drop in self-response rate, which in turn  
21 makes it overwhelmingly likely that there will be a differential undercount of non-citizens  
22 and San Jose, San Jose’s ultimate funding injury is fairly traceable to the addition of the  
23 citizenship question. *See Mendina*, 768 F.3d at 1012–13.
- 24 45. Because BAJI members’ reasonable privacy fears are directly related to the addition of the  
25 citizenship question, adding the question is fairly traceable to those concerns. *See*  
26 *Mendina*, 768 F.3d at 1012–13.
- 27 46. Because there is a substantial risk that NRFU will not be successful in remediating the  
28 undercount caused by self-response (FOF ¶¶ 105–127), and because the Census Bureau

1 has not yet even determined the method it will use for imputation in the 2020 Census  
2 (FOF ¶ 39), it has offered no “concrete plan” for mitigating the harm the addition of the  
3 citizenship question will cause. *Central Delta*, 306 F.3d at 950.

4 **D. Plaintiffs’ Injuries Will Be Redressed By A Favorable Decision.**

- 5 47. “[T]o have standing, a federal plaintiff must show only that a favorable decision is likely  
6 to redress his injury, not that a favorable decision will inevitably redress his injury.” *Beno*  
7 *v. Shalala*, 30 F.3d 1057, 1065 (9th Cir. 1994).
- 8 48. A plaintiff need show only that “an injury” be redressed by a favorable decision. *Larson v.*  
9 *Valente*, 456 U.S. 228, 243 n.5 (U.S. 1982) (emphasis in original). A plaintiff “need not  
10 show that a favorable decision will relieve his *every* injury.” *Id.* (emphasis in original).
- 11 49. Because removal of the citizenship question will allow San Jose and BAJI to use funds for  
12 other purposes than responding to the concerns created by the citizenship question, BAJI  
13 and San Jose’s harm regarding spending on outreach is redressable by a favorable  
14 decision. *See Beno*, 30 F.3d at 1065.
- 15 50. Because removal of the citizenship question will prevent the drop in data quality  
16 associated with the addition of the question, San Jose’s data quality concerns are  
17 redressable by a favorable decision. *See Beno*, 30 F.3d at 1065.
- 18 51. Because removal of the citizenship question will mitigate the eventual net undercount of  
19 non-citizens and San Jose residents, and thereby prevent it from losing funding, San Jose’s  
20 ultimate undercount injury is redressable by a favorable decision. *See Beno*, 30 F.3d at  
21 1065.
- 22 52. Because removal of the citizenship question will eliminate the choice BAJI’s members  
23 must make between answering the question and being subject to a fine, BAJI’s injuries  
24 will be redressed by a favorable decision. *See Beno*, 30 F.3d at 1065.
- 25 53. Because removal of the citizenship question will diminish the fears of and burdens on  
26 BAJI’s members, BAJI’s injuries are redressable by a favorable decision. *See Beno*, 30  
27 F.3d at 1065.
- 28

1 **II. ADDING THE CITIZENSHIP QUESTION VIOLATED THE ENUMERATION**  
2 **CLAUSE**

3 54. This Court has held that a “decision to alter the census in a way that affirmatively  
4 interferes with the actual enumeration, and does not fulfill any other reasonable  
5 governmental purpose, is subject to a challenge under the Enumeration Clause.” (Order  
6 Denying Summary Judgment, Doc. No. 119 at 8, *quoting* Order Denying Motion to  
7 Dismiss, Doc. No. 86, at 29).

8 55. The U.S. Constitution provides for an “actual Enumeration” of the population once every  
9 decade to count “the whole number of persons” in each state. U.S. Const. Art. I § 2, cl. 3,  
10 and Amen. XIV § 2.

