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

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

22 Plaintiffs,

23 vs.

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

27 Defendants.
28

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

**PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS**

Date: August 10, 2018
Time: 10:00 a.m.
Judge: Honorable Richard Seeborg
Dept: 3

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INTRODUCTION

1
2 In early 2019, the U.S. Census Bureau will begin the irreversible process of publishing
3 and distributing the 2020 Decennial Census forms. As was the case with every previous
4 decennial census, the purpose of the 2020 Census will be to conduct a headcount of all persons
5 residing in the United States, regardless of citizenship status. Because census data is used for
6 federal and state legislative apportionment and funding allocations (among other uses), the data
7 collected during the 2020 Census will impact federal, state, and local policy for years to come.

8 In March 2018, U.S. Secretary of Commerce Wilbur Ross announced that he had decided
9 to add a citizenship question to the 2020 Census, marking the first time in 70 years that every
10 Census respondent will be required to disclose their citizenship status.¹ Ross initially claimed
11 that he made his decision in response to a request by the U.S. Department of Justice (“DOJ”) for
12 assistance with enforcing Section 2 of the Voting Rights Act to prevent voter discrimination. But
13 in truth, and as Ross later expressly admitted, he was the one who contacted the DOJ in the first
14 instance to solicit the DOJ’s request. The evidence gathered to date confirms that Ross did so to
15 further the Trump Administration’s anti-immigration political agenda — not for any legitimate
16 purpose.

17 Ross’s decision to add the citizenship question was arbitrary, capricious, and
18 unconstitutional. Ross decided to add the question against the recommendations of Census
19 Bureau staff and independent experts who agreed that including the question would reduce
20 response rates and increase the costs of the 2020 Census. Further, Defendants failed to
21 adequately test the potential effects of adding a citizenship question, particularly on the quality of
22 census results and the Census Bureau’s ability to conduct an actual enumeration of the United
23 States population. Adding a citizenship question to the 2020 Census will inevitably result in
24 disproportionate undercounts of minority communities — which is precisely the intended result.
25 Because Ross’s decision was a politically motivated attempt to exclude large swaths of minority

26
27 ¹ The defendants in this action are Ross, in his official capacity as Secretary of the U.S.
28 Department of Commerce; the U.S. Department of Commerce; Ron Jarmin, in his official
capacity as Acting Director of the U.S. Census Bureau; and the U.S. Census Bureau. Plaintiffs
will refer herein to the foregoing individuals and agencies collectively as the “Defendants.”

1 residents from the 2020 Census, his decision violates both the U.S. Constitution and the
2 Administrative Procedure Act and gives rise to actionable claims for which the plaintiffs in this
3 action, the City of San Jose and the Black Alliance for Just Immigration (“BAJI”) (collectively,
4 “Plaintiffs”), are entitled to judicial relief.

5 Plaintiffs bring this action to prevent the irreparable harm that will result from
6 Defendants’ decision to require all 2020 Census respondents to disclose their citizenship status at
7 a time when immigrants, legal permanent residents, and undocumented residents alike are
8 justifiably concerned about their status and security in this country. As numerous commentators
9 and experts have explained, and as the Census Bureau’s own experts have opined, substantial
10 numbers of immigrants and other members of minority communities are likely to forego
11 responding to the 2020 Census to avoid risking disclosure of their citizenship status or the status
12 of other members of their households. This will result in an undercount of the U.S. population in
13 locales with sizeable minority communities, such as the City of San Jose. And in turn, the
14 undercount will have dire consequences for the members of those communities, such as those that
15 BAJI serves.

16 In their complaint, Plaintiffs specifically and plausibly allege that Defendants’ decision to
17 add a citizenship question to the 2020 Census at the Eleventh Hour, in disregard of decades of
18 practice and expert consensus, directly interferes with their constitutional and statutory duty to
19 conduct an “actual Enumeration” of the population. As explained below, Plaintiffs have standing
20 to bring this action based on their allegations that Defendants’ conduct has caused them, and will
21 continue to cause them, concrete injuries-in-fact. Those injuries-in-fact are fairly traceable to
22 Defendants’ decision to add a citizenship question to the 2020 Census. Moreover, Plaintiffs
23 allege, and the administrative record produced to date confirms, that Ross decided to add the
24 citizenship question to the 2020 Census to oblige political influences and promote the Trump
25 Administration’s anti-immigrant agenda — not, as he claims, to help the DOJ combat voter
26 discrimination. And regardless of Defendants’ motivations, they did not conduct any testing of
27 the citizenship question before submitting the new census questionnaire to Congress for approval
28 on the eve of the statutory deadline. Whether driven by willful incompetence or improper

1 political motivation, Defendants’ arbitrary and capricious decision must be enjoined.

2 If accepted at face value, Defendants’ arguments would insulate their decisions
 3 concerning the Census from any judicial review. But “federal courts routinely resolve census
 4 disputes.” *U.S. House of Representatives v. U.S. Dep’t of Commerce*, 11 F. Supp. 2d 76, 95
 5 (D.D.C. 1998) (denying motion to dismiss complaint challenging use of statistical sampling to
 6 supplement Census head count). This case should be no different. The Administrative Procedure
 7 Act authorizes courts to set aside agency action, findings, and conclusions found to be “arbitrary,
 8 capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706.
 9 Since the Supreme Court’s historic decision in *Marbury v. Madison*, 5 U.S. 137 (1803), district
 10 courts have had the power and authority to strike down laws, statutes, and executive actions that
 11 contravene the U.S. Constitution. *United States v. Munoz-Flores*, 495 U.S. 385, 396–97 (1990)
 12 (“None of the Constitution’s commands explicitly sets out a remedy for its violation.
 13 Nevertheless, the principle that the courts will strike down a law when Congress has passed it in
 14 violation of such a command has been well settled for almost two centuries.”). Plaintiffs’
 15 challenge to Defendants’ inclusion of a citizenship question falls squarely within the purview and
 16 jurisdiction of this Court.

17 With their motion, Defendants invite the Court to relinquish its oversight of Defendants’
 18 administration of their statutory and constitutional duties in connection with the 2020 Census.
 19 The Court should decline the invitation and deny Defendants’ motion in its entirety.

20 STATEMENT OF FACTS

21 I. THE CONSTITUTIONAL, STATUTORY, AND REGULATORY FRAMEWORK 22 GOVERNING THE CENSUS

23 The U.S. Constitution mandates an “actual Enumeration” of the population once every
 24 decade to count “the whole number of persons” in each state. U.S. Const. Art. I, § 2, cl. 3, and
 25 Amend. XIV, § 2. All persons in each state, regardless of citizenship status, must be counted.
 26 Compl. ¶ 2; *Fed’n for Am. Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 567
 27 (D.D.C. 1980). The Constitution requires an “actual Enumeration” of the population for the
 28 purpose of apportioning congressional seats among the states based on their respective

1 populations. Art. I, § 2, cl. 3. Additionally, Congress, states, and municipalities such as the City
2 of San Jose rely on decennial census data for many purposes, including federal, state, and local
3 legislative districting. Compl. ¶ 32. Census data also impacts allocation to states and localities of
4 critical funding for federal benefits and infrastructure programs. *Id.* ¶¶ 33, 85.

5 Under the Census Act, 13 U.S.C. §§ 1 *et seq.* (the “Act”), Congress delegated its
6 constitutional duty to conduct the decennial census to the Secretary of Commerce (“Secretary”)
7 and the U.S. Census Bureau (“Bureau”), a federal statistical agency within the Department of
8 Commerce (“Commerce”). Compl. ¶ 29; 13 U.S.C. §§ 2, 4, 141(a). The Act expressly limits the
9 Secretary’s discretion in conducting the census, declaring it “essential” to obtain a population
10 count that is “as accurate as possible, consistent with the Constitution and laws of the United
11 States.” Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies
12 Appropriations Act of 1998, Pub. L. No. 105-119, 111 Stat. 2480-81 (1997) (codified at 13
13 U.S.C. § 141 annot.). The Act also imposes strict statutory deadlines for developing and
14 approving the content of the census questionnaire. Under § 141(f), the Secretary must submit to
15 Congress a final list of subjects to be covered in the census questionnaire at least three years
16 before the census date, and must submit a final list of specific questions two years before the
17 census date. Compl. ¶ 30; *see* 13 U.S.C. §§ 141(f)(1)–(2). Following the submission of each of
18 these reports, the Secretary has limited discretion to alter their content and may do so only if
19 “new circumstances exist which necessitate that the subjects, types of information, or questions
20 contained in reports so submitted be modified.” Compl. ¶ 30; 13 U.S.C. § 141(f)(3).

