UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LA UNIÓN DEL PUEBLO ENTERO; *et al.*

Plaintiffs,

v.

WILBUR L. ROSS, sued in his official capacity as U.S. Secretary of Commerce; *et al.*

Defendants.

Civil Action No. 8:18-cv-01570-GJH

PLAINTIFFS' CORRECTED MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION[1]

The documentary and testimonial record in this case bears out the factual allegations the Court has already held sufficient to state Plaintiffs' claims. *La Unión Del Pueblo Entero (LUPE) v. Ross*, No. GJH-18-1570, 2018 WL 5885528, at *1 (D. Md. Nov. 9, 2018). The record leads inexorably to the conclusion that intentional discrimination was a motivating factor in the Trump Administration's decision to add a citizenship question to the 2020 decennial census (2020 Census). Most conspicuous among those facts is that Secretary Wilbur Ross and the Department of Justice (DOJ) engaged in a scheme that they concealed from the public, from Congress, and from the courts, framed up a justification that simply won't wash, and have left the Court with no other explanation for their motives but the original one that emanated from White House officials—to exclude non-citizens from apportionment counts, and to accomplish that goal by adding a citizenship question that will cause a disproportionate census undercount of minorities and immigrants. Even if the decision to add the question was as solitary and innocent as Defendants claim, it cannot be sustained where, as here, Secretary Ross failed to comply with the Administrative Procedure Act (APA).

It is Defendants' burden to show the absence of a genuine issue as to any material fact, and all evidence must be construed in the light most favorable to Plaintiffs. *Adickes v. S.H. Kress & Co.*, 398 U.S.144, 157 (1970). Defendants must point to evidence that forecloses the possibility of the existence of material disputed facts that would entitle Plaintiffs to resolution at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). As such, Defendants' failure to show an absence of disputed material facts is fatal to their motion, regardless of whether the

[1] On November 23, 2018, Plaintiffs filed an unopposed request for leave from the Court to file an oversized brief not to exceed forty-five pages. ECF No. 84. Should the Court deny Plaintiffs' request, Plaintiffs will immediately file a brief that does not to exceed thirty-five pages.

Court considers evidence outside the administrative record; accordingly Plaintiffs respectfully request the Court to deny Defendants' motion for summary judgment as to all counts.

II. PLAINTIFFS HAVE ARTICLE III STANDING

Defendants wrongly assert that in order to establish standing Plaintiffs must show that there *will* be a differential undercount. Defs.' Mem. at 9-10. Instead, Plaintiffs need only show there remains a genuine issue as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-4 (1986). Plaintiffs do so below, and Defendants are therefore not entitled to summary judgment. *See id.* [2]

A. Plaintiffs Are Not Required to Show That a Precisely Quantified and Incontestably Predicted Undercount, Differential or Otherwise, Will Occur In Order to Establish Standing.

Plaintiffs' standing to seek the requested relief rests on abundant evidence demonstrating that they are *likely* to suffer harm. The Supreme Court has held that "it is certainly not necessary . . . to wait until the census has been conducted to consider the issues presented here, because such a pause would result in extreme—possibly irremediable—hardship." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 332 (1999); *see also Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) ("An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk that the harm will occur.'") (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n. 5); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 152-53 (2010) (holding that a plaintiff has standing to seek an injunction when it is "likely to suffer a constitutionally cognizable injury"). Here, there is a substantial risk that Plaintiffs will suffer a decrease in political representation and census-based

[2] Defendants do not appear to argue that Plaintiffs' harms are not redressable, the third prong in establishing standing. Instead, Defendants argue that a favorable decision would not redress harms caused by the current political climate and the Executive Branch's anti-immigrant policies. For reasons articulated in Section II (B)(2), this argument misstates Plaintiffs' claims.

federal funding as a result of Defendants' unlawful actions. Similarly, Organizational Plaintiffs[3] already have or will imminently divert resources to mitigate the risk of an undercount.

Defendants incorrectly argue that Plaintiffs must "prove that there will be an increase in the differential net undercount specifically attributable to the citizenship question." Defs.' Mot. at 9. Unlike the facts in *Clapper*, where the Supreme Court found that the plaintiffs lacked standing because the harm alleged was "highly speculative," and detailed a series of events for which there was insufficient evidence to establish that plaintiffs' communications would be intercepted under the challenged legislation, 568 U.S. at 410-128, here, Defendants have already added the citizenship question to the 2020 Census, and it is from that action that Plaintiffs have already suffered, and will continue to suffer, harm, including current expenditures of funds to reduce the probability of a differential count. *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) ("One does not have to await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending that is enough.").

Defendants' primary support for their "speculative" injury argument is a statement by Dr. John Abowd, Chief Scientist for the Census Bureau, that "there is no credible quantitative evidence that the addition of the citizenship question would affect the accuracy of the count." ECF No. 82-2, Declaration of John M. Abowd, Ph.D. (Abowd Decl.) ¶ 13. Dr. Abowd, however, testified that this evidence does not exist in part because, notwithstanding his initial proposal, Defendants declined to devote resources to answer that question. Declaration of Andrea Senteno (Senteno Decl.), Ex. A, Oct. 12, 2018 Deposition of John Abowd, Ph.D. (Abowd Oct. 12 Dep.)

[3] *See LUPE*, 2018 WL 5885528, at *1 n. 1, *3 n. 4 (listing Organizational Plaintiffs, including Plaintiffs that assert representational organizational standing).

at 288:10-290:14. He further admitted that it is possible that the citizenship question "could drive the net undercounts way up or they could drive them way down." *Id*. at 290:8-11. By Defendants' own admission, therefore, there is a substantial risk of an undercount.

B. Plaintiffs' Harm is Fairly Traceable to Defendants' Actions and Would be Redressed by a Favorable Decision.

To establish standing, Plaintiffs' harms must be fairly traceable to Defendants' actions. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Defendants argue that Plaintiffs' injuries are not traceable to the addition of the citizenship question because: (1) there will be an undercount only if individuals violate federal law, and (2) confidentiality concerns as a result of the political climate cannot be attributed to Secretary Ross. Defs.' Mem. at 16-17. The Court, however, has already rejected Defendants' third-party traceability argument, finding that "when the Census yields inaccurate results, there is a substantial risk that the very injuries complained of by Plaintiffs will occur." *LUPE*, 2018 WL 5885528, at *7; *see also Kravitz v. United States Dep't of Commerce,* No. GJH-18-1041, 2018 WL 4005229, at *8-9 (D. Md. Aug. 22, 2018). Moreover, the Census Bureau admits that collecting "accurate" data is dependent on "the ability to obtain information from the public, which is influenced partly by the public's perception of how well their privacy and confidentiality concerns are being addressed." Declaration of Denise Hulett (Hulett Decl.), Ex. 1, Expert Report of Nancy Mathiowetz (Mathiowetz Report) at 6.[4] Public concerns over privacy and fear of repercussion are shown to relate to a lower likelihood of response to the 2020 Census. *Id*. at 6 (citing to 2020 Census: Census Barrier Attitudes Motivators Survey (CBAMS) High Level Findings, August 29, 2018). Regardless of Defendants'

[4] Furthermore, the Census Bureau has predicted that the addition of the citizenship question will decrease self-response rates among non-citizen household by at least 5.8 percentage points. As discussed *infra* Section II.C.1., there are material facts in dispute that NRFU and imputation will mitigate a differential undercount. Therefore, the injury is fairly traceable to Defendants' addition of the citizenship question. Senteno Decl., Ex. O, COM_DIS00009833 at 9874.

level of responsibility for the Administration's immigration policy or the broader political climate, those factors—and the pervasive fear of government they create in immigrant communities—set the stage for their actions. *See Landsdowne on the Potomas Homeowners Assn'n, Inc. v. OpenBand at Lansdowne,* LLC, 713 F.3d 187, 197 (4th Cir. 2013) (finding that "the causation element of standing is satisfied . . . where the plaintiff suffers an injury that is 'produced by [the] determinative or coercive effect' of the defendants' conduct 'upon the action of someone else.'").[5]

C. Plaintiffs Face a Substantial Risk of Injury Because the Addition of the Citizenship Question Will Lower Self-Response Rates.

Evidence in this case shows that the citizenship question will result in a decline in self-response rates. Internal Census Bureau analysis conservatively estimated, initially, that the citizenship question will cause response rates to the 2020 Census to decline among households with a noncitizen by 5.1 percentage points, relative to households that consist only of U.S. citizens. AR 1277 at 1282.[6] That estimate has now increased to a "conservative" 5.8 percentage points. COM_DIS00009833 at 9874.

Past censuses and American Community Surveys (ACS) portend that the inclusion of a citizenship question to the census form will depress self-response among non-U.S. citizen households as compared to U.S. citizens households, resulting in a differential non-response rate.

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[5] And it is apparent, and undisputed, that Defendants were aware of this climate well in advance of their final decision to add the citizenship question. *See* Plaintiffs' First Amended Complaint, ECF No. 42 (FAC) at ¶¶ 196-200.

[6] All references to the Administrative Record are attached to the Declaration of Andrea Senteno as Exhibit Q. The documents are organized in bates stamp order.

It is Plaintiffs' understanding that the Administrative Record contains all documents produced by Defendants bearing Bates 000001 through 0013024, as well as additional documents as stipulated by the parties in *State of New York v. U.S. Dep't of Commerce*, 18-cv-02921-JMF, ECF No. 523 Joint Stipulation Regarding Administrative Record (Nov. 13, 2018) and ECF No. 524 Second Joint Stipulation Regarding Administrative Record (Nov. 13, 2018).

Mathiowetz Report at 9-10. This trend is also consistent for Hispanic respondents. In 2000 the difference in the return rate between the short-form (where no citizenship question was asked) and the long-form (which contained a citizenship question) was 14.4 % for Hispanics, compared to a 9.3% difference in the return rate for non-Hispanics. *Id.* at 11. Regardless of the expected decline in self-response rates, Defendants maintain that there will not be a differential undercount—a key fact in dispute here.

1. There Are Genuine Issues of Material Fact as to Defendants' Ability to Remedy the Differential Undercount Attributable to the Citizenship Question.

The Census Bureau says it plans to increase its Non-Response Follow Up (NRFU) efforts to rectify any decline in self-response rates as a result of the citizenship question. At the same time, it admits that "[t]hose refusing to self-respond due to the citizenship question are particularly likely to refuse to respond in NRFU as well, resulting in a proxy response." AR 1308 at 1311. The likelihood of success of those NRFU efforts presents a genuine material issue of fact. *See infra* Section V.A.1.