11 56. A proposal to conduct the census in a manner that does not comply with the Constitution  
12 may set aside by a court prior to the start of the census because “Congress finds that . . .  
13 the decennial enumeration of the population is a complex and vast undertaking, and if  
14 such enumeration is conducted in a manner that does not comply with the requirements of  
15 the Constitution or laws of the United States, it would be impracticable for the States to  
16 obtain, and the courts of the United States to provide, meaningful relief after such  
17 enumeration has been conducted.” Pub. L. No. 105-119, § 209(a)(8), 111 Stat. at 2481.

18 57. Although Congress has delegated to the Secretary of Commerce its constitutional duty to  
19 conduct the census, the Secretary does not have unfettered discretion in carrying out those  
20 duties. *Wisconsin v. City of New York*, 517 U.S. 1 (1996). *See also* 13 U.S.C. § 141,  
21 declaring it “essential” to obtain a population count that is “as accurate as possible,  
22 consistent with the Constitution and laws of the United States.”

23 58. Courts have routinely held that the Enumeration Clause does not textually commit  
24 exclusive, non-reviewable control over the census to Congress. *See Young v. Klutznick*,  
25 497 F. Supp. 1318, 1326 (E.D. Mich. 1980), *rev’d other grounds*, 652 F.2d 617 (6th Cir.  
26 1981) (finding the Enumeration Clause “does not say that Congress and Congress alone  
27 has the responsibility to decide the meaning of, and implement, Article I, Section 2,  
28 Clause 3.”); *State of Texas v. Mosbacher*, 783 F. Supp. 308, 312 (S.D. Tex. 1992) (finding

1 Congress’s exclusive power to determine the manner of the census did not preclude  
2 judicial review of its actions); *City of Willacoochee v. Baldridge*, 556 F. Supp. 551, 557  
3 (S.D. Ga. 1983) (“[T]he Court finds no support for the argument that the Framers intended  
4 that all aspects of conducting the census be exclusively within the province of Congress  
5 and exempt from judicial review.”).

6 59. The evidence—much of it from the Bureau itself—demonstrates that in the political  
7 climate fostered by the Trump Administration, adding the citizenship question will  
8 substantially degrade the accuracy of the Census *more than it would in another climate*.  
9 The CMS Memo, the Meyers report, and the various CBAMS reports all confirm that  
10 adding the question in this climate “affirmatively interferes with the actual enumeration.”  
11 (Doc. No. 119 at 8).

12 60. Further evidence, including trial testimony of Dr. O’Muircheartaigh, confirms that the  
13 citizenship question has not been tested in on the decennial census, and the “framing” of  
14 the questionnaire can create an impact on self-response even greater than the one the  
15 Bureau calculated. (FOF ¶¶ 80-81, 108).

16 61. The affirmation of Dr. Anderson confirms that the citizenship question has never been  
17 tested in the context of a decennial census and has never been included on a decennial  
18 census that was conducted by mail-in response, and that adding the citizenship question to  
19 the Census would break with historical practice. (FOF ¶¶ 67-68, 85-86).

20 62. In response to Dr. O’Muircheartaigh and Dr. Anderson’s findings, Defendants have  
21 presented no evidence that adding the citizenship question to the 2020 Census bears a  
22 “reasonable relationship to the accomplishment of an actual enumeration of the  
23 population.” *Wisconsin*, 517 U.S. at 19–20.

24 63. Defendants have produced no evidence that adding the citizenship question will “fulfill  
25 any other reasonable governmental purpose” so as to overcome the fact that adding it will  
26 damage the enumeration. (Order Denying Summary Judgment, Doc. No. 119 at 8,  
27 *quoting* Order Denying Motion to Dismiss, Doc. No. 86, at 29).