21 Other federal laws govern the specific manner in which the census must be developed and
22 conducted. Congress passed the Paperwork Reduction Act of 1995 (“PRA”) to ensure the
23 “integrity, quality, and utility of the Federal statistical system.” 44 U.S.C. § 3501(9). To regulate
24 the activities of the Bureau, the PRA directs the Office of Management and Budget (“OMB”) to
25 issue “[g]overnment-wide policies, principles, standards, and guidelines” governing “statistical
26 collection procedures and methods,” which the Bureau is required to follow. *See id.* §§
27 3504(e)(3)(A), 3506(e)(4); 5 C.F.R. § 1320.18(c). Moreover, the Bureau must “ensure the
28 relevance, accuracy, timeliness, integrity, and objectivity of [the] information collected.” 44

1 U.S.C. § 3506(e)(1).

2 The Bureau develops and tests the content, specific language, order, and layout of census
 3 questionnaires through a process consistent with prior Bureau practice, and as required by the
 4 Information Quality Act. Compl. ¶ 39; Consolidated Appropriations Act, 2001, Pub. L. No. 106-
 5 554, § 515, 114 Stat. 2763 (2000). Further, the OMB has issued government-wide Statistical
 6 Policy Directives defining the standards that agencies such as the Bureau must follow when
 7 developing survey content. Under those Directives, the Bureau must “function in an environment
 8 that is clearly separate and autonomous from the other administrative, regulatory, law
 9 enforcement, or policy-making activities within their respective Departments,” design surveys “to
 10 achieve the highest practical rates of response, commensurate with the importance of survey
 11 uses,” and test survey components to administer surveys in a way that “maximiz[es] data quality”
 12 while “minimizing respondent burden and cost.” See Compl. ¶ 40; Office of Mgmt. and Budget,
 13 Statistical Policy Directive No. 1: Fundamental Responsibilities of Federal Statistical Agencies
 14 and Recognized Statistical Units, 79 Fed. Reg. 71609 (Dec. 2, 2014); Office of Mgmt. and
 15 Budget, Statistical Policy Directive No. 2: Standards and Guidelines for Statistical Surveys, 71
 16 Fed. Reg. 55, 522, §§ 1.3, 1.4, 2.3.1 (Sept. 22, 2006).

17 Finally, the Bureau itself has issued Statistical Quality Standards that “apply to all
 18 information products released by the Bureau and the activities that generate those products” —
 19 including the decennial census. Compl. ¶ 39; Census Bureau, Statistical Quality Standards at ii,
 20 10, 18, 20 (rev. July 2013). These standards impose rigorous pretesting requirements to identify
 21 problems and test and refine data collection instruments before implementation. *Id.*

22 **II. THE BUREAU’S PREPARATIONS FOR THE 2020 CENSUS WITHOUT A**
 23 **CITIZENSHIP QUESTION**

24 The Bureau has been preparing for the 2020 Census for several years. Compl. ¶ 38.
 25 Before each decennial census, the Bureau conducts tests regarding the content, specific language,
 26 order, and layout of the census questionnaire to improve the accuracy of the enumeration. *Id.*
 27 ¶ 39. The development process and evaluation of any changes to the census questionnaire takes
 28 several years to complete. *Id.* ¶ 41. The 2020 Census has been designed and developed in an

1 iterative fashion, incorporating results from various tests conducted over the past decade. *Id.*

2 ¶ 38. No tests have included a citizenship question or gathered data on the impact of a citizenship
3 question in the context of the 2020 Census questionnaire. *Id.* ¶¶ 43, 47–48.

4 In March 2017, Defendants submitted to Congress a report of the proposed subjects
5 planned for the 2020 Census, as required by 13 U.S.C. § 141(f)(1). Compl. ¶¶ 5, 37. The
6 subjects were unchanged from the 2010 Census. *Id.* ¶ 37. Citizenship was not among the
7 subjects that Defendants had identified for the 2020 Census questionnaire. *Id.*

8 The 2018 final “dress rehearsal” for the 2020 Census, the End-to-End Census Test, was
9 already underway by the time Ross decided to add the citizenship question in March 2018. The
10 End-to-End Census Test did not include a citizenship question. Compl. ¶ 47. As a result, none of
11 the major tests for the 2020 Census have assessed the content, language, layout, or order of the
12 citizenship question on the questionnaire, or the impact that the question regarding citizenship
13 status will have on response rates and accuracy. *Id.*

14 **III. DEFENDANTS’ PRETEXTUAL AND ARBITRARY JUSTIFICATIONS FOR**
15 **ADDING A CITIZENSHIP QUESTION TO THE 2020 CENSUS**

16 Nearly nine months after the subjects for the 2020 Census had been identified, on
17 December 12, 2017, the DOJ sent a letter to the Bureau requesting the inclusion of a citizenship
18 question on the 2020 Census. Compl. ¶¶ 6, 61. The DOJ claimed that data from a citizenship
19 question would be appropriate for use in enforcing Section 2 of the Voting Rights Act (“VRA”).
20 Compl. ¶¶ 6, Ex. 1. The DOJ did not address whether or how a citizenship question would
21 impact the Bureau’s duty to capture the “actual Enumeration” of the U.S. population. *Id.*

22 On March 26, 2018, Ross issued a memorandum directing the Bureau to place the
23 citizenship question on the 2020 Census. Compl. ¶ 62, Ex. 2. Ross’s memorandum stated that
24 his rationale for including the citizenship question is that “[k]nowing how many people reside in
25 the community and how many of those people are citizens, in combination with other
26 information, provides the statistical information that helps the government enforce Section 2 of
27 the Voting Rights Act and its protections against discrimination in voting.” Compl. ¶ 63, Ex. 2.
28 Thus, unless the Court grants the relief requested in this action, the census will ask every member

1 of every household in the United States whether each person residing in that household is a
 2 citizen of the United States. Compl. ¶ 9. The question also will ask whether each citizen was
 3 naturalized, born “in the United States,” born “in Puerto Rico, Guam, the U.S. Virgin Islands, or
 4 Northern Marianas,” or “born abroad to U.S. citizen parent or parents.” *Id.*

5 In the March 2018 memorandum, Ross claimed that he had taken a “hard look” at the
 6 DOJ’s request (which Ross later disclosed came at Ross’s behest²), had considered all relevant
 7 facts and data, and had concluded that the “value” of a citizenship question was “of greater
 8 importance than any adverse effect that may result.” Compl., Ex. 2 at 1, 7. He determined that
 9 the best option to address the DOJ’s request was to add the ACS citizenship question to the
 10 decennial census. Compl. ¶ 64. Ross speculated that the citizenship question may not cause an
 11 undercount because “there is no information available to determine the number of people who
 12 would in fact not respond because of a citizenship question being added, and no one has identified
 13 any mechanism for making such a determination.” Compl., Ex. 2 at 5. Further, he illogically
 14 concluded that “the need for accurate citizenship data” was worth the risk of an undercount. *Id.*

15 Ross further asserted in his March 2018 memorandum that the citizenship question has
 16 been “well tested.” Compl., Ex. 2. Yet at the same time, he readily admitted that “no empirical
 17 data existed on the impact of a citizenship question on responses,” and that Commerce was “not
 18 able to determine definitively how inclusion of a citizenship question on the decennial census will
 19 impact responsiveness.” *Id.* at 3, 7. Because Defendants’ consideration of the citizenship
 20 question came so late in the census planning process, none of the census content tests or
 21 preparations for the 2020 Census contemplated inclusion of a citizenship question. Compl. ¶ 47.

22 Although Defendants refer to the citizenship question as a “reinstatement,” *see* Defs.’
 23 Mem. at 5–9, not since the 1950 Census have all U.S. residents been required to report their
 24 citizenship status as part of the decennial enumeration. Compl. ¶¶ 5, 34–35. The decennial
 25 censuses between 1960 and 2000 collected citizenship information only from a limited subset of

26 _____
 27 ² *See* Supplement to Administrative Record (Docket No. 52-1) at AR001321. The Court may
 28 take judicial notice of the Administrative Record in ruling on Defendants’ motion to dismiss. *See*
Mack v. South Bay Beer Distribs., 798 F.2d 1279, 1282 (9th Cir. 1986), *abrogated on other*
grounds by Astoria Fed. Sav. & Loan Ass’n, 501 U.S. 104 (1991).

1 the U.S. population. *Id.* And since 2005, the Bureau has collected citizenship information solely
2 through the American Community Survey (“ACS”).³ *Id.* ¶ 36. The Bureau and numerous past
3 Census Directors from both Republican and Democratic administrations have opposed adding a
4 citizenship question to the person-by-person census count, warning that such an inquiry would
5 suppress response rates and undermine the accuracy of the census. *Id.* ¶¶ 71, 80–84.

6 Plaintiffs allege several facts that further underscore the irrational, arbitrary, and
7 capricious nature of the Secretary’s decision to include a citizenship question on the 2020 Census.
8 *First*, in the over 50 years since the VRA’s enactment, the Bureau has never asked about
9 citizenship when conducting its 100% enumeration of the population. Compl. ¶ 67. Courts
10 regularly rely on ACS data rather than decennial census data to calculate “citizen voting age
11 population” in voting rights litigation. *Id.* ¶ 68. And in any event, data collected through the
12 decennial census would not provide a “reliable calculation” of “citizen voting age population”
13 because citizenship information collected decennially will quickly become outdated and less
14 reliable over the course of the subsequent decade. *Id.* ¶ 69.