2. NRFU Will Not Mitigate the Impact of Rostering Errors on the Enumeration.

One Census form is completed for each household. The person filling out the form lists each person in the household on the form. If a respondent fails to include someone in the household (because that person is not a citizen or for some other reason), it is known as a "rostering" error. The Census Bureau's hopeful forecast that NRFU will completely remedy the impact of the citizenship question ignores the likelihood of rostering errors due to the presence of the citizenship question. Hulett Decl., Ex. 3, Declaration of William O'Hare (O'Hare Decl.), Ex. 2, Expert Witness Report of William P. O'Hare at 38. NRFU will not remedy those errors because the Census Bureau will not know about the missing people until post-census surveys detect them, and therefore will not be able to include them in the count.

Dr. Abowd confirmed that the Census Bureau will not employ NRFU if a household omits a member in its response to the census form. Senteno Decl., Ex. B, Oct. 5, 2018 Deposition of John Abowd, Ph.D (Abowd Oct. 5 Dep.) at 396:2-399:2. Plaintiffs' expert Dr. Nancy Mathiowetz explains that "it is likely that the citizenship question will not only cause some households not to respond to the Census questionnaire, it will also cause some households not to list the noncitizens living in the household." Mathiowetz Report at 27. There are approximately 19.6 million multi-person households in which one or more non-U.S. citizens live with at least one adult U.S. citizen. *Id.* at 30. As a conservative estimate, "[i]f one in twenty (5%) of these households decides not to enumerate one non-citizen because of the presence of the citizenship question, in excess of a half million non-citizens (.05 times 10.7 million) would be missed." *Id.* at 31. The Census Bureau's assumption that the respondent will include everyone in the household is inconsistent with evidence from the 2010 decennial census, where the overwhelming majority of young children missed in the census lived in households that were included in the census. O'Hare Decl., Ex. 2 at 38-39.

a. Defendants' Speculation as to the Success of NRFU in Remedying Non-Responses Caused by the Citizenship Question is a Genuine Issue of Disputed Fact.

Defendants' assertion that there will be no undercount as a result of the citizenship question is pure speculation. The census's history of differential undercounts of minority populations, at a minimum, creates a dispute of fact on this issue.

Defendants argue that "the estimated decrease in self-response rates does not translate into an increase in net undercount, and the use of estimates as if they did is wholly inappropriate." Abowd Decl. ¶ 20. However, Plaintiffs' expert, Dr. William O'Hare—with his 40 plus years of experience analyzing and using Census data and previous service on the Census Bureau Advisory Committee—found a persistent, reliable close connection between lower self-

response rates and higher net undercount rates. Looking at the 1990, 2000, and 2010 censuses, Dr. O'Hare concluded that the Census Bureau's expected decrease of at least 5.1 percentage points for households with at least one non-U.S. citizen will increase the net undercount and omission rates for people living in those households which are over-represented by Latinos and Asians. O'Hare Decl., Ex. 2 at 1-31; *see also* O'Hare Decl., Ex. 3, Rebuttal Report of William O'Hare ¶¶ 8-48. Moreover, Dr. O'Hare's analysis confirms that self-response rates and correlating undercount rates over the past three censuses vary across demographic groups, i.e., that demographic groups with low self-response rates have high net undercounts. *Id.*, Ex. 3 ¶¶ 28-32, 38-39, 44. States with relatively higher numbers of non-citizens will have higher net undercounts due to higher non-response rates. *Id.*, Ex. 2 at 31-35.

The Census Bureau predicts that NRFU operations will be just as successful as in prior years, and that they will be able to successfully solicit responses from 98.5% of those households identified for NRFU. *See* Senteno Decl., Ex. C, Memorandum by Dr. John Abowd and David Brown (Abowd and Brown Mem.). However, the Census Bureau's use of this "success" rate does not refer to the accuracy of the data for each demographic group. Instead, it refers to the rate at which the Census Bureau was able to collect any data or mitigate the overall undercount. Mathiowetz Report at 8. For example, the net undercount for the Hispanic population in 2020 was more than 1.5%, despite the Census Bureau's overwhelmingly high "success" rate. *Id.* at 9; *see also* O'Hare Decl., Ex. 3 ¶ 58 ("Data collected in the [NRFU] portion of the Census is less accurate than that collected in the self-response portion. Decreased self-response translates into more omissions and increased undercount of those populations with reduced self-response rates.").

b. Proxy Efforts and Imputation Will Be Less Successful Than the Census Bureau Anticipates.

The Census Bureau will impute data that it is unable to collect in the NRFU process. Defs.' Mem. at 12-13. Defendants concede that "proxy efforts, as well as imputation, may result in lower quality data for *demographic* questions," but contend that they should not result in an undercount. *Id.* at 13.

Plaintiffs dispute that the use of proxies and imputation to enumerate households will not contribute to a differential undercount. Plaintiffs' evidence shows that "groups with lower self-response rates are likely to experience a greater net undercount." Mathiowetz Report at 21, 25. Dr. Abowd testified that adding the citizenship question "will make it more difficult . . . to collect accurate data on the enumeration, which will complicate the assessment of net undercount." Senteno Decl., Ex. D, Aug. 29, 2018 Deposition of John Abowd, Ph.D (Abowd Aug. 29 Dep.) at 264:7-10. Evidence from the 2010 Census showed that "NRFU operations and whole person imputation were not successful at eliminating undercount for population subgroups, including Hispanics." Hulett Decl., Ex. 2, Rebuttal Expert Report by Nancy Mathiowetz at 11. "Whole-person imputations will only offset omissions to the extent there are data that support the imputation of a person record . . . . If the count information is incorrect, the whole person imputation cannot address the omission." *Id.* Many non-traditional housing units are not included in the imputation. Hulett Decl., Ex. 4, Expert Report of Matthew Barreto (Barreto Report) ¶ 52. Thus, genuine issues of material of fact remain.

c. Even a Minimal Differential Undercount Will Cause Injury to Plaintiffs.

Even if the differential undercount is minimal, there is a substantial risk that Plaintiffs will be harmed. Defendants rely on analysis by Dr. Stuart Gurrea to argue that if a historical NRFU rate is applied to the simulations or projections made by plaintiffs' experts there will be

no harm to Plaintiffs. As detailed above, there is no basis for this application of a 98.5% historical NRFU rate. *See supra* Section II.C.2.a. In fact, Dr. Gurrea testified that if there were an undercount of one population and an overcount in another population such that they canceled each other out, then it would be possible to have a full enumeration—which the Census Bureau claims it will achieve—but still see an impact on congressional apportionment. Senteno Decl., Ex. E, Deposition of Dr. Stuart Gurrea at 120:12-121:8.

Plaintiffs' evidence shows that even with a minimal undercount Plaintiffs will suffer harm. Based on population projections, Kimball Brace[7] assessed the reapportionment impact of a differential undercount at three different potential levels of undercount anticipated by other experts in this case. He concluded that there is a risk that California, Texas, Arizona, Florida, Nevada, and New Jersey are at risk for losing a Congressional seat because of the differential undercount, and that the larger the undercount, the higher the risk. Hulett Decl., Ex. 5 Expert Report of Kimball W. Brace at 6-7. Mr. Brace makes clear that an undercount of Hispanics and non-citizens of *any* magnitude will shift political representation in counties with higher percentages of those populations from those counties to the rest of the state. *Id.* at 7-9; *see also Dep't of Commerce*, 525 U.S. at 332-34 (finding at summary judgment that plaintiffs established standing through expert testimony demonstrating that they were likely to have their votes diluted in state and local elections due to differential population undercounts in the counties in which they resided).

Similarly, Dr. Andrew Reamer conducted an analysis of the impact a differential undercount would have had on funding for certain federally funded programs allocated in 2016,

[7] Mr. Brace is the president of a consulting firm that specializes in reapportionment, redistricting, election administration, and the census, and that has consulted on those matters since 1979.

had there been a citizenship question on the 2010 census. Hulett Decl., Ex. 6, Expert Report of Dr. Andrew Reamer at 3-6. Dr. Reamer found that certain states where Plaintiffs live that have relatively high percentages of non-U.S. citizens would lose population shares and federal funding. *See id.* at 5. He concluded that "[i]f a differential undercount is present, this dynamic would be realized regardless of the size of the undercount nationwide, even, for instance, 0.1%." *Id.* The likelihood of an impact on federal funding to certain programs is also supported by Dr. O'Hare's finding that the higher net undercount in at least twelve states will impact the share of federal money allocated to those states based on census data. O'Hare Decl., Ex. 2 at 31-36. Given the genuine issues of material fact as to Plaintiffs' likely injuries, Defendants are not entitled to summary judgment.

d. Organizational Plaintiffs Have Established Standing in Their Own Right.

Plaintiff Organizations allege standing based on two different theories: (1) representational standing, where the injury is to the organization's members, *Am. Humanist Ass'n v. Maryland-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195, 203-04 (4th Cir. 2017) (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)); and (2) direct organizational standing, where the injury is to the organization itself, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 458 (4th Cir. 2005) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

Defendants argue that Organizational Plaintiffs are unable to assert standing in their own right. Defs.' Mem. at 17-18. Defendants' attack on Plaintiffs' associational standing is limited to the assertion that Organizational Plaintiffs with members cannot establish that "members would otherwise have standing to sue in their own right." Defs.' Mem. at 17 (citing *Piedmont Envtl.*

Council v. Dep't of Transp., 58 F. App'x 20, 23 (4th Cir. 2003) (internal quotations omitted)).[8] For the reasons discussed above, individual members of Plaintiff organizations face a substantial risk of harm to their representational and economic interests. *See, e.g.*, Sections II.C.1 & 2a-c.

Regardless, Organizational Plaintiffs can establish associational standing based on the diversion of resources and impact on their missions under *Havens Realty Corp*. Plaintiffs do not need to "show that there is a real impending harm *justifying* the need to divert resources." Defs.' Mem. at 18 (emphasis added). Instead, Plaintiffs must establish that because of the addition of the citizenship question their missions have been frustrated and they have or imminently will need to divert resources to mitigate the impact of the citizenship question. *Havens*, 455 U.S. at 379. Dr. Abowd confirms that the Census Bureau will need to more heavily rely on *Trusted Voices*—several of which are Organizational Plaintiffs—as part of the Census Bureau's plan to reach communities that are reluctant to respond to the census because of the addition of the citizenship question. Abowd Decl. ¶¶ 61-62 & n. 52 (*trusted voices* "help people understand that being included in the final count is critical for their communities."). This reliance on Organizational Plaintiffs to do increased outreach to bolster response rates alone is sufficient evidence of harm to Organizational Plaintiffs.