28

- 1 64. The DOJ Request contains no evidence that adding the citizenship question will “fulfill  
2 any other reasonable governmental purpose.” (Order Denying Summary Judgment, Doc.  
3 No. 119 at 8, *quoting* Order Denying Motion to Dismiss, Doc. No. 86, at 29). In fact, as  
4 set forth below in Paragraph 95, the cases cited by the DOJ Request do not support the  
5 proposition that the DOJ needs block-level CVAP data to enforce the Voting Rights Act.
- 6 65. The Decisional Memo contains no evidence that adding the question will fulfill a  
7 reasonable governmental purpose and in fact is pretextual, in failing to disclose the true  
8 reasons for Ross’s decision, and, contains numerous statements that are contradicted  
9 elsewhere in the record. (FOF ¶¶ 385–407).
- 10 66. The failure of the Decisional Memo to set forth any evidence that adding the question will  
11 create any attendant benefit, and the unsupported statements in the Decisional Memo  
12 (FOF ¶¶ 385–423), together demonstrate that adding the question does not bear “a  
13 reasonable relationship to the accomplishment of an actual enumeration of the population,  
14 keeping in mind the constitutional purpose of the census,” which is “to determine the  
15 apportionment of the Representatives among the states.” *Wisconsin*, 517 U.S. at 19–20.<sup>4</sup>

16 **III. THIS COURT MUST SET THE DECISION ASIDE BECAUSE IT WAS MADE IN**  
17 **VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT**

18 **A. The Stated Reason For Adding The Citizenship Question Was Pretextual And**  
19 **Subject To Improper Influence**

- 20 67. When “an agency justifies its actions by reference only to information in the public file  
21 while failing to disclose the substance of other relevant information that has been  
22 presented to it, a reviewing court cannot presume that the agency has acted properly . . .  
23 but must treat the agency’s justification as a fictional account of the actual decisionmaking  
24 process and must perforce find its actions arbitrary.” *Home Box Office, Inc. v. F.C.C.*, 567  
25 F.2d 9, 54–55 (C.A.D.C. 1977).

27 <sup>4</sup> As this Court has noted, Plaintiffs’ Apportionment Clause claim and Enumeration Clause claim  
28 “rise and fall together.” (Order Denying Motion to Dismiss, Doc. 86 at 2-3 n.2).

- 1 68. To comply with the APA, an agency must “disclose the basis of its” decision. *Burlington*  
2 *Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–68 (1962).
- 3 69. The Administrative Record demonstrates that Ross made a decision months before May  
4 2017 to add a citizenship question to the 2020 Census; on that date he wrote that he was  
5 “mystified that nothing has been done in response to my month[s]’ old request that we  
6 include the citizenship question.” (AR0003710).
- 7 70. There is nothing in the Administrative Record to suggest that Ross wanted a citizenship  
8 question to improve enforcement of the Voting Rights Act. Nothing in the record prior to  
9 the DOJ Request references the Voting Rights Act at all, yet numerous documents show  
10 Ross was focused on adding the question within weeks of being sworn in.
- 11 71. The Administrative Record shows that the reasons given by Ross in his Decisional Memo  
12 and in his June 21, 2018 supplement to the Administrative Record were not the true  
13 reasons behind his decision, and were certainly not all of the material reasons behind his  
14 decision. (FOF ¶¶ 385-397, 424-429, 439-446).
- 15 72. Ross and Comstock’s efforts to conceal their actions suggest that the factfinder “can  
16 reasonably infer from the falsity of the explanation that [Defendants are] dissembling to  
17 cover up” an ulterior purpose. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S.  
18 133, 147 (2000)
- 19 73. The scheme in which Ross and Comstock engaged—including searching for an agency to  
20 make a request that Ross had already decided to accept—shows that the request from DOJ  
21 was made to “provide a pretext for the ulterior motive” of the decision-maker, and the  
22 decision is therefore not in accordance with the APA. *Woods Petroleum Corp. v. U.S.*  
23 *Dep’t of Interior*, 18 F.3d 854, 859 (10th Cir. 1994).
- 24 74. Because the administrative record shows that Ross had some other reason for pursuing the  
25 citizenship question than the one set forth in the Decisional Memo, the Decisional Memo  
26 is a “fictional account of the actual decisionmaking process” and this Court therefore  
27 “must perforce find its actions arbitrary.” *Home Box Office*, 567 F.2d at 54–55.
- 28

1 75. The absence of any explanation for Ross’s months-long campaign to add the citizenship  
2 question suggests “that there is here one administrative record for the public and this court  
3 and another for the Commission and those ‘in the know’” rendering the decision arbitrary  
4 and capricious. *Id.* at 54.