15 *Second*, including the citizenship question on the decennial census actually undermines
16 the VRA’s purpose of ensuring fair representation for all communities, because it will likely deter
17 responses from non-citizens and their relatives — many of whom are members of the minority
18 populations that Section 2 of the VRA is designed to protect. Compl. ¶ 63.

19 *Third*, the detail requested by the citizenship question, concerning whether respondents
20 were citizens at birth or naturalized, or where citizens were born, can serve no purpose
21 whatsoever in the enforcement of Section 2 of the VRA. Compl. ¶ 63. Section 2 of the VRA
22 prohibits voting practices or procedures that discriminate on the basis of race, color, or
23 membership in a language minority group. A citizen, whether that person is a citizen at birth or
24 naturalized, is entitled to protection against discrimination in voting.

25 *Fourth*, Defendants have failed to identify and explain any “new circumstances” that

26 ³ Between 1960 and 2000, citizenship was asked on the long-form questionnaire sent once every
27 decade to approximately 1 in 6 households. The ACS is a separate survey that the Bureau
28 administers to a sample of the U.S. population on a monthly basis. Compl. ¶ 36. Ross decided to
import the multi-part citizenship question designed for use in the ACS directly into the 2020
Census questionnaire — without any changes and without any separate pre-testing.

1 “necessitated” this modification to the subjects that Defendants submitted to Congress in 2017, as
2 required by statute under 13 U.S.C. § 141(f)(3). Compl. ¶ 65.

3 Accordingly, including a question regarding citizenship that will lead to a systematic
4 undercount of minority populations across the United States will undermine, not advance, the
5 goals of the VRA by impairing fair representation of those groups and the states in which they
6 live. Ross’ purported reasoning for adding the citizenship question is a pretext for other unstated
7 and ulterior purposes. Compl. ¶ 70. Plaintiffs contend that Ross asked the DOJ to provide a
8 justification for adding the citizenship question.

9 **IV. THE ADDITION OF A CITIZENSHIP QUESTION AS A RESULT OF**
10 **IMPROPER POLITICAL INFLUENCES AND AGENDAS**

11 While the Bureau has spent most of the past decade preparing for a 2020 Census without a
12 citizenship question, the Trump Administration has been intent on using the census to advance its
13 anti-immigration political agenda. *See* Compl. ¶¶ 72–81. It is only now, after the Trump
14 Administration has declared an all-out war on immigrant populations, that the citizenship
15 question has been added to the 2020 Census. This is no coincidence.

16 Indeed, the partial Administrative Record that Defendants have produced to date (Docket
17 Nos. 38, 52) (the “AR”) confirms that (1) the White House demanded the inclusion of a
18 citizenship question in the 2020 Census to reduce the representation of non-citizens in Congress
19 and for other illicit purposes; (2) Ross obediently complied with the White House’s demand; and
20 (3) Ross has now changed his explanation as to how the decision to add the citizenship question
21 came about. Specifically, in July 2017, Kris Kobach, Kansas’s Secretary of State and then-
22 Deputy Chair of the Presidential Commission on Election Integrity — also known as the “Voter
23 Fraud Commission” — contacted Ross “at the direction of Steve Bannon,” the White House’s
24 Chief Strategist at the time.⁴ AR000763. In a July 2017 e-mail to Ross, Kobach complained that

25 ⁴ Kobach first came to national attention by authoring Arizona’s “Show Me Your Papers” law,
26 most of which was struck down in *Arizona v. United States*, 567 U.S. 387 (2012). Later, in
27 *League of Women Voters of United States v. Newby*, 838 F.3d 1, 13 (D.C. Cir. 2016), the D.C.
28 Circuit preliminarily enjoined action taken by the Executive Director of the Election Assistance
Commission, at Kobach’s request, to change the federal voter registration form to require
documentary proof of citizenship. And in Kansas, Kobach required documentary proof of
citizenship from those registering to vote for federal elections until the Tenth Circuit enjoined

1 the absence of a citizenship question on the Census questionnaire “leads to the problem that aliens
 2 who do not ‘reside’ in the United States are still counted for congressional apportionment
 3 purposes.” AR000764. Kobach noted that it was “essential” to add a citizenship question to the
 4 2020 Census to combat this purported “problem.” *Id.* Kobach proposed the precise citizenship
 5 question language that Ross subsequently added to the 2020 Census form. *Id.*

6 In his June 2018 “supplement” to the AR, Ross contradicted his prior explanation and
 7 confirmed that the DOJ did not initiate the request to add a citizenship question to the 2020
 8 Census. To the contrary, after conferring with “senior Trump Administration officials”
 9 (presumably, Kobach, Bannon and others), it was **Ross** who approached the DOJ to seek its
 10 support for a citizenship question. AR001321. Although DOJ eventually requested adding the
 11 citizenship question, it did so only at Ross’s prompting, which itself was done at the White
 12 House’s behest.

13 On March 26, 2018, Ross issued a memorandum confirming the addition of a citizenship
 14 question to the 2020 Census, setting aside decades of practice regarding the decennial census,
 15 defying the advice of his own and other experts, and using the 2020 Census to promote the anti-
 16 immigrant and voter suppression agenda of the Trump Administration. Compl. ¶ 62, Ex. 2.

17 **V. THE HARM TO PLAINTIFFS RESULTING FROM A CITIZENSHIP QUESTION**
 18 **THAT WILL CAUSE A DISPROPORTIONATE UNDERCOUNT**

19 As alleged in the Complaint, there is compelling evidence — including studies performed
 20 by the Bureau itself and findings cited in Ross’s March 2018 memorandum⁵ — that the inclusion
 21 of a citizenship question on the 2020 Census will result in a disproportionate undercount of
 22 certain demographic groups, including immigrants, minorities, and noncitizens. Compl. ¶ 72.

23 Since at least 1980, the Bureau has recognized that, because of immigrants’ fear of how

24
 25 him from doing so. *Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016); *see also Fish v. Kobach*,
 26 294 F. Supp. 3d 1154, 1168 (D. Kan. 2018) (finding that Kobach disobeyed a preliminary
 injunction order by failing to ensure that voter registration applicants became fully registered and
 willfully failed to make sure county election officials were properly trained).

27 ⁵ Ross’s March 2018 memorandum notes that the drop-off in response rates between the long
 28 form questionnaire (which asked about citizenship) and the short form questionnaire (which did
 not) was 3.3% greater for noncitizens than for citizens in the 2000 Census. Compl., Ex. 2 at 4.

1 information disclosed on the Census may be used against them, “any effort to ascertain
2 citizenship will inevitably jeopardize the overall accuracy of the population count.” Compl. ¶ 82.
3 The Bureau’s own experts believe that adding the citizenship question may threaten the accuracy
4 and confidentiality of enumeration, jeopardize the Bureau’s nonpartisan reputation, and make the
5 2020 Census more expensive to conduct. This is especially troubling in light of the Trump
6 Administration’s proposed funding cuts, which will adversely affect the 2020 Census and thus
7 exacerbate the citizenship question’s effect on the accuracy of the census. *Id.* ¶¶ 83–84.

8 Both before and after requesting and receiving the DOJ’s December 2017 letter, Ross met
9 with a number of elected officials, stakeholders, interest groups, and experts regarding the
10 addition of the citizenship question. The AR reveals that many experts rejected the idea of adding
11 the citizenship question. *See* AR001257 (finding that the Bureau could provide the DOJ the
12 requested data through statistical sampling); AR001259 (Former Deputy Director of the Bureau
13 told Ross that the citizenship question would diminish response rates, decrease quality of
14 responses, and increase costs); and AR001276 (data firm Nielsen cautioned against adding a
15 citizenship question). Chief Scientist and Associate Director of Research and Methodology at the
16 Bureau, Dr. John M. Abowd, conducted three distinct analyses which showed that adding a
17 citizenship question will have a negative effect on the accuracy and quality of the 2020 Census
18 and likely will cause a significant decline in response rates from noncitizen households.
19 AR001277, AR001279–82. Dr. Abowd recommended alternative methods to satisfy the DOJ’s
20 concerns. AR001283. However, Ross mischaracterized and substantially ignored Dr. Abowd’s
21 findings in his March 2018 Memorandum. Compl., Ex. 2.

22 Additionally, a disproportionate undercount in the 2020 Census will cause significant
23 harm to cities such as San Jose, which has a large immigrant population, and to residents who live
24 there. Compl. ¶¶ 85, 92. An undercount will cause California and its municipalities to lose
25 federal funding, including resources from the federal assistance programs that distribute funds on
26 the basis of decennial census-derived statistics. *Id.* Citywide, 12.6% of San Jose’s population
27 lives below the poverty line. *Id.* ¶ 86. Many San Jose residents rely on federally funded benefits
28 for their livelihoods. *Id.* ¶ 87. And San Jose will lose millions of dollars in federal funding for

1 public health, education, transportation and neighborhood improvements on an annual basis if
2 there is an undercount of its population. *Id.* ¶ 101.