The undisputed evidence is that several Organizational Plaintiffs have already begun and

[8] Defendants argue that "[s]ome of the organizational plaintiffs also claim that they will be harmed if census data becomes less reliable . . . yet they likewise cannot establish that any such injury is certainly impending or offer any concrete evidence of such harm." Defs.' Mem. at 18. For the same reasons discussed above, Plaintiffs have shown that harm caused by a differential undercount is certainly impending, and at the very least, that material issues of fact exist as to its immanency. Nevertheless, even if Plaintiffs cannot prove that they will be harmed if there is an undercount, Plaintiffs still have standing based on injury to the organizations themselves. *See*, *e.g.*, Declaration of Juanita Valdez-Cox (Valdez-Cox Decl.) ¶¶ 4, 10 & 12-15.

will imminently be forced to divert resources because of the addition of the citizenship question,[9] and that but for this action, these financial and organizational resources otherwise would be spent toward their core activities.[10] *See, e.g.*, Valdez-Cox Decl. ¶¶ 4, 10 & 12-15; Declaration of Angelica Salas ¶¶ 3, 11-16; Declaration of Jerry Gonzalez ¶¶ 3-4, 8, 10-11 & 13-14; Declaration of Peter Bloch Garcia ¶¶ 3-4, 6-11; Declaration of Elaine Tso ¶¶ 3-4, 6-7, 9-12; Declaration of John Park ¶¶ 3, 11-13. Plaintiffs have established injury based on harm directly to the organization, and thus Defendants' are not entitled to summary judgment.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE CLAIM THAT DISCRIMINATORY INTENT MOTIVATED THE ADMINISTRATION'S PLAN TO ADD A CITIZENSHIP QUESTION TO THE 2020 CENSUS

Defendants agree that the Supreme Court in *Arlington Heights* identified a non-exhaustive list of factors that may constitute part of the "mosaic" of evidence that can give rise to an inference of discrimination: (1) disparate impact, i.e., whether the action "bears more heavily on one race than another;" (2) the "historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes;" (3) "[d]epartures from the normal procedural sequence" and "[s]ubstantive departures[,]" "particularly if the factors usually considered important . . . favor a decision contrary to the one reached," and (4) "contemporary

[9] For example, LUPE will hire additional staff dedicated to census outreach and advocacy work; has begun its census work at least one year earlier than in the past; and will have to divert significant staff time and resources from its other core programs, such as its English as a Second Language classes, to census outreach, education, and advocacy. Valdez-Cox Decl. ¶¶ 4 & 12.

[10] The Court need not find that all Plaintiffs have standing for the case to proceed. If the Court determines that one of the Plaintiffs has standing, all of the Plaintiffs may proceed with their claims. *See Carey v. Population Services Int'l*, 431 U.S. 678, 682 (1977) (finding that where multiple plaintiffs join in asserting the same claim, if one plaintiff has standing, the court need not decide the standing of the other plaintiffs); *see also Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014) (same). Accordingly, Plaintiffs submit a representative sample of declarations, including organizational and individual plaintiffs (Ms. Valdez-Cox and Mr. Raj Mukherji).

statements" by those deciding the issue. 429 U.S. at 266-68.[11]

The main point of disagreement is not legal. Rather, Defendants contend that Plaintiffs have no probative, admissible evidence of the *Arlington Heights* factors by resurrecting the arguments rejected in their motion to dismiss—again attempting to limit the realm of relevant evidence solely to the motives of one man, the Secretary.[12] Defs.' Mem. at 22. Nonetheless, the record demonstrates that Secretary Ross's "decision" was not his decision alone, that the plan emerged early in his tenure, and most certainly was presented to him by Administration officials in a way that caused him to abandon all normal administrative steps and deliberations and available scientific evidence to accomplish the pre-determined goal of the Administration. *See infra* Sections II.B-C, IV & V.A. Defendants disagree with Plaintiffs' presentation of the facts, which is precisely why summary judgement is not warranted—many of these facts are unrebutted and the remainder are clearly in dispute.

Arlington Heights counsels that "racial discrimination is not just another competing consideration." 429 U.S. at 265-66.[13] The deference accorded to decision-makers "balancing

[11] *See also Pathways Psychosocial v. Town of -Leonardtown, MD*, 133 F. Supp. 2d 772, 782-789, 792 (D. Md. 2001) (denying summary judgement where record contained *Arlington Heights* evidence that discriminatory animus may have been a motivating factor in defendants' rescissions of an earlier endorsement of a project).

[12] This argument is very convenient, given that Defendants have so far blocked Plaintiffs' access to the Secretary. Pending before the U.S. Supreme Court is Defendants' Petition for a Writ of Mandamus and Petition for Certiorari, the outcome of which will determine whether Secretary Ross's deposition will take place. *In re U.S. Dep't of Commerce, et al.*, No 18-557 (S. Ct. Filed Oct. 29, 2018).

[13] The Fifth Amendment prohibits Defendants' discriminatory actions irrespective of whether their decision to add a citizenship question was intended to target individuals because of race and/or national origin or because of immigration status. Defendants' classification only raises the issue of what level of scrutiny the Court applies. Even under the lowest level of scrutiny, however, the Fifth Amendment does not permit arbitrary exclusions of non-citizens in a way that does not promote a legitimate federal interest. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 101-02 (1976).

numerous competing considerations" is "no longer justified" once a plaintiff shows that discrimination was a motivating factor. *Id.* "Instead, courts must scrutinize the legislature's actual non-racial motivations to determine whether they alone can justify the legislature's choices. *North Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 221 (4th Cir. 2016), cert. denied, *North Carolina v. North Carolina State Conf. of NAACP*, 137 S. Ct. 1399 (2017).[14]

A. *Arlington Heights* Factor 1: Plaintiffs' Evidence Demonstrates That They Will Be Disparately Impacted by the Addition of a Citizenship Question to the 2020 Census.

The Court previously held that the "pattern" in this factor "is the disparate impact itself, not a showing of multiple bad acts by Defendants." *LUPE*, 2018 WL 5885528, at *8. Defendants take exception to this holding, insist that the pattern here is not as "stark" as it was in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), or *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and urge the Court to "look to other evidence." Defs.' Mem. at 22[15] (citing *Arlington Heights*, 429 U.S. at 266). Aware of the undeniably profuse body of evidence in this case, Defendants impose another baseless condition on this first factor—Plaintiffs must quantify and precisely predict the impact of a citizenship question, and they must be prove that the Census Bureau is mistaken when it

[14] Once Plaintiffs have made out a prima facie case that discrimination motivated a facially neutral law, *Arlington Heights* shifts the burden to Defendants to show that the citizenship question would have been added to the 2020 Census, at the last minute, without that motivation. *Arlington Heights*, 429 U.S. at 270 n. 21. Other than the sham rationale provided by Attorney General Sessions, Defendants have made no argument that the question would have been added absent a discriminatory motive. *Centro Presente v. United States Dep't of Homeland Security,* No. 18-10340, 2018 WL 3543535, at *15 (D. Mass. July 23, 2018) (("[O]nce plaintiffs have made out a prima facie case that discrimination motivated a facially neutral law, the burden shifts to Defendants to show that the same decisions would have been made even without that motivation.") (citing *Hunter v. Underwood*, 471 U.S. 222, 228 (1985)).

[15] The first *Arlington Heights* factor requires only an examination of whether the "official action bears more heavily on one race than another." 429 U.S. at 266 (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)). The Supreme Court observes that such disparate impact evidence can amount to a "clear pattern, unexplainable on grounds other than race," that results from an otherwise neutral piece of legislation. *Id*.

asserts that it is "prepared to react, adjust, and complete NRFU to ensure an accurate enumeration . . . ." Abowd Decl. ¶ 24; *see also* Defs.' Mem. at 22-24. However, as discussed *supra* in Section II.A, the Supreme Court does not require the Court to "wait until the Census is conducted to consider the issues presented here." *Dep't of Commerce*, 525 U.S. at 332. At trial, Plaintiffs expect to prove by a preponderance of evidence that is it substantially likely that the addition of the citizenship question will disparately impact certain demographic groups, and have already produced sufficient evidence to meet this first *Arlington Heights* factor. That evidence includes the Census Bureau's own analysis. *See* AR 1277 at 1282; COM_DIS00009833 at 9874; *see also supra* Section II.C.

Secretary Ross forged ahead with the plan to add a citizenship question despite all the evidence that showed it was unnecessary and would only create negative outcomes, all the while knowing that those negative outcomes would primarily affect non-citizens and Latinos.[16] As a result, there can be little doubt that he chose this path "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass. v. Feeney,* 442 U.S. 256, 279 (1979).

The Census Bureau's evidence is supplemented by three different Plaintiffs' experts who all conclude that the addition of the question will result in a disproportionate undercount. *See supra* Section II.C. Plaintiffs' experts also agree that that the presence of the question will cause populations sensitive to immigration concerns to be reluctant and fearful to respond to the census. O'Hare Decl., Ex. 2. at 36; Mathoweitz Report at 3, 5-7; Barreto Report ¶¶ 95-101, 134-

[16] The Census Bureau informed the Secretary on multiple occasions that adding a citizenship question would disproportionately negatively impact not only non-citizen households, but also Hispanic individuals, would have no countervailing benefit, would not serve the DOJ's request as well as use of administrative records, and would merely add cost and harm data quality. AR 5535-38; AR 1277-85; AR 2185-89; COM_DIS00009833-9909.

136, 143-144; Hulett Decl., Ex. 7, Expert Report of Douglas S. Massey, Ph.D. ¶¶ 18-20. Regardless of the precise level at which the Census Bureau will undercount each demographic group, there can be little doubt that the burden will be disparately borne.

Finally, Defendants' insistence that NRFU efforts will completely mitigate the disparities caused by the citizenship question is not supported by past censuses, and is most certainly in dispute. *See infra* Section V.A.1.

B. *Arlington Heights* Factor 2: The Historical Background Leading to the Addition of the Citizenship Question is Replete with Ulterior Motives, Connivance, Falsehood, and Secrecy.

Defendants argue with regard to the second *Arlington Heights* factor that Plaintiffs have failed to demonstrate a "history of discrimination by the Secretary," who is the only person "under the constitutional microscope." Defs.' Mem. at 23. However, the historical background of this decision compels a wider lens. There is a great deal of evidence in the record, much of it undisputed, that the historical background of the decision was not what Secretary Ross has represented, and that the rationale for the decision was fabrication, concocted to cover its true purpose. "Proof that the defendant's explanation is unworthy of credence is . . . one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 147 (2000). Moreover, Secretary Ross is most certainly not the only actor subject to the Court's scrutiny, because there is strong evidence that he did not act alone, that his motives were not closely-held, and that he and other high level Administration officials acted in concert with unlawful discriminatory motives.