5 76. Even if Ross considered some relevant factors after receiving the DOJ Request, that does  
6 not “immunize” the decision; it would still “be invalid if based in whole or in part on the  
7 pressures emanating from [political actors].” *Tummino v. Torti*, 603 F. Supp. 2d 519, 544  
8 (E.D.N.Y. 2009).

9 77. Because the decision to add the citizenship question originated from Ross’s consultations  
10 with high-ranking political officials, including the White House Chief Strategist, it should  
11 be set aside for being guided by improper political influence. *Sokaogon Chippewa Cmty.*  
12 *(Mole Lake Band of Lake Superior Chippewa) v. Babbitt*, 961 F. Supp. 1276, 1286 (W.D.  
13 Wis. 1997) (explaining that an agency decisions may be set aside for improper political  
14 influence when “the pressure was intended to and did cause the [Agency’s] actions to be  
15 influenced by factors not relevant under the controlling statutes.”).

16 78. In determining whether an agency acted with improper political motivation, a court may  
17 rely on “inferences” based on the record before it. *Tummino*, 603 F. Supp. 2d at 546  
18 (inferring political motivations based on the timing of agency action).

19 79. Here, the record provides evidence that Ross both received communications from “senior  
20 Administration officials” and requested that the Attorney General direct his underlings to  
21 ask the question, from which it may be inferred that the decision was based “in part on the  
22 pressures emanating from [political actors].” *Tummino*, 603 F. Supp. 2d at 544. *See also*  
23 *D.C. Fed’n of Civic Ass’ns v. Volpe*, 459 F.2d 1231, 1237 (D.C. Cir. 1971) (“Even if the  
24 Secretary had taken every formal step required by every applicable statutory provision,  
25 reversal would be required . . . [if] extraneous pressure intruded into the calculus of  
26 considerations on which the Secretary’s decision was based.”).

27 80. The scheme in which Ross and Comstock engaged, and which Defendants attempted to  
28 conceal even after this litigation was filed, constitutes “administrative misconduct not



1 covered by the other more specific paragraphs” that renders a decision arbitrary and  
 2 capricious. *Ass’n. of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed.*  
 3 *Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984) (Scalia, J.).

4 81. Whatever Ross’s motivation, the failure to include his motivating rationale in the  
 5 Administrative Record itself renders the decision arbitrary and capricious and supports  
 6 setting it aside. 5 U.S.C. § 706(2)(A).

7 **B. The Decision To Add A Citizenship Question Must Be Struck Down As**  
 8 **Arbitrary And Capricious Because It Runs Contrary To The Evidence, Fails**  
 9 **To Consider Important Aspects Of The Problem, And Is Implausible**

10 82. The standard for evaluating whether an agency’s decision was arbitrary and capricious is  
 11 whether the decision “was the product of reasoned decisionmaking.” *Motor Vehicle Mfrs.*  
 12 *Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* (“*State Farm*”), 463 U.S. 29, 52  
 13 (1983).

14 83. Agency action is arbitrary and capricious when any of the following factors are met: “the  
 15 agency has relied on factors which Congress has not intended it to consider, entirely failed  
 16 to consider an important aspect of the problem, offered an explanation for its decision that  
 17 runs counter to the evidence before the agency, or is so implausible that it could not be  
 18 ascribed to a difference in view or the product of agency expertise.” *State Farm*, 463 U.S.  
 19 at 43. Courts evaluate whether a decision complied with the APA based on the record  
 20 before the decisionmaker and “*post hoc* rationalizations for agency action” carry no  
 21 weight. *Id.* at 50.