3 Further, the results of the 2020 Census likely will be inaccurate if the citizenship question
4 is included, which in turn means that apportionment of congressional seats based upon those
5 results will not account for “the whole number of persons in each state,” in violation of the
6 Fourteenth Amendment’s apportionment clause. Compl. ¶ 100. San Jose will be awarded fewer
7 seats in the U.S. House of Representatives than its population dictates. *Id.* ¶ 93.

8 The expected undercount also will harm BAJI, which advocates for minority and
9 immigrant communities, because of the drain on its resources caused by the need to divert funds
10 to educate constituents regarding the citizenship question and other programming to minimize its
11 effects. *Id.* ¶¶ 88, 94. Further, the diminished federal funding and political representation of
12 minority and immigrant communities as a result of the citizenship question directly frustrates
13 BAJI’s goal of fostering racial, economic, and social equality for Black immigrants and other
14 historically underrepresented communities. *Id.*

15 ARGUMENT

16 Each of Defendants’ arguments that Plaintiffs’ claims must be dismissed are meritless.
17 *First*, Plaintiffs have standing to challenge the Secretary’s decision because they allege facts
18 establishing concrete injury resulting from the inclusion of a citizenship question on the 2020
19 Census. *Second*, Ross’s decision regarding the content of the 2020 Census is not an inherently
20 political question committed to his unfettered discretion and is subject to judicial review. *Third*,
21 Plaintiffs plausibly allege that Defendants have violated their Constitutional duty to conduct an
22 actual “Enumeration” of the population.

23 I. LEGAL STANDARD

24 A complaint must set forth “a short and plain statement of the grounds for the court’s
25 jurisdiction,” and “a short and plain statement of the claim showing that the pleader is entitled to
26 relief.” Fed. R. Civ. P. 8(a). Under Rule 12(b)(1) of the Federal Rules of Civil Procedure,
27 Plaintiffs bear the burden of demonstrating that the Court has subject-matter jurisdiction. *See*
28 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). When a motion to dismiss attacks

1 jurisdiction under Rule 12(b)(1) on the face of the complaint, the court assumes the factual
 2 allegations in the complaint are true and draws all reasonable inferences in the plaintiff's favor.
 3 *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009).

4 To survive a Rule 12(b)(6) motion to dismiss, Plaintiffs “need only allege ‘enough facts to
 5 state a claim to relief that is plausible on its face.’” *Matrixx Initiatives, Inc. v. Siracusano*, 563
 6 U.S. 27, 45 n.12 (2011) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A
 7 claim is facially plausible “when the plaintiff pleads factual content that allows the court to draw
 8 the reasonable inference that the defendant is liable.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 9 (2009). This court “must accept as true all of the factual allegations contained in the complaint.”
 10 *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

11 **II. PLAINTIFFS HAVE STANDING TO CHALLENGE DEFENDANTS’ INCLUSION**
 12 **OF A CITIZENSHIP QUESTION ON THE 2020 CENSUS.**

13 To allege standing, Plaintiffs must state facts sufficient to demonstrate that they “(1)
 14 suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant,
 15 and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136
 16 S. Ct. 1540, 1547 (2016) (citing *Lujan*, 504 U.S. at 560–61); *see also Fair Housing of Marin v.*
 17 *Combs*, 285 F.3d 899, 905 (9th Cir. 2002) (finding direct organizational standing where a
 18 nonprofit “showed a drain on its resources from both a diversion of its resources
 19 and frustration of its mission”); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982)
 20 (organizational standing requires a personal stake in the outcome of the controversy).

21 Defendants base their standing challenge only on the first and second prongs. However, a
 22 plaintiff’s “general factual allegations of injury resulting from the defendant’s conduct” are
 23 sufficient to establish standing at the pleading stage, and courts “must ‘presume that general
 24 allegations embrace those specific facts that are necessary to support the claim.’” *Circle Click*
 25 *Media LLC v. Regus Management Group LLC*, No. 3:12-CV-04000-SC, 2015 WL 6638929, at *4
 26 (N.D. Cal. Oct. 30, 2015) (quoting *Lujan*, 504 U.S. at 561). Here, San Jose and BAJI have
 27 alleged specific facts regarding their respective injuries-in-fact that are fairly traceable to
 28 Defendants’ decision to add a citizenship question to the 2020 Census.

1 **A. Plaintiffs have plausibly alleged that adding a citizenship question to the**
 2 **2020 Census will cause Plaintiffs multiple, non-speculative injuries.**

3 To establish an injury in fact, Plaintiffs must allege an invasion of a legally protected
 4 interest that is “concrete and particularized” and “actual or imminent, not conjectural or
 5 hypothetical.” *Spokeo*, 136 S. Ct. at 1548. Allegations of a “future injury” can satisfy this prong
 6 “if the threatened injury is ‘certainly impending,’ or there is a ‘substantial risk’ that the harm will
 7 occur.” *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Clapper v.*
 8 *Amnesty Int’l USA*, 568 U.S. 398, 409, 414 n.5 (2013)). Here, Plaintiffs allege — and
 9 Defendants’ own findings support — that the addition of a citizenship question will result in a
 10 disproportionate undercount of immigrants and those residing in immigrant communities.

11 1. Plaintiffs assert plausible facts — including Defendants’ own findings —
 12 that establish that the addition of a citizenship question will result in a
 13 disproportionate undercount.

14 In arguing that Plaintiffs’ allegations are merely conjectural, hypothetical, and speculative,
 15 *see* Defs.’ Mem. at 13, Defendants wholly ignore findings ***from their own studies*** providing that
 16 “any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the
 17 population count.” *FAIR v. Klutznick*, 486 F. Supp. at 568 (discussing the Bureau’s
 18 representations that citizenship questions inevitably trigger hostility, resentment, and refusal to
 19 cooperate in minority communities); Compl. ¶ 82. Indeed, the Bureau itself has definitively
 20 concluded that adding a citizenship question to the decennial census will result in an undercount
 21 of immigrant communities. Compl. ¶¶ 71–72, 80–83. Further, the Census Scientific Advisory
 22 Committee — the Bureau’s own advisory body — has concluded that the decision to add the
 23 citizenship question was based on flawed logic and may threaten the accuracy and confidentiality
 24 of enumeration, make the census more expensive to conduct, and jeopardize the Bureau’s
 25 nonpartisan reputation. Compl. ¶ 83. The Bureau further has concluded that there is “an
 26 unprecedented ground swell in confidentiality and data sharing concerns, particularly among
 27 immigrants or those who live with immigrants,” and that these concerns “may present a barrier to
 28 participation in the 2020 Census.” Compl. ¶ 80. The Bureau also has reported heightened

1 concerns and fears about questions regarding citizenship and immigration status on the census in
 2 light of anti-immigrant political rhetoric from the current Administration, including President
 3 Trump’s repeated calls to deport undocumented immigrants without due process. Compl. ¶ 81;
 4 Donald J. Trump (@realDonaldTrump), Twitter (Jun 24, 2018, 8:02 AM), [https://twitter.com/
 5 realDonaldTrump](https://twitter.com/realDonaldTrump).

6 Notably, Defendants do not dispute or even address in their Motion to Dismiss the
 7 numerous findings that the citizenship question will cause an increased undercount during the
 8 2020 Census. And while Defendants argue in their Motion that Plaintiffs’ allegations of
 9 decreased response rates are speculative, Ross confirmed in sworn testimony before Congress as
 10 recently as May 10, 2018 that the Bureau itself estimates that response rates will decline by 1%
 11 overall as a result of the citizenship question.⁶ *Senate Appropriations Committee, Commerce,
 12 Justice, Science and Related Agencies Subcommittee Hearing on the F.Y. 2019 Funding Request
 13 for the Commerce Department*, 115th Cong. 26 (May 10, 2018). The impact on majority-
 14 minority jurisdictions such as San Jose likely will be much greater.

15 In addition to Defendants’ concessions, Plaintiffs sufficiently plead facts regarding the
 16 predominance of immigrants in their communities, the growing culture of fear and intimidation in
 17 the current political climate, and the deterrent effect of the citizenship question on response rates
 18 in immigrant communities. *See* Compl. ¶¶ 52–53, 55–57, 60. In any case, Defendants’ insistence
 19 on a “definitive” answer regarding the effect of the citizenship question, *see* Defs.’ Mem. at 13–
 20 14 n.5, is not appropriate under the facial plausibility standard applied at the motion to dismiss
 21 stage. As the Supreme Court recognized in *Department of Commerce v. United States House of
 22 Representatives*, 525 U.S. 316 (1999), “it is certainly not necessary for this Court to wait until the
 23 census has been conducted to consider the issues presented here, because such a pause would
 24 result in extreme — possibly irremediable — hardship.” *Id.* at 332; *see also Central Delta Water
 25 Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002) (when the injury plaintiffs face is

26 _____
 27 ⁶ In their Motion, Defendants noticeably oscillate between inconsistent positions (1) insisting that
 28 the citizenship question has been “well tested,” and (2) claiming that they are unaware of
 empirical data regarding how a citizenship question might impact response rates on the 2020
 Census. *See* Defs.’ Mem. at 6–8.