Shortly after President Trump's inauguration, for example, former Kansas Secretary of State, Kris Kobach spoke to President Trump, urging him to ensure that the Census include a citizenship question to address the supposed inflated number of Congressional seats that

California received by "counting illegal aliens." Senteno Decl., Ex. F (Kansas City Star news article). In March 2017, Earl Comstock, Director of Policy and Strategic Planning for the Department of Commerce, emailed Secretary Ross regarding "Your Question on the Census," which appears to have been whether undocumented residents are counted for Congressional apportionment. AR 2521. Mr. Comstock responded in the affirmative, and included a blog entitled "The Pitfalls of Counting Illegal Immigrants." *Id.* During the same time period, high level officials were in conversations with Secretary Ross about the citizenship question, including Stephen Bannon. *Id.*; Senteno Decl., Ex. G, Defendants' Second Supplemental Responses to Plaintiffs' Interrogatories (Interrogatory Responses) at 2-3.[17] Secretary Ross also discussed the citizenship question with Mr. Kobach, *id*; *see also* AR 763-64, and he had the first of a number of conversations with Attorney General Sessions in the Spring of 2017 as well, Interrogatory Responses at 2-4.[18]

By the beginning of May 2017, Secretary Ross was complaining to Mr. Comstock that he was "mystified why nothing [has] been done in response to my months old request that we include the citizenship question," and that "worst of all they emphasized that they have settled

[17] After months of denials, the Secretary eventually admitted on October 11, 2018 that he did in fact discuss the citizenship question with Mr. Bannon, as well as with Mr. Kobach, Attorney General Sessions, and several other administration officials. Defendants' Second Supplemental Responses to Plaintiffs' First Set of Interrogatories to Defendant United States Department of Commerce and Wilbur Ross (these responses were produced on October 11, 2018 in the consolidated cases of *State of New York, et al. v. United States Dep't of Commerce, et al.*, and *New York Immigration Coalition, et al. v. United States Dep't of Commerce, et al.*, Case No. 18-Civ.-2921).

[18] Acting Assistant Attorney General John Gore acknowledged that in the course of events leading to the drafting of the DOJ request letter, he "had a conversation with AG Sessions about the question of the use of total population or some other measure for apportionment purposes." Gore Dep. at 338:2-13.

with congress on the questions to be asked."[19] AR 3710. Although Mr. Comstock allowed that the "broad topics" had already been submitted to Congress as required, he assured Secretary Ross that he would arrange a meeting with DOJ to "work with Justice to get them to request" the citizenship question. *Id*.

The very next day, May 3, Senior White House advisor Eric Branstad looked for a DOJ contact, connected Mr. Comstock to a number of DOJ employees with whom he met or spoke to about the question, including, several times, the Acting Director of DOJ's Executive Office of Immigration Review. AR 3701; AR 2462; AR 12756. Mr. Comstock went "looking for an agency" to ask the question—not because any agency raised any issue with census data, but because Secretary Ross wanted the question added and he had to comply with the Paperwork Reduction Act (PRA). Senteno Decl., Ex. J, Deposition of Earl Comstock (Comstock Dep.) at 153:2-154:21; 181:3-182:1.

While Mr. Comstock was searching for an agency to submit a request to justify the addition of the citizenship question, Mr. Kobach wrote to the Secretary "at the direction" of Mr. Bannon, sent him the exact language that was eventually added to the short-form, reminded him of the importance of excluding non-citizens from the count for apportionment purposes, and warned that without a citizenship question "aliens who do not actually 'reside' in the United States are still counted for congressional apportionment." AR 763-64.

On August 8, Secretary Ross wrote to Mr. Comstock to complain that "they seem dig [sic] in about not [asking] the citizenship question and that raises the question of where is the

[19] Karen Dunn Kelley, the Under Secretary of Commerce for Economic Affairs, testified that by the time she was confirmed in Summer 2017, she knew that the Secretary was "interested in considering" adding a citizenship question to the census. Senteno Decl., Ex. I, Deposition of Karen Dunn Kelley (Kelley Dep.) at 151:3-152:7.

DOJ in their analysis?" AR 12476. Secretary Ross offered to call Attorney General Sessions should it become necessary to do so. AR 12476. But Mr. Comstock's efforts had reached a "dead end." Comstock Dep. at 411:6-12. He had not yet secured the "request" that the Secretary needed for cover.[20] As of September 8, DOJ had already rejected the request[21] and the Department of Homeland Security (DHS) could not be persuaded either, despite several phone calls with Mr. Comstock. AR 12756. Mr. Comstock testified that without DOJ, "that would probably put an end to the citizenship question." Comstock Dep. at 190:5-12.

But Secretary Ross followed through on his offer to call Attorney General Sessions,[22] because five days later, Acting Assistant Attorney General John Gore reached out to Commerce, and assured them that Attorney General Sessions was available and "eager to assist," and that DOJ "can do whatever you all need us to do."[23] AR 2651-52. However, two months later, the DOJ *still had not provided Commerce with the requested letter*. So an impatient Secretary Ross wrote to Peter Davidson, the General Counsel of Commerce: "Census is about to begin translating the questions into multiple languages and has let the printing contract. We are out of time. Please set up a call for me tomorrow with whoever is the responsible person at Justice. We must have this resolved." AR 11193. Mr. Davidson reassured the Secretary that "I can brief you

[20] On August 11, 2017, James Uthmeier, counsel and special advisor to Secretary Ross, sent a memorandum entitled "Census Memo." Senteno Decl., Ex. O, COM_DIS00018590. While the memo itself has been withheld, in the cover email Uthmeier wrote that "our hook here," was to claim that "[u]litmately, we do not make decisions on how the data should be used for apportionment, that is for Congress (or possibly the President) . . . ." *Id* at 18590.

[21] Mr. Gore confirmed that by September 2017, DOJ had decided it did not wish to "raise the citizenship question." Gore Dep. at 69:4-9.

[22] By September 17, 2017, Attorney General Sessions and Secretary Ross had "connected," *id.,* in a conversation facilitated by Mr. Gore. Gore Dep. at 95:14-112:19. Mr. Gore understood that when Attorney General Sessions called him in mid-September of 2017, he did so at Secretary Ross's behest. *Id*. at 83:16-84:6.

[23] Mr. Gore's deposition testimony confirms that DOJ did not initiate communications with Commerce regarding the citizenship question. Gore Dep. at 67:5-68:5.

tomorrow . . . no need for you to call." *Id*. Two weeks later, DOJ issued the request that Secretary Ross had sought since early Spring. AR 1525-27.[24]

There remained the problem that, pursuant to the statutory deadline for reporting new topics to Congress, Commerce had already informed Congress of its needs for 2020.[25] Nonetheless, the Census Bureau dutifully set out to study how best to meet DOJ's ostensible need for block level Citizen Voting Age Population (CVAP) data, analyzing the advantages and disadvantages of adding a citizenship question as compared to other methods of acquiring the information DOJ requested. The Census Bureau scientists concluded that administrative records could provide DOJ with more accurate block-level CVAP information than adding the question, while at the same time avoiding the potential negative impact on voluntary cooperation with the census and the concomitant lower differential response rates. AR 11646-49; AR 11634-45. The Census Bureau provided additional analysis in January of 2018 that contained similar, expanded findings that were specific as to the extent of the expected decline in self-response rates and estimated the additional cost increases that the addition of a citizenship question would necessitate. AR 1277-85. Again, they recommended the use of administrative records for accurate citizenship data. *Id*.

The Secretary then demanded additional analysis and proposed that the Census Bureau include the citizenship question that he wanted, but *also* use administrative records to provide CVAP data. AR 1313 at 1316; AR 9812-33. For at least the third time, the Census Bureau informed Secretary Ross that the proposal would result in all the previously identified problems

[24] Even before the DOJ Request, Ms. Kelley recalled that Commerce was having internal discussion about getting the letter. Kelley Dep. at 128:15-21 ("[W]e thought we were going to get a letter, and then a letter came.").

[25] *See* 13 U.S.C. § 141(f)(1), (2).

with poorer quality data and higher costs, and that households "refusing to self-respond due to the citizenship question are particularly likely to refuse to respond in NRFU as well, resulting in a proxy response." AR 1308 at 1311-12; AR 9812 at 9815. No evidence before the Secretary suggested that adding a citizenship question would improve, rather than detract from, the accuracy of citizenship data.

Nonetheless, Secretary Ross continued to push to add the citizenship question no matter the hurdles he faced or the strong objections raised by the Census Bureau, legislators, and other third parties. On March 22, 2018, Secretary Ross initiated the request for the citizenship question. AR 3893-3900. After working for nearly a year to convince DOJ, then DHS, then DOJ again, to provide him with cover for the Administration's decision to add the question, and to keep his ruse from the public, Secretary Ross testified under oath to the House Ways and Means Committee that "[DOJ], as you know, initiated the request for inclusion of the citizenship question."[26]

C. *Arlington Heights* Factor 3: Defendants Departed, Procedurally and Substantively, From Past Practice, Including the Concoction of a Rationale That Does Not Bear Scrutiny.

Once Defendants made the decision to add a citizenship question in Spring of 2017, what followed was an impatient search for, and unabashed prevarication about the pretextual justification for the addition of the question. A trier of fact could infer from the Secretary's shifting explanations and falsity concerning his motives that he was covering up a discriminatory purpose. *See New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 808 (S.D.N.Y. 2018) (in an *Arlington Heights* analysis, evidence suggests that Secretary Ross's rationale for the

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

decision "may have been pretextual"); *Reeves*, 530 U.S. at 147 (a proffered rationale that is not credible can be persuasive circumstantial evidence of intentional discrimination.).

1. DOJ's Voting Rights-Related Rationale is Unworthy of Credence.

Attorney General Sessions provided a rationale for Secretary Ross that was as flimsy as it was untimely. Mr. Gore drafted the request, received edits from junior political appointees and Attorney General Sessions' advisors, none of whom had experience in Voting Rights Act (VRA) cases or in assessing the reliability of CVAP data, and received final authorization from Attorney General Sessions. Senteno Decl., Ex. H, Deposition of John Gore (Gore Dep.) at 127:3-17, 133:13-142:7, 157:22-160:18.