22 84. It is arbitrary and capricious for an agency “to rely on portions of studies in the record that  
 23 support its position, while ignoring . . . those studies that do not.” *Genuine Parts*  
 24 *Company v. Environmental Protection Agency*, 890 F.3d 304, 313 (C.A.D.C. 2018).

25 85. An agency acted arbitrarily and capriciously when it “ignore[d] critical context” and  
 26 “cherry-pick[ed] evidence.” *Water Quality Ins. Syndicate v. United States*, 225 F. Supp.  
 27 3d 41, 69 (D.D.C. 2016).  
 28



1 Administrative law does not permit such a dodge.” *Delaware Dep’t of Nat. Res. & Env’tl.*  
2 *Control v. EPA*, 785 F.3d 1, 16 (D.C. Cir. 2015).

3 92. When an agency receives an intra-agency request, it is “not required ‘to undertake an  
4 independent analysis’ of another agency’s conclusions,” but “it may not ‘blindly adopt  
5 [those] conclusions.’” *Ergon-W. Virginia, Inc. v. United States Env’tl. Prot. Agency*, 896  
6 F.3d 600, 610 (4th Cir. 2018) quoting *City of Tacoma, Washington v. F.E.R.C.*, 460 F.3d  
7 53, 76 (D.C. Cir. 2006). Here, Ross blindly adopted the conclusions of the DOJ Request,  
8 even while all the scientific evidence before him suggested they should be rejected.

9 93. The DOJ Request asks for a specific method—putting the citizenship question on the  
10 Census—for obtaining the data but “provides no analysis or factual data to support this  
11 concern” over other means of doing so. *State v. Bureau of Land Mgmt.*, 286 F. Supp. 3d  
12 1054, 1065 (N.D. Cal. 2018). Additionally, Defendants have conceded that DOJ did not  
13 tell Ross that it was “necessary” to add the citizenship question in order to get the data it  
14 said it needed.

15 94. Agency action that appears “perfectly reasonable and appropriate in the face of a given  
16 problem may be highly capricious if that problem does not exist.” *City of Chicago, Ill. v.*  
17 *Federal Power Commission*, 458 F.2d 731, 742 (C.A.D.C. 1972).

18 95. None of the cases cited in the DOJ Request actually support the DOJ’s request for such  
19 data to enforce the VRA. See *Reyes v. City of Farmers Branch*, 586 F.3d 1019, 1023–24  
20 (5th Cir. 2009) (while CVAP data is appropriate evidence to prove minority-majority  
21 district, no mention of need for block-level CVAP data and Plaintiffs did not rely on ACS  
22 citizenship data); *Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998) (affirms  
23 use of CVAP data for determining proportional equality of voting power, but rejects use  
24 of decennial census to obtain such data: “To verify the age and citizenship of the  
25 population would enormously complicate the decennial census and open the census-taker  
26 to charges of manipulation.”); *Negron v. City of Miami Beach*, 113 F.3d 1563, 15 67–69  
27 (11th Cir. 1997) (plaintiffs relied unsuccessfully on voting-age population to draw  
28 illustrative districts and never attempted to proffer districts based on CVAP data); *Romero*

1           *v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989), *overruled in part on other*  
2           *grounds by Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1141 (9th Cir. 1990)  
3           (affirms that “eligible minority voter population, rather than total minority population, is  
4           the appropriate measure of geographical compactness”); *LULAC v. Perry*, 548 U.S. 399,  
5           423-442 (2006) (no discussion of block-level CVAP data).

6   96.    Because no evidence in the Administrative Record—including the DOJ Request—  
7           suggests that the DOJ Civil Rights Division has been unable to enforce the Voting Rights  
8           Act based on a lack of block-level citizenship data for the 53 years since its adoption,  
9           Ross’s decision to add the question addresses a problem that “does not exist” and is  
10          therefore capricious. *Chicago*, 458 F.2d at 742.