1 “difficult or impossible to remedy,” they need not wait for the irreversible harm to occur before
2 challenging the government action in court).

- 3 2. Plaintiffs have plausibly alleged that a census undercount will directly
4 harm Plaintiffs’ representational, electoral, and federal-funding interests,
5 and require an expenditure of time and resources.

6 Plaintiffs plausibly allege that decreased response rates resulting from the citizenship
7 question will cause them imminent, substantial harm, including through vote dilution, a reduction
8 of their federal funding, and the diversion of their time and resources so as to combat the effects
9 of the citizenship question. Compl. ¶¶ 85–89, 109–110. Each of these injuries is “concrete”
10 harm.

11 *First*, the Supreme Court has already held that the “threat of vote dilution” as a result of
12 procedural changes to the decennial census can be a “concrete” injury in fact that is “actual or
13 imminent, not ‘conjectural’ or ‘hypothetical.’” *Dep’t of Commerce*, 525 U.S. at 332 (quoting
14 *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). In *Department of Commerce*, various U.S.
15 residents and counties challenged Commerce’s plan to use statistical sampling in the 2000 Census
16 to address the “chronic and apparently growing problem of ‘undercounting’ certain identifiable
17 groups of individuals,” including certain minorities. *Id.* at 320, 322. The plaintiffs alleged that
18 such sampling would result in vote dilution on the state and local levels because of (1) subsequent
19 re-apportionment of state representatives based on federal decennial census population data; and
20 (2) the use of federal decennial census data for intrastate legislative redistricting. *See id.* at 330–
21 34. Applying the summary judgment standard, the Court found that plaintiffs’ expected loss of
22 representation “undoubtedly satisfie[d] the injury-in-fact requirement of Article III standing.” *Id.*
23 at 331. The Court reasoned that “voters have standing to challenge an apportionment statute
24 because ‘they are asserting a plain, direct and adequate interest in maintaining the effectiveness of
25 their votes.’” *Id.* at 331–32 (quoting *Baker v. Carr*, 369 U.S. 186, 208 (1962)).

26 Likewise here, Plaintiffs allege that they will be “disproportionately affected” by the
27 census undercount as it relates to their representation. Compl. ¶¶ 92, 114. The impact of adding
28 a citizenship question to the census will disproportionately impact San Jose because of its large

1 immigrant population vis-à-vis other municipalities. Compl. ¶¶ 49–51, 92–93, 114. Further, 40%
2 of San Jose’s population was born outside the United States and as much as 17% of its population
3 consists of undocumented immigrants, ranking it among the twenty metropolitan areas of the
4 United States with the largest number of undocumented immigrants. Compl. ¶¶ 19, 51. Given
5 the significant size of San Jose’s immigrant population, an undercount impacts San Jose’s
6 political representation on the national, state, and local levels.

7 San Jose, which spans California’s 17th, 18th, and 19th congressional districts, has three
8 representatives in the U.S. House of Representatives. As required by the California Constitution,
9 California’s State Senate also relies on the census enumeration as the population base for
10 intrastate redistricting. *See* Cal. Const. art XXI, § 1. San Jose spans three state-level districts,
11 and is currently represented by three State Senators. Disproportionately low response rates
12 resulting from a citizenship question on the census could decrease the enumeration counts for San
13 Jose and its immediate surrounding area⁷ below the level required to maintain its three
14 congressional seats and three State Senate seats. Thus, Plaintiffs plausibly allege that an
15 undercount of San Jose’s large immigrant community because of the citizenship question
16 threatens to decrease their political representation. Such voter dilution is a concrete injury. *See*
17 *Dep’t of Commerce*, 525 U.S. at 332. Further, Defendants’ contentions that Plaintiffs do not take
18 into consideration undercounts of other states is simply not accurate as the Complaint alleges with
19 specificity the disproportionate harm the citizenship question will cause San Jose because of the
20 size of its immigrant populations.

21 *Second*, Defendants do not dispute that federal funding is impacted by census data. *See*
22 *Wisconsin v. City of New York*, 517 U.S. 1, 5–6 (1996); *City of Los Angeles v. U.S. Dep’t of*
23 *Commerce*, 307 F.3d 859, 864 (9th Cir. 2002) (Congress, states, and municipalities rely on census
24 data for many purposes including allocation of federal funding). Courts have concluded that a
25 city can satisfy standing requirements by alleging that a census undercount would “result in a loss
26 of federal funds.” *See e.g.*, *City of Detroit v. Franklin*, 4 F.3d 1367, 1374 (6th Cir. 1993); *Carey*

27 _____
28 ⁷ Santa Clara County, in which San Jose resides, has also raised concerns about the impact that
the citizenship question will have on response rates. Compl. ¶ 57.

1 v. *Kluznitz*, 637 F.2d 834, 836, 838 (2d Cir. 1980); *Chief Probation Officers of Cal. v. Shalala*,
 2 No. C-95-4644 DLJ, 1996 WL 134890, at *3 (N.D. Cal. Mar. 14, 1996). Plaintiffs repeatedly
 3 assert in their Complaint that an undercount will result in annual losses of millions of dollars⁸ in
 4 federal funds relied upon by San Jose, its residents, and the minority and immigrant communities
 5 that BAJI serves. *See e.g.*, Compl. ¶¶ 11–12, 32–33, 49, and 85–88. Contrary to Defendants’
 6 allegation that Plaintiffs’ claim of loss of funding lacks specificity as to which programs are at
 7 issue, Plaintiffs identified numerous specific federal funding streams that are dependent on census
 8 data, including funding for Medicaid, Medicare Part B, the Supplemental Nutrition Assistance
 9 Program, the State Children’s Health Insurance Program, and the Highway Planning and
 10 Construction Program. Compl. ¶ 33. Courts have concluded that a city can satisfy standing
 11 requirements by alleging that a census undercount would “result in a loss of federal funds.”

12 *Third*, Defendants’ reliance on *La Asociacion de Trabajadores de Lake Forest v. City of*
 13 *Lake Forest* 624 F.3d 1083, 1088 (9th Cir. 2010) is misplaced. In *La Asociacion*, the
 14 organization-plaintiff ***made no attempt*** to allege organizational standing in its complaint.
 15 Whereas, BAJI pleads organizational standing with specificity. Compl. ¶ 23 (discussing in detail
 16 the diversion of BAJI’s essential and limited resources, including time and money, to address and
 17 counteract the harmful effect of the inclusion of a citizenship question into the 2020 Census).

18 Defendants then incredulously argue that there is no connection between BAJI’s goal of
 19 fostering racial, economic, and social equality for Black immigrants and other historically
 20 underrepresented communities, and a census citizenship question that will disproportionately
 21 depress the response rates of immigrant communities and thus their political representation and
 22 federal funding. Yet the Bureau partnered with BAJI just two years ago to discuss possible
 23 changes to the 2020 Census questionnaire and the impact of its questions on the very community
 24 that BAJI serves. Compl. ¶ 42. As alleged in the Complaint, this meeting “was an extension of
 25 BAJI’s efforts to bolster federal funding for historically undercounted and under-resourced

26 _____
 27 ⁸ Even minimal loss of federal funding is sufficient to establish standing. *See Backus v. General*
 28 *Mills, Inc.*, 122 F. Supp. 3d 909, 919 (N.D. Cal. 2015) (“The injury may be minimal . . . an
 identifiable trifle is sufficient to establish standing.” (alteration in original) (internal quotation
 marks omitted) (citing *Preminger v. Peake*, 552 F.3d 757, 763 (9th Cir. 2008))).

1 minority and immigrant communities.” *Id.* ¶ 59. Thus, Defendants’ claim that BAJI’s mission is
 2 “fairly far afield from the context of a census questionnaire,” Defs.’ Mem at 17, is undermined by
 3 the Bureau’s own conduct and falls short of disproving BAJI’s organizational standing.

4 Further, Plaintiffs’ showing that they chose to divert critical resources to counteract
 5 Defendants’ actions in an attempt to minimize the harmful effects of a citizenship question on the
 6 census is directly analogous to the Supreme Court’s holding in *Havens Realty Corp.* There, the
 7 plaintiffs satisfied the standing requirement by alleging: “Plaintiff HOME has had to devote
 8 significant resources to identify and counteract the defendant’s [sic] racially discriminatory
 9 steering practices.” *Havens Realty Corp.*, 455 U.S. at 378–79. Both San Jose and BAJI plead in
 10 much greater detail the ways in which their time and resources will be — and already have been
 11 — diverted as a result of the addition of a citizenship question to the census. *See e.g.*, Compl. ¶¶
 12 12, 23, 58, 60, 94, 110.