The DOJ letter provides a number of reasons for its newfound dissatisfaction with ACS CVAP data: because it is a separate data set from the decennial census; does not align in time with the census; contains statistical estimates with error margins; and requires the use of an estimation technique to arrive at block-level data. AR 1525-27. However, for as long as DOJ has enforced the VRA, it has relied on statistical estimates of CVAP with error margins; has never had a single data set with both total population and CVAP data; and has always relied on estimation procedures for block-level CVAP data. Gore Dep. at 174:14-18, 182:18-188:14, 234:3-236:14. Most revealing is Mr. Gore's testimony that he is not aware of any Section 2 VRA cases that ever failed because of any of the issues cited in his letter. *Id.* at 190:11-15, 194:6-195:10, 203:11-204:15, 236:22-238:7.[27] Finally, Mr. Gore agreed that CVAP data collected

[27] The one case Defendants identified in which a court rejected reliance on ACS data, *Benavidez v. Irving Indep. Sch. Dist*., 690 F. Supp. 2d 451, 460-62 (N.D. Tex. 2010), was a district court case where private plaintiffs relied on estimates based on only a single year of ACS responses ("one-year ACS estimates"), which was all that was available at that time. This contrasts with the estimates based on a pool of five years of ACS responses ("five-year ACS estimates") that courts have repeatedly found sufficient. *See, e.g.*, *Rodriguez v. Harris Cty.*, 964 F. Supp. 2d 686, 727-28 (S.D. Tex. 2013); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 687-

through the census questionnaire is not necessary for DOJ's VRA enforcement. *Id.* at 299:15-300:11.[28]

In fact, the evidence suggests that Attorney General Sessions was not at all interested in acquiring more accurate block level citizenship data, but rather was only interested in bringing the agreed-upon end goal—the addition of the citizenship question. On December 22, 2017, ten days after the DOJ request, Acting Census Bureau Director Ron Jarmin, per standard practice, invited DOJ to discuss the Census Bureau's recommendation that a linked file of administrative and survey data already in the possession of the Census Bureau would provide the data the DOJ requested, and would "result in higher quality data produced at a lower cost." Senteno Decl., Ex. P, DOJ00002712 at 2716 (emphasis added). But Attorney General Sessions directed his staff not to attend.[29]

Plaintiffs' experts provide additional evidence as to the untenable nature of DOJ's request.[30] Based on his vast redistricting experience, Plaintiffs' expert demographer David Ely finds no valid basis for the assertions set forth in the DOJ letter. *Thornburg v. Gingles,* 478 U.S. 30, 50-51 (1986), requires plaintiffs to demonstrate that a minority group is sufficiently large and geographically compact to constitute the majority of the voting eligible population in a single-

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90 (S.D. Tex. 2017); *Benavidez v. Irving Indep. Sch. Dist.,* No. 3:13-CV-0087-D, 2014 WL 4055366, at *17 (N.D. Tex. 2014). Mr. Gore testified that he was not aware of a case where a VRA claim failed due to reliance on five-year ACS estimates, which the Census Bureau considers reliable for any geographic area. Gore Dep. at 242:14-247:22.

[28] The Trump Administration has not filed any VRA Section 2 cases. Gore Dep. at 249:11-251:3.

[29] Initially Arthur Gary (the signer of the DOJ request Gore drafted) accepted the invitation. Gore Dep. at 259:5-262:10. However, Attorney General Sessions cancelled the meeting and decided to reject the invitation altogether. *Id.* at 265:3-274:21.

[30] David Ely is a demographer and consultant who has managed numerous redistricting projects and has served in over 30 federal and state voting rights cases in 12 states, including cases brought under Section 2 of the VRA. Ely Report ¶¶ 1-10.

member district. It is not necessary, however, to determine the exact number of citizens in each census block, and there is no requirement regarding the geographic distribution of voting-age citizens within a particular jurisdiction. Hulett Decl., Ex. 8, Expert Report of David Ely (Ely Report) ¶ 20. For decades, survey sample data collected through the decennial census "long form" questionnaire, and later through the ACS, was used to produce CVAP estimates needed for VRA enforcement. *Id.* ¶¶ 23-25. Currently, block group CVAP data from five-year ACS is entirely sufficient for the analysis that is necessary for voting rights enforcement actions and redistricting in jurisdictions where VRA compliance is a significant issue. *Id.* Block-level CVAP data from the Census Bureau have never been available in the past, and their absence has never hindered Mr. Ely's work drawing reliable district maps that are in compliance with Section 2, nor prevented courts from finding that the requirements of Section 2 have been met. *Id*. ¶ 16.

a. Defendants' Concealment of the Provenance of the DOJ Request Contributes Greatly To Its Dubiousness.

Secretary Ross and Commerce officials not only failed to consult with Census Bureau officials while they were searching for cover, but also hid from them the fact that Commerce was behind the DOJ "request." Until the lawsuits were filed, neither Director Jarmin nor Dr. Abowd knew that Commerce was behind the DOJ Request. Senteno Decl., Ex. K, Abowd Aug. 15, 2018 Deposition of John Abowd, Ph.D (Abowd Aug. 15 Dep.) at 230:3-13; Ex. L Deposition of Ron Jarmin (Jarmin Dep.) at 400:11-401:2. Secretary Ross testified in Congress that DOJ "initiated" the process to add the citizenship question.[31] Similarly, Mr. Comstock testified before Congress, swearing that the citizenship question was being added because "[w]e received a request from [DOJ] for this, and their rationale was that the level of the information that they needed to enforce the [VRA] was not available." Comstock Dep. at 294:18-295:1. Of course he did not

[31] *See* March 22 Hearing, *supra* note 26.

mention in his sworn testimony anything about his own active role in the search and in convincing DOJ to request the question. *Id.* at 298:17-299:1; *see also supre* Section II.A.2. Even after the lawsuits challenging the addition of the citizenship question were filed, as recently as April of this year, DOJ took pains to hide the fact that Secretary Ross had demanded that DOJ send the request. A series of DOJ talking points, for example, begin with the following reminder: "**NOT PUBLIC:** In 2017, Secretary of Commerce Wilbur Ross requested that the Justice Department send a letter requesting the addition of a citizenship question on the 2020 Census." Senteno Decl., Ex. P at DOJ00032071; *id*. at DOJ00032074 (emphasis in original); Gore Dep. at 330:10-333:4.

At every step, Defendants concealed the true nature of this process, the identity of their co-conspirators, and the true reasons leading to DOJ's December 2017 letter and Secretary Ross's Decision Memo. Had their motives been as noble as they claim, they would not have had to be secretive, to cover up, and to prevaricate.

2. Defendants Departed from Past Practices and Legal Constraints Governing the Timing of Census Decision-making and Testing.

Plaintiffs produced additional evidence of Defendants' departure from normal procedures that is relevant to the third *Arlington Heights* factor. That evidence includes, but is not limited to, facts demonstrating that Secretary Ross ignored advice and analysis provided by the Census Bureau that the addition of the citizenship question would lower response rates and data quality, ignored years of prior practice by failing to test new content,[32] failed to comply with the congressional reporting requirements and data-gathering constraints in the Census Act, and failed to comply with the PRA. *See infra* Section V.

[32] Adding a highly sensitive question at a late date without proper testing violates the best practices of social science research and the Census Bureau itself. Barreto Report ¶ 41.

D. *Arlington Heights* Factor 4: The Record Contains Contemporary Statements by Those Involved in Ensuring That the Secretary Carried out the Administration's Intent to Discriminate Against Immigrant Communities of Color.

Arlington Heights' fourth factor requires evidence of "contemporary statements" by those deciding the issue. 429 U.S. at 266-68. As this Court noted, the contemporary statements by President Trump and members of his administration, while "not made specifically in relation to the citizenship question they are nonetheless relevant to understanding the administration's motivations. After all, 'discriminatory intent is rarely susceptible to direct proof.'" *LUPE*, 2018 WL 5885528, at *9 (quoting *Hayden v. Paterson*, 594 F.3d 150, 153 (2d Cir. 2010)). Some of those statements are so vile that they leave no doubt as to President Trump's belief that immigrant communities of color are criminal and relatively worthless.[33] As another court recently recognized, "there is evidence that President Trump harbors an animus against non-white, non-European aliens which influenced" his decision to revoke protected status from individuals from Haiti, Sudan, El Salvador, and Nicaragua. *Ramos v. Nielsen,* No. 18-CV-01554-EMC, 2018 WL 4778285, at *17 (N.D. Cal. Oct. 3, 2018).

The evidence also includes a January 23, 2017, leaked draft executive order entitled, "Executive Order on Protecting American Jobs and Workers by Strengthening the Integrity of Foreign Worker Visa Programs." The draft executive order states that its purpose is to "help

[33] *See*, *e.g.*, Julie H. Davis, et al., *Trump Alarms Lawmakers With Disparaging Words for Haiti and Africa*, NYT, Jan. 11, 2018, *available at* https://goo.gl/xCTsNN (last visited May 16, 2018) (President Trump discussed an immigration proposal with advisors and party leaders and asked why he would want "all these people from shithole countries," referring to Haiti and various nations in Africa, and adding that the U.S. should accept more immigrants from countries like Norway); On May 16, 2018, during a California Sanctuary State Roundtable, in response to a comment by Fresno County Sheriff about the criminal gang MS-13, President Trump said, "We have people coming into the country, or trying to come in—and we're stopping a lot of them—but we're taking people out of the country. You wouldn't believe how bad these people are. These aren't people. These are animals." *President Trump Hosts California Sanctuary State Roundtable*, C-SPAN (May 16, 2018), *available at* cs.pn/2INPSJ4.

fulfill several campaign promises" and to address the "flow of illegal entries and visa overstays." To that end, it instructed the Director of the U.S. Census Bureau to "include questions to determine U.S. citizenship and immigration status on the long-form questionnaire in the decennial [C]ensus."[34] Also relevant are anti-immigrant statements by President Trump and current and former Administration officials. These are referenced in the FAC and are not disputed by Defendants. *See* FAC ¶¶ 219-254**.** For example, on May 21, 2018, the White House published an article on its website regarding MS-13 that used the term "animals" to describe individuals ten times. The article states that "President Trump's entire Administration is working tirelessly to bring these violent animals to justice."[35] On May 10, 2018, during an interview with National Public Radio, White House Chief of Staff John Kelly said undocumented immigrants were "not people that would easily assimilate into the United States, into our modern society. They're overwhelmingly rural people. In the countries they come from, fourth-, fifth-, sixth-grade educations are kind of the norm. They don't speak English; obviously that's a big thing . . . . They don't integrate well; they don't have skills."[36]

In March 2016, Trump Administration advisor Mr. Bannon pronounced that "[t]wenty percent of this country is immigrants. Is that not the beating heart of this problem?"[37] Attorney

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[34] Memorandum from Andrew Bremberg to Donald Trump, President on Executive Order on Protecting American Jobs and Workers by Strengthening the Integrity of Foreign Worker Visa Programs 1 (Jan. 23, 2017), *available at* https://goo.gl/qWHL5T.

[35] White House, *What You Need to Know About the Violent Animals of MS-13*, May 21, 2018, *available at* https://www.whitehouse.gov/articles/need-know-violent-animals-ms-13/.

[36] John Burnett and Richard Gonzales, *John Kelly on Trump, The Russia Investigation and Separating Immigrant Families*, NPR (May 10, 2018), *available at* https://goo.gl/7RDpmH.