11   97.    Even had the DOJ Request provided substantial evidence to support adding the question,  
12          “evidence that is substantial viewed in isolation may become insubstantial when  
13          contradictory evidence is taken into account,” so in light of the overwhelming evidence  
14          that adding the citizenship question will harm census quality, and that adding the  
15          citizenship question will result in poorer quality citizenship data, Ross’s treatment of the  
16          DOJ Request as asking for the addition of a citizenship question and addition of the  
17          citizenship question on that basis is rendered insubstantial. *Landry v. F.D.I.C.*, 204 F.3d  
18          1125, 1140 (C.A.D.C. 2000).

19   98.    For all of these reasons, including Ross’s knowledge of and participation in the events  
20          leading up to the DOJ Request, his decision that providing DOJ with citizenship data  
21          through the addition of the citizenship question outweighed “any adverse effect” on the  
22          census was “so implausible that it could not be ascribed to a difference in view or the  
23          product of agency expertise.” *State Farm*, 463 U.S. at 43.

24   99.    A decision is contrary to the evidence before the agency where, as here, that evidence  
25          shows that it will result in “plainly inferior” outcomes and the agency did not provide a  
26          “satisfactory explanation” for rejecting that evidence. *Pub. Citizen, Inc. v. Mineta*, 340  
27          F.3d 39, 56 (2d Cir. 2003).

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1 100. The decision to add the citizenship question was therefore arbitrary and capricious and  
2 should be set aside under 5 U.S.C. § 706(2)(A).

3 2. *The Decision To Add the Citizenship Question Failed To Consider*  
4 *Important Aspects Of The Problem*

5 101. Although Ross wrote in the Decisional Memo that the question had been “well-tested,” he  
6 “entirely failed to consider” the Bureau’s long-standing policy on testing and the  
7 differences between testing a question for the ACS and testing it for the Decennial  
8 Census. *State Farm*, 463 U.S. at 43.

9 102. “It is well settled that an agency, even one that enjoys broad discretion, must adhere to  
10 voluntarily adopted, binding policies that limit its discretion.” *Padula v. Webster*, 822  
11 F.2d 97, 100 (D.C. Cir. 1987) (citation omitted)).

12 103. Because Ross and Commerce ignored the Bureau’s long-standing process for changing the  
13 content on questionnaires, including the process for testing questions prior to adding them  
14 to a census instrument, the decision failed to comply with agency regulations and policies  
15 and therefore constitutes arbitrary and capricious conduct. *De Loss v. Dep’t of Hous. &*  
16 *Urban Dev.*, 714 F. Supp. 1522, 1534 (S.D. Iowa 1988).

17 104. Because Ross did not consider the prior inadequate testing of the citizenship question, or  
18 the fact that the question had not been subject to field testing in the context of the survey,  
19 the decision was arbitrary and capricious. *See also Organized Vill. of Kake v. U.S. Dep’t*  
20 *of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (“a policy change violates the APA if the  
21 agency ignores or countermands its earlier factual findings without reasoned explanation  
22 for doing so”).

23 105. By stating that prior tests of different questions on a similar topic were sufficient, despite  
24 concerns from those who knew best, Ross “ignore[d] critical context” and “cherry  
25 pick[ed] evidence.” *Water Quality*, 225 F. Supp. 3d at 69.

3. Ross's Overall Conclusion That Providing DOJ With Citizenship Data Outweighs Any Possible Damage To The Census Is Implausible

106. Because there is no basis in the Administrative Record to suggest that Ross was motivated by concerns of enforcing the Voting Rights Act, and because the DOJ Request does not require addition of the citizenship question to enforce the Voting Rights Act, the stated motivation for adding the question in the Decisional Memo is “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *State Farm*, 463 U.S. at 43.