13 **B. Plaintiffs’ injuries are fairly traceable to the challenged action because the**
 14 **two are linked together by a strong causal chain.**

15 Defendants cannot reasonably dispute that Plaintiffs’ injuries are “fairly traceable” to the
 16 challenged action. To meet the causation element of standing, plaintiffs must allege their injuries
 17 are “fairly traceable to the challenged action of the defendant[s], and not the result of the
 18 independent action of some third party not before the court.” *Bennett v. Spear*, 520 U.S. 154, 167
 19 (1997). However, the fact that “the harm to [plaintiffs] may have resulted indirectly does not in
 20 itself preclude standing.” *Warth v. Seldin*, 422 U.S. 490, 504 (1975). Causation may be found
 21 even if there are multiple links in the chain connecting the defendants’ unlawful conduct to the
 22 plaintiffs’ injuries; there is no requirement that the defendants’ conduct comprise the last link in
 23 the chain. *See Bennett*, 520 U.S. at 168–69. “[W]hat matters is not the length of the chain of
 24 causation, but rather the plausibility of the links that comprise the chain.” *Mendia v. Garcia*, 768
 25 F.3d 1009, 1012–13 (9th Cir. 2014).

26 Here, Plaintiffs easily meet their burden at this stage of the litigation by alleging a causal
 27 chain plausibly linking the challenged action to their injuries. *Bennett*, 520 U.S. at 168 (“on a
 28 motion to dismiss we presum[e] that general allegations embrace those specific facts that are

1 necessary to support the claim”). Plaintiffs have specifically alleged that Defendants’ addition of
2 the citizenship question to the 2020 Census will exacerbate nonresponse rates among minority
3 and immigrant communities, resulting in an increased undercount of these populations and
4 attendant injuries in the form of lost representation, foregone federal funding, and diversion of
5 resources. Compl. ¶¶ 1, 10–12, 20, 23, 49, 58, 60, 83, 85–89, 92–94, 99–102, 109–110, 114.

6 Defendants wrongly contend that Plaintiffs’ injuries are not “fairly traceable” to Ross’s
7 decision because they will be, in part, attributable to the “independent actions of third parties.”
8 Defs.’ Mem. at 13. Defendants claim that Plaintiffs lack standing because their injuries will
9 result from the “failure [of individuals] to respond” to the 2020 Census. *Id.* at 18. This baseless
10 argument rests on a non-existent requirement that Defendants’ conduct be the very last step in the
11 chain of causation. *See Bennett*, 520 U.S. at 168; *see also Attias v. Carefirst, Inc.*, 865 F.3d 620,
12 629 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 981 (2018) (“Article III standing does not require
13 that the defendant be the most immediate cause, or even a proximate cause, of the plaintiffs’
14 injuries; it requires only that those injuries be ‘fairly traceable’ to the defendant.”).

15 Plaintiffs plausibly allege facts showing that the Defendants’ unlawful conduct “is at least
16 a substantial factor motivating the third parties’ actions,” thereby establishing a sufficiently causal
17 chain connecting the following: (1) Defendants’ decision; (2) the decision of individuals to not
18 respond to the 2020 Census; and (3) Plaintiffs’ injuries. *Mendia*, 768 F.3d at 1013 (quoting *Tozzi*
19 *v. U.S. Dep’t of Health & Human Servs.*, 271 F.3d 301, 308 (D.C. Cir. 2001)); *accord San Luis &*
20 *Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1171 (9th Cir. 2011). Statistical experts
21 and Defendants’ own reports have confirmed that the addition of the citizenship question will
22 chill response rates within minority and immigrant communities in light of the Trump
23 Administration’s heightened anti-immigrant rhetoric and near-constant declarations of anti-
24 immigrant policies. Compl. ¶¶ 6, 10, 71–73, 80–83.

25 The existence of other factors which may also deflate response rates does not detract from
26 the fact that Plaintiffs plausibly allege that the addition of the citizenship question will *exacerbate*
27 nonresponse rates. Additionally, the Bureau itself has made representations to federal courts
28 acknowledging the plausibility of this casual chain. *Id.* ¶ 82; *FAIR*, 486 F. Supp. at 568

1 (“[A]ccording to the Bureau any effort to ascertain citizenship will inevitably jeopardize the
2 overall accuracy of the population count.”). It is evident that Plaintiffs have made a showing
3 without relying on “speculation” or “guesswork” about third parties’ motivations. *Clapper*, 568
4 U.S. at 413.

5 Further, it is of no consequence whether the decisions of individuals to not respond to the
6 2020 Census are subject to legal penalties or are irrational in the eyes of Defendants.⁹ *See, e.g.*,
7 *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462–63 (1958) (holding that violence
8 against NAACP members by private third parties did not defeat the causation element of
9 standing); *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (holding “irrational” reactions of
10 the public leading to depressed sales did not defeat the causation element of standing in suit
11 challenging Department of Justice’s classification of three films as “political propaganda”).

12 Defendants cite *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1228
13 (9th Cir. 2008), for the proposition that unlawful acts of independent third parties break the chain
14 of causation. But *Salmon Spawning* does not stand for that proposition and is inapplicable in any
15 event. There, the Ninth Circuit did not rely at all on the unlawful nature of the injurious act;
16 rather, the court held that the alleged injury (excessive salmon harvesting) was not traceable to
17 the United States’ failure to withdraw from the Pacific Salmon Treaty or its failure to ask
18 Canadians to take additional conservation measures. *Id.* The court reasoned that “if the United
19 States withdrew [from the Treaty], the harvesting of listed species would arguably increase
20 because the Treaty set abundance-based limits on the Canadians’ take,” and that Canada “could
21 . . . refuse to accommodate the United States’ request.” *Id.* Accordingly, the plaintiff’s
22 allegations relied on an “attenuated chain of conjecture insufficient to support standing.” *Id.* No
23 such “attenuated chain of conjecture” exists here.

24 ⁹ While it would certainly be unlawful for the Bureau to disclose personally identifiable
25 information — including citizenship status — collected through the 2020 Census to law
26 enforcement or immigration authorities, *see* 13 U.S.C. § 9, fears of such government
27 collaboration are corroborated by the Bureau’s “prominent role in the relocation of 120,000
28 residents of Japanese ancestry to detention camps” at the outset of the United States’ entry into
World War II. Steven A. Holmes, *Report Says Census Bureau Helped Relocate Japanese*, N.Y.
Times (Mar. 17, 2000), <https://www.nytimes.com/2000/03/17/us/report-says-census-bureau-helped-relocate-japanese.html>. With that backdrop, widespread refusal to respond to the 2020
Census can hardly be considered “irrational.”

1 In sum, both San Jose and BAJI satisfy Article III’s standing requirement because they
2 plausibly allege that decreased response rates resulting from the addition of a citizenship question
3 will imminently cause them substantial, concrete injuries that are fairly traceable to Defendants’
4 conduct. Notably, if this Court finds that San Jose has standing, it need not reach a decision
5 regarding BAJI’s standing for this case to proceed, and vice versa. *See Carey v. Population*
6 *Services Int’l*, 431 U.S. 678, 682 (1977) (where multiple plaintiffs join in asserting the same
7 claim, if one plaintiff has standing, the court need not decide the standing of the other
8 plaintiffs); *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993) (same).

9 **III. PLAINTIFFS’ CLAIMS DO NOT POSE A POLITICAL QUESTION EXEMPT**
10 **FROM JUDICIAL REVIEW.**

11 Contrary to Defendants’ meritless arguments, Plaintiffs’ claims do not pose a political
12 question that is exempt from judicial review. Defs.’ Mem. at 19–23. Defendants cite three
13 factors, set forth in *Baker v. Carr*, 369 U.S. at 217, which they contend render Plaintiffs’ claims
14 nonjusticiable. None of those factors precludes the Court’s adjudication of any of Plaintiffs’
15 claims in this action.

16 First, the Enumeration Clause does not “textually commit” the “manner” of conducting
17 the census solely to the discretion of Congress, while only permitting the “person-by-person
18 headcount of the population” to be subject to judicial review. Second, the Supreme Court has set
19 forth a judicially manageable “reasonableness” standard against which to judge Defendants’
20 decision-making regarding the content of the census. Plaintiffs’ challenge to the citizenship
21 question does not present one of the rare and extraordinary cases in which the judicial branch is
22 precluded by the political question doctrine from fulfilling its role in our constitutional system of
23 checks and balances. *See U.S. Dep’t of Commerce v. Montana*, 503 U.S. 442, 458 (1992)
24 (finding constitutionality of Congress’s selection among alternative methods of apportionment is
25 “well within the competence of the Judiciary”).

26 Ross does not have unlimited, unreviewable discretion to conduct the census however he
27 chooses, even where such conduct violates constitutional commands, runs afoul of statutory and
28 regulatory constraints, breaches agency standards, and is driven by improper political motivations

1 as alleged by Plaintiffs.

2 **A. The Constitution does not textually commit the conduct of the census to the**
 3 **exclusive authority of Congress.**

4 To bar review under the political question doctrine, a constitutional delegation of authority
 5 must clearly vest discretion in a political branch “and nowhere else.” *See, e.g., Nixon v. United*
 6 *States*, 506 U.S. 224, 229 (1993) (holding that Article I, § 3 cl. 6 effected a textual commitment
 7 because it vested “sole” authority over impeachment in the Senate). A case or issue that
 8 “touches” on a power delegated to another branch is not necessarily beyond judicial review.
 9 *Baker*, 369 U.S. at 211; *see also Corrie v. Caterpillar*, 503 F.3d 974, 982 (9th Cir. 2007), citing
 10 *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986): (“We will not find a
 11 political question ‘merely because a decision may have significant political overtones.’”). The
 12 first *Baker* factor does not render Plaintiffs’ claims unreviewable.