[37] Bannon said, "Engineering schools . . . are all full of people from South Asia, and East Asia. . . . They've come in here to take these jobs." Bannon further added that American students "can't get engineering degrees; they can't get into these graduate schools because they are all foreign students. When they come out, they can't get a job." Phillip Bump, *Steven Bannon Once Complained That 20 Percent of the Country is Made up of Immigrants. It Isn't*, Wash. Post. (Feb.

General Sessions complained that Deferred Action for Childhood Arrivals (DACA) "denied jobs to hundreds of thousands of Americans by allowing those same jobs to go to illegal aliens."[38] Indeed, Attorney General Sessions has long held anti-immigrant views. In September 2017, then-Senator Sessions stated, "All I would just say to you is that it's a sad thing that we've allowed a situation to occur for decades that large numbers of people are in the country illegal [*sic*] and it's going to have unpleasant, unfortunate consequences."[39] In November 2016, Attorney General Sessions stated that "almost no one coming from the Dominican Republic to the United States is coming here because they have a provable skill that would benefit us and that would indicate their likely success in our society."[40] Finally, the allegations also include statements from Mr. Kobach that evince a clear intent to exclude immigrants from political representation. *See supra* Section III.B.

Defendants again attempt to limit the realm of relevant evidence solely to words uttered by Secretary Ross about the citizenship question in particular. However, Plaintiffs have produced direct and plausible evidence, supported by documentation, that Secretary Ross did not act alone. *See supra* Sections III.B & C. When multiple officials influence a final decision, the relevant inquiry is whether the decision was "tainted with discriminatory intent even if the decisionmakers personally have no strong views on the matter." *Innovative Health Sys., Inc. v.*

1, 2017), *available at* https://www.washingtonpost.com/news/politics/wp/2017/02/01/steve-bannon-once-complained-that-20-percent-of-the-country-is-made-up-of-immigrants-it-isnt/?noredirect=on&utm_term=.700948ce4c7b.

[38] Jefferson B. Sessions, U.S. Attorney General, Remarks on DACA (Sep. 5, 2017), *available at* https://goo.gl/sT7EGQ (hereinafter Sessions Remarks on DACA).

[39] *Id*. The Fifth Amendment prohibits invidious discrimination—even against people "whose presence in this country is unlawful." *Plyler v. Doe,* 457 U.S. 202, 210 (1982).

[40] Sam Stein & Amanda Terkel, *Donald Trump's Attorney General Nominee Wrote Off Nearly All Immigrants From An Entire Country*, Huffington Post (updated Nov. 20, 2016), *available at* https://goo.gl/xQ6NrY.

City of White Plains, 117 F.3d 37, 49 (2d Cir. 1997), superseded on other grounds by *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001); *see also Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 279 (E.D.N.Y. 2018) (holding that there is still liability for intentional discrimination when a "biased individual manipulates a non-biased decision-maker into taking discriminatory action"); *Ramos*, 2018 WL 4778285, at *16 (granting preliminary injunction and noting "even if the DHS Secretary or Acting Secretary did not personally harbor animus . . . , their actions may violate the equal protection guarantee if President Trump's alleged animus influenced or manipulated their decision making process.") (citation omitted); *see also Centro Presente*, 2018 WL 3543535, at *14 n.3 (explaining that although the "cat's paw" principle originates in the employment discrimination context, "nothing in the reasoning of those opinions makes them inapplicable in a constitutional context").

Notably, one of the men with whom the remarks originate is the President, who chooses, directs, and demands loyalty from his Cabinet.[41] So, yes, the President's statements do properly contribute to the *Arlington Heights* inquiry and can raise an inference of discriminatory motive for related actions by the head of the Department of Commerce and by every other Cabinet member working in concert with the White House. *New York,* 315 F. Supp. 3d at 810 (finding that President Trump's discriminatory statements "help to nudge [plaintiffs'] claim of intentional discrimination across the line from conceivable to plausible") (citing *Batalla Vidal*, 291 F. Supp.

[41] Defendants rely on *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018), for the proposition that Trump Administration statements are irrelevant to an *Arlington Heights* inquiry, and cannot render "facially neutral decisions constitutionally suspect." Defs.' Mem. at 23. The court in the New York census cases rejected Defendants' reliance on *Trump* as "somewhere between facile and frivolous," noting that the deferential review applied by the Supreme Court in Hawaii and by every case it cites involved either "immigration or the admission of non-citizens," and most certainly does not "unsettle decades of equal protection jurisprudence regarding the types of evidence a court may look to in determining a government actor's intent." *New York,* 315 F. Supp. 3d at 810-811.

3d at 279) (relying on "racially charged" statements by the President where he was alleged to have directed the decision at issue in concluding that the plaintiffs' allegations of discriminatory intent were sufficient to survive a motion to dismiss).[42]

Finally, although Plaintiffs have been unable to depose Secretary Ross, his views on immigration are not a secret. On October 9, 2017, Secretary Ross issued a press release applauding Trump Administration programs to "swiftly return illegal entrants" and to "stop sanctuary cities, asylum abuse and chain immigration."[43] Moreover, the Fourth Circuit has recognized that officials acting in their official capacities:

> seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority. Even individuals acting from invidious motivations realize the unattractiveness of their prejudices when faced with their perpetuation in the public record. It is only in private conversation, with individuals assumed to share their bigotry, that open statements of discrimination are made, so it is rare that these statements can be captured for purposes of proving racial discrimination in a case such as this.

Smith v. Town of Clarkton, N. C., 682 F.2d 1055, 1064 (4th Cir. 1982).

In this case, those "private conversations" were with Attorney General Sessions, several of Attorney General Sessions' key immigration aides, Mr. Bannon, and Mr. Kobach—the individuals who played a major role in the decision, and who did so with discriminatory

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[42] *See also Batalla Vidal,* 291 F. Supp. 3d at 276-77 (statements made by President Trump that allegedly suggest that he is prejudiced against Latinos are found "sufficiently racially charged, recurring, and troubling as to raise a plausible inference that the decision to end the DACA program was substantially motivated by discriminatory animus."); see also *Mullen v. Princess Anne Volunteer* Fire Co., Inc., 853 F.2d 1130, 1133 (4th Cir. 1988) ("Racial slurs represent the conscious evocation of those stereotypical assumptions that once laid claim to the sanction of our laws. Such language is symbolic of the very attitudes that the civil rights statutes are intended to eradicate.").

[43] Press Release, U.S. Dept. of Commerce, Statement From U.S. Secretary of Commerce Wilbur Ross on the Release of President Trump's Immigration Priorities (Oct. 9, 2017), https://www.commerce.gov/news/press-releases/2017/10/statement-us-secretary-commerce-wilbur-ross-release-president-trumps

motives.[44] *See supra* Sections II.A. 2.-3., III. Additionally, President Trump's campaign claimed he "officially mandated" that the citizenship question be added. *New York*, 315 F. Supp. 3d at 780. The evidence shows that these individuals made statements that either demean or target immigrant communities of color, and that Mr. Kobach pushed for the citizenship question as a way to neutralize the growing political power of these communities.

IV. THE EVIDENCE SUPPORTS AN INFERENCE THAT THE CO-CONSPIRATORS REACHED AN AGREEMENT TO DEPRIVE PLAINTIFFS OF THEIR CONSTITUTIONAL RIGHTS

To survive Defendants' motion for summary judgment, Plaintiffs need not produce direct evidence of a meeting of the minds between the conspirators, *Panley v. McDowell Cnty. Bd. of Ed.*, 876 F.3d 646, 658 (4th Cir. 2017), and need only "come forward with specific circumstantial evidence" that reasonably leads to the inference "that each member of the alleged conspiracy shared the same conspiratorial objective," *id*. (internal quotation marks omitted). As described in more detail above in Section II, Plaintiffs have come forward with this evidence, which is unrebutted by Defendants.

We know, for example, that President Trump, Administration officials, including Mr. Bremberg and Mr. Bannon, Mr. Kobach, and Secretary Ross all at one point from early 2017 to Spring 2017 discussed adding a citizenship question to the decennial census for immigration enforcement purposes or to exclude immigrants from Congressional apportionment. *See supra* Sections II.A, B & D. By May 2017, Secretary Ross had made the decision to add a citizenship question to the 2020 Census, and only needed to fabricate a rationale that appeared legitimate for adding the citizenship question at this late date. *Id.* After early attempts to get DOJ and then

[44] On September 5, 2017, Attorney General Sessions said that DACA "denied jobs to hundreds of thousands of Americans by allowing those same jobs to go to illegal aliens." *See* Sessions Remarks on DACA, *supra* note 38.

DHS to fabricate the request, Attorney General Sessions confirmed that he was "eager to assist," and the DOJ finally provided the "request" for the citizenship question. *Id.* When, as decided a year earlier, Secretary Ross publicly announced his decision to add a citizenship question to the 2020 Census, President Trump informed his supporters that he had "officially mandated that the 2020 United States Census ask people living in America whether or not they are citizens," Senteno Decl., Ex. M (CNN news article), but made no mention of the VRA enforcement pretext. *Id*.

Defendants present no evidence to rebut the above, *see* Defs.' Mem. at 25, 27, and completely ignore the evidence showing that Secretary Ross was not the only decisionmaker and that the only plausible explanation for the addition of the citizenship question to the 2020 Census was the conspirators' discriminatory objective to exclude immigrants from apportionment and create a disproportionate undercount of communities of color and immigrant communities, *see supra* Section II. They have failed to meet their burden of pointing to evidence that "foreclose[s] the possibility of the existence of certain facts from which 'it would be open to [the trier of fact] . . . to infer from the circumstances' that there had been a meeting of the minds," *Anderson*, 477 U.S. at 249, and denial of their motion is therefore warranted.

V. DEFENDANTS FAIL TO ESTABLISH COMPLIANCE WITH THE APA SUCH THAT THEY ARE ENTITLED TO SUMMARY JUDGMENT

The APA provides that courts must "hold unlawful and set aside" agency action that is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;" "in excess of statutory jurisdiction, authority, or limitations;" or "without observance of procedure required by law[.]" 5 U.S.C. § 706(2)(A)-(D). In order to assess whether an agency action is unlawful, "the court shall review the whole record[.]" 5 U.S.C. § 706.

The APA requires the court to decide whether the agency articulates an explanation for

its decision and made a rational connection between the facts found and the choice made. *See Baltimore Gas & Elec. Co. v. Natural Res. Del Council*, 462 U.S. 87, 105 (1983). In so doing, the court conducts a "plenary review of the Secretary's decision, . . . to be based on the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 420 (1971), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977). However, this case presents circumstances that warrant consideration of evidence beyond the administrative record. *See Overton Park*, 401 U.S. at 420 ("But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.").[45]

Disputed material facts show that Secretary Ross's decision to add the citizenship question was arbitrary and capricious and in excess of his statutory jurisdiction and authority.