107. Because all of the information that was before Ross when he issued the Decisional Memo showed that adding the question would decrease accuracy—including the accuracy of citizenship data—it is implausible that he made the decision to add the question because it would provide more accurate and complete data. *See Organized Village of Kake v. U.S. Dept. of Agriculture*, 795 F.3d 956, 969 (9th Cir. 2015) (holding that the explanation that decision was based on comments to a proposed rule was “implausible” given the fact that the comments in question raised “no new issues regarding alternatives already fully explored” by the agency).

**C. The Decision To Add The Citizenship Question Violated The Census Act**

108. Courts must set aside agency actions that are made “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C).

109. When “a statute’s language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant those commands with others it may prefer.” *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018).

110. The Census Act requires that the Secretary of Commerce submit to Congress a final list of subjects to be covered in the census questionnaire at least three years before the census date, and must submit a final list of specific questions two years before the census date. 13 U.S.C. §§ 141(f)(1)-(2).

- 1 111. Once these reports are submitted, the Secretary of Commerce has limited discretion to  
2 alter their content and may do so only if “*new circumstances exist which necessitate that*  
3 *the subjects, types of information, or questions contained in report so submitted be*  
4 *modified.*” 13 U.S.C. § 141(f)(3) (emphasis added).
- 5 112. The proper framework for analyzing whether a federal agency has complied with a  
6 congressional reporting statute is set forth in *Chevron U.S.A. v. Natural Resources*  
7 *Defense Council, Inc.*, 467 U.S. 837 (1984). See *Allied Local and Regional Mfrs. Caucus*  
8 *v. U.S. E.P.A.*, 215 F.3d 61, 66–67 (C.A.D.C., 2000) (applying the *Chevron* framework to  
9 a challenge to an EPA report submitted to Congress under Section 183(e) of the Clean Air  
10 Act, which “further directs that the study be completed, and a report submitted to  
11 Congress, ‘not later than 3 years after November 15, 1990.’”).
- 12 113. If an agency fails to comply with a congressional reporting statute, a court may require the  
13 agency to submit a report that complies with the statute or strike down the underlying  
14 agency action on which the report is based. See *Center for Biological Diversity v.*  
15 *Brennan*, 571 F. Supp. 2d 1105, 1113 (N.D. Cal. 2007); *South Carolina v. United States*,  
16 329 F. Supp. 3d 214, 219 (D.S.C. 2018).
- 17 114. This Court has already noted that “Defendants do not request *Chevron* deference” and that  
18 such deference “is not appropriate here because the canons of construction provide a clear  
19 interpretation of the statute.” (Order Denying Motions for Summary Judgment, Doc. No.  
20 119 at 15).
- 21 115. This Court has already concluded that the “resolution of this claim ultimately turns on  
22 whether [Secretary Wilbur] Ross concluded new circumstances necessitated addition of  
23 the citizenship question.” (Order Denying Motions for Summary Judgment, Doc. No. 119  
24 at 15).
- 25 116. Because it has never been DOJ’s position that CVAP data from the decennial census  
26 (rather than the ACS or another source) is “necessary” to enforce Section 2 of the Voting  
27 Rights Act, and no evidence in the Administrative Record suggests that Ross concluded  
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1 new circumstances necessitated addition of the citizenship question, the decision was  
2 made in violation of 13 U.S.C. § 141(f)(3).

3 117. In addition, 13 U.S.C. § 6(c) requires that “[t]o the maximum extent possible and  
4 consistent with the kind, timeliness, quality and scope of the statistics required, the  
5 Secretary shall acquire and use information” from other federal sources “instead of  
6 conducting direct inquiries.”

7 118. Section 6(c) was “intended to emphasize the Congress’ desire that such authority be used  
8 whenever possible in the dual interests of economizing and reducing respondent burden.”  
9 H.R. Rep. No. 94-1719, at 10 (1976) (Conf. Rep.), *as reprinted in* 1976 U.S.C.C.A.N.  
10 5476, 5477–78.