13 Defendants argue that the portion of the Enumeration clause “in such Manner as
 14 [Congress] shall by law direct” establishes a “textually demonstrable constitutional commitment”
 15 to Congress of unreviewable discretion over the content of the census. Defs.’ Mem. at 19–21
 16 (quoting *Baker*, 369 U.S. at 217). Defendants concede that the Enumeration Clause requires “a
 17 decennial, person-by-person headcount of the population,” which presents “a judicially
 18 cognizable question that courts have routinely answered.” Defs.’ Mem. at 19. Yet, Defendants
 19 argue that the “manner” of conducting the census, including the content of the census form,
 20 presents a nonjusticiable political question reserved for Congress. *Id.* Tellingly, Defendants do
 21 not cite a single case in support of their argument. Defendants fail to cite case law because there
 22 is no support for Defendants’ theory that only some Enumeration Clause challenges to the census
 23 are subject to judicial review while Plaintiffs’ claims are nonjusticiable.

24 Courts have uniformly held that the Enumeration Clause does not textually commit
 25 exclusive, non-reviewable control over the census to Congress. All the Enumeration Clause
 26 “does is impose on Congress the responsibility to provide for the taking of a decennial census. It
 27 does not say that Congress and Congress alone has the responsibility to decide the meaning of,
 28 and implement, Article 1, Section 2, Clause 3.” *Young v. Klutznick*, 497 F. Supp. 1318, 1326

1 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981); *State of Texas v.*
2 *Mosbacher*, 783 F. Supp. 308, 312 (S.D. Tex. 1992) (although the Constitution granted Congress
3 the exclusive power to determine the manner of the census, there was no indication that the
4 actions were non-reviewable); *City of Willacoochee v. Baldrige*, 556 F. Supp. 551, 557 (S.D. Ga.
5 1983) (“[T]he Court finds no support for the argument that the Framers intended that all aspects
6 of the conducting of the census be exclusively within the province of Congress and exempt from
7 judicial review.”).

8 Defendants argue that challenges as to “whom to count, how to count them, [and] where
9 to count them,” pertain to the “actual Enumeration” clause, while Plaintiffs’ claims regarding the
10 content of the census form relate to the “manner” in which the actual Enumeration is done. Defs.’
11 Mem. at 19. Defendants’ strained parsing of the Enumeration clause fails for several reasons.
12 First, there is no distinction between the “manner” of conducting an “actual Enumeration” and
13 technical considerations of “whom to count, how to count them, [and] where to count them,”
14 which Defendants concede are subject to judicial review. The content of the census form falls
15 under “the method, as opposed to the fact, of enumeration.” *See Quon v. Stans*, 309 F. Supp. 604,
16 605 (N.D. Cal. 1970) (evaluating whether the Census Director’s decision to require respondents
17 to mail-back census forms was made “in a manner not irrational, arbitrary, or capricious”); *see*
18 *also Prieto v. Stans*, 321 F. Supp. 420, 421 (N.D. Cal. 1970) (denying the Census Bureau’s
19 motion to dismiss the plaintiffs’ claim that the short-form census questionnaire would lead to an
20 inaccurate enumeration where it did not offer an option for Mexican-Americans to self-identify).

21 Second, Defendants’ proposed interpretation is inconsistent with decades of precedent in
22 which challenged census procedures have been considered part of the “manner” in which the
23 census was conducted. *See Utah v. Evans*, 536 U.S. 452, 474 (2002) (holding that the use of
24 “hot-deck” imputation to infer information about certain addresses was permissible under the
25 Enumeration Clause as conferred by the “in such Manner” language); *Wisconsin*, 517 U.S. 1, 17
26 (upholding the Secretary’s decision not to use a post-enumeration survey as part of Congress’s
27 delegation of its broad authority to “conduct the census ‘in such Manner as they shall by Law
28 direct”); *Franklin v. Massachusetts*, 505 U.S. 788, 803–807 (1992) (upholding the Secretary’s

1 manner of counting federal employees serving abroad).

2 Third, Plaintiffs clearly challenge “how” the Secretary has chosen to count the population
3 — by using an untested questionnaire that demands the citizenship status of every household
4 member. Ross’s decision runs afoul of the “actual Enumeration” requirement because his
5 conduct will lead to a disproportionate undercount of the population. Compl. ¶¶ 90–98. There is
6 no support for Defendants’ argument that the content of a census questionnaire is shielded from
7 judicial review because it is “textually committed” solely to Congress.

8 **B. The Supreme Court has set forth manageable standards that allow the Court**
9 **to review Defendants’ manner of conducting the census.**

10 The second and third *Baker* factors also do not preclude judicial review. The Secretary’s
11 “manner” of conducting the census, including adding a citizenship question, is constrained by the
12 Constitution, statute, and agency policies. Courts are fully equipped to review Ross’s decision to
13 add a citizenship question without making policy determinations outside the scope of their
14 constitutional authority. *See Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 823 (9th Cir.
15 2017) (no political question where court is asked to review process employed by the Government,
16 not to pass judgment on the wisdom of Executive’s foreign policy or military decisions).

17 First, the applicable standard of review derives directly from the text of the Constitution.
18 To ensure equal representation for all, the Constitution, through both Article I, Section 2 and the
19 Fourteenth Amendment, explicitly requires the federal government to accurately conduct an
20 “actual Enumeration” of the people. U.S. Const. art. I, § 2, cl. 3. This language places a clear
21 duty on the Secretary and Bureau to count the “whole number of persons in each State.” U.S.
22 Const. amend. XIV, § 2. In turn, this mandate creates a “strong constitutional interest in
23 accuracy,” *Utah*, 536 U.S. at 478, including in the enumeration of non-citizens. *See FAIR*, 486 F.
24 Supp. at 567. Though broad, the Secretary’s discretion does not permit him to evade this
25 constitutional mandate.

26 The Supreme Court has held that decisions associated with the administration of the
27 decennial census must bear “a reasonable relationship to the accomplishment of an actual
28 enumeration of the population, keeping in mind the census’ constitutional purpose of

1 apportioning congressional representation.” *Wisconsin*, 517 U.S. at 20 (court may review
2 Secretary’s conduct under a reasonable test even where Constitution vests Congress with
3 discretion in conducting the census); see *City of New York v. U.S. Dep’t of Commerce*, 34 F.3d
4 1114, 1129 (2d Cir. 1994), *rev’d on other grounds sub nom. Wisconsin*, 517 U.S. at 20 (“[T]he
5 federal government . . . is required to make a good-faith effort to achieve the Constitution’s plain
6 objective of equal representation for equal numbers of people.”).

7 The Constitution’s concern for accurate enumeration of all persons is made plain in light
8 of the fears that drove the drafters of the Enumeration Clause. The Clause, after all, was drafted
9 with a focus on the total population to avoid the census being used as a tool for political
10 manipulation. See *Utah*, 536 U.S. at 478; see also *id.* at 503 (Thomas, J., concurring and
11 dissenting in part) (explaining that the Framers’ “principle concern was that the Constitution
12 establish a standard resistant to manipulation”).

13 Ross exceeds the constitutional bounds of his discretion when he makes decisions that will
14 affirmatively undermine the constitutional purpose of an actual Enumeration — as Plaintiffs
15 plausibly allege he did in this case. Compl. ¶¶ 5–10. Thus, this Court may review whether Ross
16 exceeded his discretion by adding a citizenship question that will undermine the accuracy of the
17 enumeration without running afoul of the political question doctrine.

18 Defendants contend that the constitutional standard articulated by the Supreme Court is
19 inapplicable here because Plaintiffs do not challenge a “calculation methodology.” Defs.’ Mem.
20 at 22 n.9, 25. As explained above, this artificial distinction finds no support in the relevant case
21 law. The requirement of a “reasonable relationship to the accomplishment of an actual
22 enumeration” applies to the Secretary’s “conduct of the census” generally; it is not limited to the
23 Secretary’s choice of calculation methodologies. See *Wisconsin*, 517 U.S. at 19–20. There is no
24 sensible reason to read the Constitution as allowing review of calculation methodologies, while
25 exempting from review any other decision by the Secretary on how to conduct the census
26 regardless of its impact on the constitutional purpose of an accurate count.