A. Defendants' Decision to Add A Citizenship Question is Arbitrary and Capricious Because the Decision Runs Counter to the Evidence and the Secretary Failed to Consider An Important Aspect of the Problem.

Secretary Ross's decision to add the citizenship question against the expert advice of the Census Bureau is arbitrary and capricious. Agency action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [made a decision that] is so implausible that it could not be ascribed to a difference of view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[45] *See also Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 188 n.4 (4th Cir. 2005 ("While review of an agency decision is usually confined to that record, there may be circumstances to justify expanding the record or permitting discovery. [ ] We review a district court's admission of extra-record evidence for abuse of discretion.") (internal citations omitted).

1. The Decision Runs Contrary to Data Provided By Census Bureau Experts Showing that the Addition of the Question Will Result in Poor Quality Data, disproportionately Impacting Noncitizens and Minorities.

Secretary Ross stated in his decision memo that his goal was to provide DOJ with "complete and accurate data," and that it was "imperative that [an] option be developed to provide a greater level of accuracy . . . ." AR 1313 at 1316. His conclusion that "Alternative D" (which combines administrative data with Census data) will "provide DOJ with the most complete and accurate CVAP data" is counter to the evidence that was presented to him in at least two ways. *Id.* at 1317. *First,* the Census Bureau found that self-response to inquiries about citizenship status are historically inaccurate for as many as a third of non-citizens respond as citizens. AR 1277 at 1284. *Second*, adding the citizenship question to the 2020 census will reduce number of people who respond. *See* AR 1308 at 1311 ("However, inclusion of a citizenship question on the 2020 Census questionnaire is very likely to reduce the self-response rate, pushing more households into [NRFU]"). Thus, by asking the citizenship question of all households, Secretary Ross ignored the evidence provided to him by the Census Bureau, and lowered the quality of the 2020 Census data.

The Secretary stated that "while there is widespread belief among many parties that adding a citizenship question could reduce response rates, the Census Bureau's analysis did not provide definitive, empirical support for that belief." AR 1313 at 1316. However, this assertion is contradicted by multiple facts presented to him. The Census Bureau found that "[i]n the period from 2013 to 2016, item nonresponse rates for the citizenship question on the mail-in questionnaires for non-Hispanic whites (NHW) ranged from 6.0% to 6.3%, non-Hispanic blacks (NHB) ranged from 12.0% to 12.6%, and Hispanics ranged from 11.6 to 12.3%. In that same period, the ISR [internet self-response] item nonresponse rates for citizenship were greater than those for mail-in questionnaires. In 2013, the item nonresponse rates for the citizenship variable

on the ISR instrument were NHW: 6.2%, NHB: 12.3% and Hispanic: 13.0%. By 2016 the rates increased for NHB and especially Hispanics. They were NHW: 6.2%, NHB: 13.1%, and Hispanic: 15.5% (a 2.5 percentage point increase)." AR 1277 at 1280; *see also* AR 8614, 8615; AR 11634 at 11639. And more generally, "[b]oth citizen and noncitizen households have lower self-response rates on the long form compared to the short form; however, the decline in self-response for noncitizen households was 3.3 percentage points greater than the decline for citizen households" in 2000 and in 2010 the decline was 5.1 percentage points greater for noncitizen households. AR 1277 at 1280. These documents not only show empirical evidence of lower response rates, but also show that those most impacted are noncitizens and minorities. And, as discussed *supra* Section II.C, Plaintiffs' experts show that lower self-responses result in undercounts.

Secretary Ross also claimed that any nonresponse could be addressed through the Census Bureau's NRFU efforts. Defs.' Memo at 12-13. But this fact, too, is not supported by the evidence. As discussed above, the addition of the citizenship question will increase the NRFU workload. *See* AR 1308 at 1311. Not only that, but the Census Bureau informed Secretary Ross that "[t]hose refusing to self-respond due to the citizenship question are particularly likely to refuse to respond in NRFU as well[.]" *Id.* The NRFU linkage rates were far lower for proxy responses than self-responses (33.8 percent vs. 93.0 percent, respectively)." *Id.*

Funding cuts resulted in fewer opportunities to test peak census operations during End-to-End Testing (also known as the Census Dress Rehearsal),[46] and the one dress rehearsal the

[46] Although Secretary Ross believes that his Lifecycle Cost Estimate has sufficient funds to address this increased NRFU workload, that is not the case. *See* AR 1313 at 1319; Abowd Decl. ¶¶ 58-60. As an initial matter, Congress has not allocated the estimated funds and has in recent years even cut back on funding for the 2020 Census. *See* Lowenthal Report at 24. This reduction

census bureau did conduct did not test the citizenship question. *See* Abowd Aug. 29 Dep. at 225:13-16. That meant that while NRFU operations were tested during the End-To-End test, these operations did not assess the impact of the citizenship question. *See* Abowd Decl. ¶ 40. And, as the Government Accountability Office (GAO) noted as recently as August 2018, the revised lifecycle cost estimate is not fully reliable due to the uncertainty and risks of the assumptions therein, even before the citizenship question was added. *See* Hulett Decl., Ex. 9, Expert Report of Terri Ann Lowenthal (Lowenthal Report) at 24. Thus, at a minimum there are disputed facts as to the efficacy of NRFU and whether Defendants will have funds and resources allocated to conduct the needed NRFU.

2. Secretary Ross Erroneously Claimed That There Was No Mechanism To Identify Individuals Harmed By The Citizenship Question.

Secretary Ross is incorrect that there is no mechanism for identifying individuals who would not respond to due to the addition of a citizenship question. *See* AR 1313 at 1317. As the empirical evidence provided by the Census Bureau demonstrates, there indeed is such a mechanism—including internal review of responses from prior decennial censuses and ACS surveys. *See* AR 1277 at 1280; *see also* AR 8614 at 8615; AR 11634 at 11639. Moreover, the Census Bureau has established procedures to determine the impact of adding a question to the census questionnaire, including response rates and data quality: a randomized controlled trial; yet no such test was performed before Secretary Ross reached his decision. *See* Abowd Decl. ¶¶ 18-19; Abowd Aug. 15 Dep. at 59-60, 83-84; Abowd Aug. 29 Dep. at 104-105; Abowd Oct. 5 Dep. at 426:3-430:12; *see also* Lowenthal Report at 15.

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in funding led to cancellation of previously planned field tests for the 2020 Census in 2017 and two of the three sites for the 2018 End-to-End Census Test. *See id.*

Such testing and evaluation has occurred whenever a new question or change has been contemplated for the past several censuses.[47] *See* Lowenthal Report at 9. Testing in prior censuses demonstrates that there are indeed mechanisms to evaluate response rates *and* that placement of a question on the decennial census questionnaire has "significant consequences for item response rates and the quality of final data[.]" *Id.* at 14. "The 2010 Census content determination process clearly demonstrates the critical importance of testing changes to existing questions or additions of new questions to a Decennial Census questionnaire, even where similar questions have been used in different census surveys, and that unanticipated consequences can result from such actions that can only be detected through testing." Hulett Decl., Ex. 10, Expert Report of Mr. John Thompson (Thompson Report) at 8. Testing the citizenship question would evaluate with better granularity the impact of the citizenship question. The decision to add a citizenship question runs counter to the evidence presented to Secretary Ross.

3. Defendants Failed To Evaluate the Citizenship Question in the Context of the 2020 Census.

"Given the importance of the Decennial Census, the Census Bureau has established extensive testing processes in order to properly assess proposed changes to the content of the questionnaire and avoid the risk of introducing undercounts or other inaccuracies into the census data." Thompson Report at 4. As such, the various examples of changes in previous censuses

[47] For example, testing for the 2000 Census short form began *eight* years prior, in 1992. *Id.* at 14. Testing included research into alternative formats and placements for the 2000 Census race and ethnicity (Hispanic origin) question, and showed that "[m]oving the Hispanic origin question immediately before the race question apparently reduce the item nonresponse rate for the Hispanic origin question substantially compared to the 1990 Census (5.4 percent versus 10.5 percent). *Id*. Similarly, for the 2010 census, a randomized control test was conducted in 2005 to "test different ways in which questions to collect data on Race and Hispanic Ethnicity could be implemented." *See* Thompson Report at 7. When the Census Bureau made the decision to add a "Middle Eastern or North African" response category to the 2020 Census, it did so only after "extensive testing had been conducted for over a decade[.]" *Id.* at 10.

discussed above exemplify the "well established process" the Census Bureau has followed when adding content to the decennial census questionnaire to ensure that it complies with, *inter alia*, multiple laws, directives, and its own Statistical Quality Standards. *See e.g.* AR 3890-91; AR 4802 at 4804; AR 9859 at 9865. But Defendants ignored these procedures arguing that the citizenship question was imported from the ACS survey and, as such had undergone "cognitive research and questionnaire testing required for new questions." AR 1313 at 1319; *see also* AR 1277 at 1279. In doing so, they "failed to consider an important aspect of the problem" in several ways. *See State Farm*, 463 U.S. at 43.

First, Defendants ignored their own findings that the citizenship question on the ACS had lowering response rates and data quality. *See* AR 1277 at1280, 1284. Indeed, the Census Bureau is planning on evaluating the efficacy of the ACS citizenship question after the 2020 Census. *See* Abowd Oct. 12 Dep. at 178-182. *Next,* and perhaps more troubling, Defendants ignored years of prior practice by failing to test new content as it had for the 2000, 2010, and even the 2020 censuses. As the testing for the 2000 Census revealed, factors such as question order and placement has an impact on response rates and data quality. *See supra* n. 49. Thus, Secretary Ross's assertion that "[t]o minimize any impact on decennial census response rates, I am directing the Census Bureau to place the citizenship question last" without any testing or basis in the evidence before him is arbitrary and capricious. AR 1313 at 1320; *see also* Lowenthal Report at 9. Furthermore, testing would have also revealed any further issues with response rates and data quality resulting from importing the citizenship question from the ACS onto the 2020 census questionnaire as it did when the Census Bureau tested the impact of importing the Ancestry question from the long form to the 2010 census questionnaire. *See* Thompson Report at 8 ("The Ancestry question tested in . . . 2005 . . . is substantially similar as the Ancestry Question

in the 2000 Census long form . . . the hypothesis that placement of the Ancestry question in the battery of questions to collect Race and Hispanic origin would improve the quality of these data did not prove to be correct.").