11 119. Nowhere in the Decisional Memo does Ross mention Section 6(c), which violates the APA  
12 because “an agency implementing a statute may not ignore . . . a standard articulated in  
13 the statute.” *Friends of Richards-Gebaur Airport v. FAA*, 251 F.3d 1178, 1195 (8th Cir.  
14 2001).

15 120. Because it is a “foundational principle of administrative law that a court may uphold  
16 agency action only on the grounds that the agency invoked when it took the action,” and  
17 Ross provided no grounds for ignoring Section 6(c), the decision was arbitrary and  
18 capricious. *Michigan*, 135 S. Ct. at 2710

19 121. Because Ross violated both 13 U.S.C. § 141 and 13 U.S.C. § 6(c), the decision to add the  
20 citizenship question was made “in excess of statutory jurisdiction, authority, or  
21 limitations, or short of statutory right” and must be set aside. 5 U.S.C. § 706(2)(C).

22 **IV. DEFENDANTS SHOULD BE ENJOINED FROM ADDING A CITIZENSHIP**  
23 **QUESTION TO THE CENSUS**

24 122. Because including the citizenship question on the 2020 Census violates Article I, Section  
25 2, Clause 3 of the United States Constitution, Defendants should be enjoined from adding  
26 a citizenship question to the 2020 Census.

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- 1 123. Because the decision to add the question was made in violation of the Administrative  
2 Procedure Act, this Court should “hold unlawful and set aside” the decision. 5 U.S.C. §  
3 706(2).
- 4 124. In addition to setting aside the decision, the Court should issue an injunction to prohibit  
5 “the perpetuation of unlawful agency action,” *League of Women Voters*, 838 F.3d at 12  
6 (preliminary injunction), and to ensure that the agency complies with the law going  
7 forward. *See Central United Life, Inc. v. Burwell*, 128 F. Supp. 3d 321, 330 (D.D.C.  
8 2015), *aff’d*, 827 F.3d 70 (D.C. Cir. 2016) (“Forcing federal agencies to comply with the  
9 law is undoubtedly in the public interest.”).
- 10 125. The Court should vacate the agency’s decision and remand to the agency with instructions  
11 to remove the citizenship question from the 2020 Census, rather than to consider the issue  
12 anew. Such action is appropriate here because “the record here has been fully developed,  
13 and the conclusions that must follow from it are clear.” *Sierra Club v. U.S. E.P.A.*, 346  
14 F.3d 955, 963 (9th Cir. 2003) (remanding a decision to an agency with instructions on  
15 how to rule on the matter). *See also Tummino*, 603 F. Supp. 2d at 550 (remanding to an  
16 agency with instructions).
- 17 126. Should the Court remand and permit further agency consideration, it should recuse Ross  
18 and Commerce from participating in such consideration because the record provides clear  
19 and convincing evidence that Ross and Commerce have an “unalterably closed mind on  
20 matters critical to the disposition of the proceeding.” *Ass’n of Nat’l. Advertisers, Inc. v.*  
21 *F.T.C.*, 627 F.2d 1151, 1170 (D.C. Cir. 1979). *See Nehemiah Corp. of Am. v. Jackson*,  
22 546 F. Supp. 2d 830, 847 (E.D. Cal. 2008) (barring HUD Secretary from participating in  
23 reconsideration based on public statement that “HUD intends to approve the new rule by  
24 the end of the year even if the agency receives critical comments”). Upon remand, any  
25 further consideration of the question should be made solely by Director Dillingham as the  
26 head of the Census Bureau.
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Respectfully submitted,

Dated: February 1, 2019

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**CITY OF SAN JOSE and BLACK ALLIANCE FOR JUST IMMIGRATION**

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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: February 1, 2019

/s/ Ana G. Guardado  
Ana G. Guardado

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 1, 2019, 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  
Ana G. Guardado

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