In addition to not testing and following the well-established process, Defendants actually attempted to skew the record by claiming that "[b]ecause no new questions have been added to the Decennial Census (for nearly 20 years), the Census Bureau did not feed [sic] bound by past precedent when considering the Department of Justices' request." AR 1286, 1296. This statement was made as part of an answer to question 31 (of 35 questions) Commerce sent to the Census Bureau: "What was the process that was used in the past to get questions added to the decennial Census or do we have something similar where a precedent was established?" *Id*. However, this statement did not originate with the Census Bureau, who had instead responded with the well-established process discussed *supra* Section V.A.2; *see also e.g.* AR 9812, 9832-33; *see also* Abowd Aug. 15 Dep. 281-282; Jarmin Dep. 211. But, in fact, "the Census Bureau considered adding two new questions to the 2020 Census, a combined race and ethnicity question and a tribal enrollment question, and a new ancestry question to the 2010 Census. All three proposals underwent significant research, testing, and stakeholder outreach and consultation before final decision on whether to add them to the 2020 and 2010 Censuses, respectively." Lowenthal Report at 18. Indeed, to date no one knows the author of this answer to question 31; the Census Bureau's original response to question 31 was changed by Commerce Deputy Counsel Michael Walsh and Senior Policy Advisor Sahra Park-Su. *See* Senteno Decl., Deposition of Sahra Park-Su at 141-143; *see also* AR 13023. But as Ms. Park-Su further testified, even their response was further changed to the version that appears in AR 1286 and released as part of the original administrative record. *Id*. at 159-160; 169.

Finally, as Dr. Abowd testified, if the Census Bureau was consulted about Secretary Ross's decision to add the citizenship question at the outset, the Census Bureau could have tested it. *See* Abowd Aug. 29 Dep. at 181:2-14. Here, the administrative record lacks adequate evidence showing why the addition of the citizenship question was not adequately tested as other new content had been tested in prior censuses. The administrative record also does not show why Defendants felt it necessary to skew the record to falsely claim that there was no prior process for adding questions to the decennial census. This court is permitted to consider evidence outside the administrative record, including fact depositions of Census Bureau employees, when the record does not disclose factors considered by the Secretary. *Overton Park*, 401 U.S. at 420; *see also United States v. Shaffer Equip. Co*., 11 F.3d 450, 460-61 (4th Cir. 1993). The Secretary's failure to adequately consider the need for testing new content renders his decision arbitrary and capricious. *State Farm*, 463 U.S. at 43.

B. Secretary Ross Failed to Disclose That His Decision to Add the Citizenship Question Was Pretextual.

An agency action must state the basis of its action or its action is arbitrary and capricious. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *see also State Farm,* 463 U.S. at 43-44. "That fundamental requirement has not been met here" where the reason given for agency action is wrong. *N.E. Coal. On Nuclear Pollution v. Nuclear Regulatory Comm'n*, 727 F.2d 1127, 1131 (D.C.Cir. 1984). Thus, when an agency says one thing but does another, it "indicates that the Secretary's stated reason my very well be pretextual." *Pub. Citizen v. Heckler*, 653 F. Supp. 1229, 1237 (D.D.C. 1986).

Secretary Ross stated that his reason to add the citizenship question was based upon DOJ's request for block level citizenship data to enforce the VRA. But as discussed in Sections II.B & C above, the "request" was extracted from the DOJ, and the reasons given for the request

are baseless and pretextual. The Secretary's decision was both arbitrary or capricious.

Defendants urge this court to disregard Secretary Ross's perfidy because "there's nothing unusual about a new cabinet secretary coming to office inclined to favor a different policy direction, soliciting support from other agencies to bolster his views, disagreeing with staff, or cutting through red tape." Defs.' Mem. at 33. But if that was the case, Secretary Ross and his staff would not have siloed Census Bureau staff as to his intentions and the Census Bureau would have had an opportunity to better assess the impact of adding the citizenship question through testing. *See* Abowd Aug. 15 Dep. at 279:11-280:13; Jarmin Dep., 400:11-401:2; *see also* Abowd Aug. 29 Dep. at 181:2-14. Secretary Ross failed to disclose the basis of decision, contrary to *Burlington Truck Lines*, 371 U.S. at 168, but he also skewed the record to render judicial review meaningless. *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 248-49 (1972) (holding that "[o]ur view is that the considerations urged here in support of the Commission's order were not those upon which its action was based."); *see also Andreas-Myers v. NASA*, No. GJH-16-3410, 2017 WL 1632410, at *4 (D. Md. Apr. 28, 2017) ("An agency may not skew the record by excluding unfavorable information or omit information simply because it did not rely on it for its final decision.") (citation and alterations omitted).

C. Secretary Ross's Decision Is in Excess of the Authority Granted To Him In Violation of the APA.

Agency action taken in excess of the statutory limitations must be set aside under the APA. *See* 5 U.S.C. § 706 (2)(c). Plaintiffs may bring suit under the APA even when no private cause of action is provided by the underlying statute. *See Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999); *see also Thompson v. United States HUD,* 348 F. Supp. 2d 398, 421-423 (D. Md. 2005) ("Statutory violations, of course, may constitute agency action 'not in accordance with law' within the meaning of the APA."). Moreover, this court has

held that Defendants are subject to judicial review under the Census Act. *See Kravitz*, 2018 WL 4005229, at *14-16. As such, any action taken by Defendants in excess of the authority granted by law is a violation of the APA.

1. Secretary Ross's Decision Does Not Comply With the Census Act.

Congress placed explicit limits on the Secretary's discretion in conducting the census. Under the Census Act, the Secretary must 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. *See* 13 U.S.C. § 141(f)(1), (2). Following the submission of each of these reports, the Secretary may alter their content when "new circumstances exist which necessitate that the subjects, types of information, or questions contained in reports so submitted be modified." *Id*. § 141(f)(3).

Defendants did not include citizenship for the decennial census questionnaire sent to all households in the list of subjects submitted to Congress. AR 194. And, Defendants provide no evidence that Secretary Ross's decision memo, his submission to Congress, or his supplemental memo set forth *any* new circumstances that necessitate the addition of the citizenship question. Enforcement of the VRA is not new, neither is redistricting, or apportionment. As such, Secretary Ross acted in excess of his statutory authority in violation of the APA. *See* 5 U.S.C. § 706(2)(c).

The Census Act also requires the Secretary to "the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required" use information from other governmental department and agencies as well as from other jurisdictions *instead of conducting direct inquiries*. 13 U.S.C. § 6 (emphasis added). The decision to go with Alternative D instead of Alternative C is in excess of limitations put upon Secretary Ross by the Census Act.

See e.g. AR 1277 at 1277, 1283.[48] *See id.* Defendants cannot point to any other credible evidence that Alternative C has less quality data and scope than Alternative D; in fact, all evidence from the Census Bureau points out that Alternative D is less accurate and more costly. *See e.g.* AR 1308-12. Finally, as discussed in Section III.C.1, Mr. Gore admitted that data from the 2020 census questionnaire is unnecessary to meet DOJ's request. *See* Gore Dep. 299:15-300:11; 422:2-17.

2. Secretary Ross's Decision Does Not Meet The Requisite Standards.

The Census Bureau is designated as a principal statistical agency.[49] To regulate the activities of federal statistical agencies like the Census Bureau, the PRA directs the Office of Management and Budget ("OMB") to issue "[g]overnment-wide policies, principles, standards, and guidelines" governing "statistical collection procedures and methods," which agencies are required to follow. *Id*. 44 U.S.C. §§ 3504(e)(3)(A), 3506(e)(4); 5 C.F.R. § 1320.18(c).[50] *Inter alia,* these OMB Statistical Policy Directives include compliance with the *Principles and Practices for a Federal Statistical Agency* issued by the Committee on National Statistics of the National Academies (CNSTAT). *Id*; *see also* Lowenthal Report at 6. CNSTAT principles include statistical independence from political and other external undue influence. *See* Lowenthal Report

[48] As the Census Bureau's analysis found, relying solely on administrative records to provide DOJ with citizenship data would "best meet DOJ's stated uses, is comparatively far less costly" than adding a citizenship question and using administrative records alone "does not increase response burden, and does not harm the quality of the census count."

[49] *See, e.g.*, Office of Mgmt. and Budget, Statistical Programs of the United States Government: Fiscal Year 2018 at 6, https://www.whitehouse.gov/wp-content/uploads/2018/05/statistical-programs-2018.pdf.

[50] *See e.g.* Office of Mgmt. and Budget, Statistical Policy Directive No. 1, Fundamental Responsibilities of Fed. Statistical Agencies and Recognized Statistical Units, 79 Fed. Reg. 71610 (Dec. 2, 2014), *available at* https://www.bls.gov/bls/statistical-policy-directive-1.pdf; Office of Mgmt. and Budget, Statistical Policy Directive No. 2, Standards and Guidelines for Statistical Surveys §§ 1.3, 1.4, 2.3 (2006), 71 Fed. Reg. 55522 (Sept. 22, 2006), *available at* https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/statpolicy/standards_stat_surveys.pdf.

at 20. As such, a statistical agency such as Defendants must avoid pressures "that seek to undermine its impartiality, nonpartisanship, and professional judgment." *Id.* at 22. But when Secretary Ross conspired to add the citizenship question and went against the professional expertise of the Census Bureau, he violated the PRA, OMB, and CNSTAT principles in violation of the APA.

VI. THERE ARE GENUINE ISSUES OF MATERIAL FACT REGARDING PLAINTIFFS CLAIM UNDER THE ENUMERATION CLAUSE

The Court found in this case and in *Kravitz* that "when the Census Bureau unreasonably compromises the distributive accuracy of the census, it may violate the Constitution." *LUPE*, 2018 WL 5885528, at *7; *Kravitz*, 2018 WL 4005229, at *13. Defendants claim that their NRFU efforts will remedy all of the deficits caused by the inclusion of a citizenship question. Defs.' Mem. at 9-10. The record contains extensive evidence to the contrary, concerning both the efficacy and funding of the NRFU plans. *See supra* Sections I.C.1., IV.A.1. Plaintiffs' expert opinions that the citizenship question will result in an uncorrectable undercount in violation of the Enumeration Clause clearly constitute evidence that establishes the existence of genuine issues of material fact sufficient to preclude summary judgement. *Benedict v. Hankook Tire Company Limited*, 295 F. Supp. 3d 632, 649 (E.D. Va. 2018).

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion to for Summary Judgment in its entirety.

Date: November 29, 2018

Respectfully submitted,

By: /s/ Burth G. Lopez

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**Pro hac vice application forthcoming*

CERTIFICATE OF SERVICE

I certify that on this 29th day of November, 2018, I caused a copy of the foregoing document to be sent to all parties receiving CM/ECF notices in this case.

/s/ Burth Lopez
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