27 Defendants contend the Secretary has unfettered discretion to make every census related
28 decision: from types of advertising and the use of different languages to the number of census

1 offices and personnel. Defs.’ Mem. at 22. Defendants are wrong. Each of the Secretary’s
 2 decisions must be reasonably related to the accomplishment of an actual enumeration. If
 3 Defendants’ interpretation were accepted, the Secretary would be free to engage in any census
 4 procedure that undermines an actual count of the population without any reasonable basis for the
 5 decision — for example by failing to advertise the census whatsoever, issuing questionnaires only
 6 in a single foreign language, intentionally discriminating against specific residents, or assigning
 7 one census taker per state. Defendants offer no logical explanation for why such arbitrary and
 8 unreasonable decisions would not be subject to judicial review, while conceding that questions
 9 regarding calculation methodologies are reviewable. Clearly, the courts may review the
 10 reasonableness of any census decision and maintain deference to the Secretary’s broad discretion.

11 Second, as described in greater detail at pp. 29–33, a robust set of statutes, regulations,
 12 and agency standards governing the collection of statistical information further constrain the
 13 Secretary’s discretion and provide judicially manageable standards for reviewing his last-minute
 14 decision to add an untested citizenship question to the census. For example, under the PRA,
 15 agencies must ensure the “accuracy” and “objectivity” of their data. 44 U.S.C. § 3506(e)(1).
 16 Further, under OMB standards issued pursuant to the PRA, the Bureau must maximize data
 17 quality, pretest surveys, and achieve the highest practical rates of response. Compl. ¶ 40.

18 In light of these detailed requirements, the Court need not “supplant a . . . decision of the
 19 political branches with the courts’ own unmoored determination.” *Zivotofsky v. Clinton*, 566 U.S.
 20 189, 196 (2012). The relevant policy determinations regarding the paramount importance of
 21 census accuracy and the procedures needed to ensure that the census is designed to achieve that
 22 goal have already been made.

23 **IV. DEFENDANTS HAVE FAILED TO REBUT THE STRONG PRESUMPTION IN**
 24 **FAVOR OF JUDICIAL REVIEW UNDER THE ADMINISTRATIVE**
 25 **PROCEDURE ACT.**

26 Defendants fail to carry their “heavy burden of overcoming the strong presumption” in
 27 favor of judicial review of administrative actions under the APA. *Bowen v. Michigan Acad. of*
 28 *Family Physicians*, 476 U.S. 667, 672 (1986). The authority endorsing judicial review is as

1 evident as the need for it is obvious.

2 Indeed, section 701(a)(2) of the APA exempts a narrow class of agency actions from
3 judicial review only where those actions are “committed to agency discretion by law.” 5 U.S.C.
4 § 701(a)(2). The Supreme Court has explained that this “narrow exception” occurs in “rare
5 instances” where “a court would have no meaningful standard against which to judge the
6 agency’s exercise of discretion such as where statutes are drawn in such broad terms that in a
7 given case there is no law to apply.” *City & County of San Francisco v. U.S. Dep’t of Transp.*,
8 796 F.3d 993, 1001 (9th Cir. 2015) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)); *see*
9 *Regents of Univ. of Cal. v. United States Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1030
10 (N.D. Cal. 2018). In determining whether an agency decision fits within this exception, courts
11 consider “the language of the statute and whether the general purposes of the statute would be
12 endangered by judicial review.” *ASSE Int’l, Inc. v. Kerry*, 803 F.3d 1059, 1068 (9th Cir. 2015)
13 (internal citations omitted). “[T]he mere fact that a statute contains discretionary language does
14 not make agency action unreviewable.” *Id.* Additionally, “[e]ven where statutory language
15 grants an agency ‘unfettered discretion,’ its decision may nonetheless be reviewed if regulations
16 or agency practice provide a ‘meaningful standard by which this court may review its exercise of
17 discretion.’” *Id.*

18 Here, in addition to the standards supplied by the Constitution described above, a
19 substantial body of requirements stemming from the Act, administrative regulations, and Bureau
20 practice also constrict the Secretary’s discretion and provide meaningful standards for judicial
21 review.

22 Undeniably, “the overall goal of the Census Act is accuracy.” *City of Los Angeles*, 307
23 F.3d at 872; *City of Willacoochee*, 556 F. Supp. at 555 (“Necessarily implicit in the Census Act is
24 the command that the census be accurate.”). Through the Act, Congress delegated its
25 constitutional duty to conduct the decennial census to the Secretary and the Bureau. 13 U.S.C. §
26 2, 4, 141(a). In doing so, Congress narrowed the Secretary’s discretion by explicitly declaring
27 that “it is essential that the decennial enumeration of the population be as accurate as possible,
28 consistent with the Constitution and laws of the United States.” 13 U.S.C. § 141 (note).

1 Moreover, the Act states that “[i]n connection with any such [decennial] census, the Secretary is
 2 authorized to obtain such other census information as *necessary*.” 13 U.S.C. § 141(a). Plaintiffs
 3 allege that the collection of citizenship information is not only unnecessary, but in fact
 4 detrimental to both “actual Enumeration” and the enforcement of the Voting Rights Act. Compl.
 5 ¶¶ 10, 61–84.

6 Furthermore, changes to the decennial questionnaire are governed by long-standing and
 7 extensive processes, which Defendants completely ignored. *See* Compl. ¶¶ 8, 38–48. Indeed,
 8 these processes — as mandated and shaped by federal statutes, administrative requirements, and
 9 Bureau practices — expressly bind the Secretary’s discretion when adding questions to the
 10 decennial census. *See ASSE Int’l, Inc.*, 803 F.3d at 1069 (recognizing that an agency’s decision
 11 may be “reviewed if regulations or agency practice provide a ‘meaningful standard’”); *Spencer*
 12 *Enters., Inc. v. United States*, 345 F.3d 683, 688 (9th Cir. 2003) (same); *Padula v. Webster*, 822
 13 F.2d 97, 100 (D.C. Cir. 1987) (“It is well settled that an agency, even one that enjoys broad
 14 discretion, must adhere to voluntarily adopted, binding policies that limit its discretion.” (citation
 15 omitted)). *See generally* Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115
 16 Mich. L. Rev. 1239, 1283 (2017) (“[A]gency action that was otherwise unreviewable becomes
 17 reviewable . . . if the agency’s discretion is limited by preexisting agency rules, including those
 18 rules that do not have the force and effect of law.”). Implicit in these multiyear-long processes is
 19 the acknowledgement that there are no do-overs when it comes to enumeration.

20 The relevant requirements here stem, in part, from the Information Quality Act, which
 21 directs the Director of the OMB¹⁰ to require federal agencies to issue guidelines for “ensuring and
 22 maximizing the quality, objectivity, utility, and integrity of information (including statistical
 23 information).” *See* Consolidated Appropriations Act of 2001, Pub. L. No. 106–554, § 515(b), 114
 24 Stat. 2763 (codified at 44 U.S.C. § 3516 note). The OMB guidelines require agencies to “design
 25 surveys to achieve the highest practical rates of response, commensurate with the importance of
 26 survey uses, respondent burden, and data collection costs, to ensure that survey results are

27 _____
 28 ¹⁰ The Director of the Office of Management Budget sets “policies, standards, and guidelines”
 that govern statistical methods across the federal government. *See* 44 U.S.C. § 3504(e)(3).

1 representative of the target population so that they can be used with confidence to inform
2 decisions” as well as pretest survey components to ensure accuracy and reliability. *See* 71 Fed.
3 Reg. 55, 522 (Sept. 22, 2006) §§ 1, 2.3.1.

4 The Bureau’s Statistical Quality Standards specify statistical quality standards for the
5 Bureau and govern the processes — from planning to collecting to analyzing and reporting — for
6 Bureau information products. *See* Bureau’s Statistical Quality Standards at i. Critically, the
7 document specifically states, “All Census Bureau employees and Special Sworn Status
8 individuals must comply with these standards.” *Id.* at ii (emphasis added). With respect to
9 questionnaire content, the Standards require pretesting in order to avoid “confusion,”
10 “misinterpretation,” and “a loss of information.” *Id.* at 12. The standards also expressly specify
11 the circumstances under which and the methods by which pretesting “must” occur. Sub-
12 Requirement A2-3.3 states that “pretesting must be performed when,” for example, “review by
13 cognitive experts reveals that adding pretested questions to an existing instrument may cause
14 potential context effects” or “an existing data collection instrument has substantive modifications
15 (e.g., existing questions are revised or new questions added).” *Id.* at 8. Additionally, pretesting
16 must verify that questions “are not unduly sensitive and do not cause undue burden.” *Id.*

17 There can be no doubt these requirements impose significant restraints on agency
18 discretion. Indeed, they manifest the Bureau’s intent to constrain its actions in a mandatory way
19 and provide ample “law to apply” for defining and enforcing the limits of the Secretary’s
20 discretion. *See Sheikh v. U.S. Dep’t of Homeland Sec.*, 685 F. Supp. 2d 1076, 1091 (C.D. Cal.
21 2009) (“[T]he Ninth Circuit . . . has clearly held that internal agency policy directives or even
22 ‘agency practice’ can supply a meaningful standard by which to review an agency’s discretionary
23 act.”). Plaintiffs allege that adding the citizenship question is in clear contravention of these
24 requirements and long-standing Bureau practice. *See* Compl. ¶¶ 41–46 (detailing the nearly
25 decade-long process by which the Bureau evaluated and eventually rejected a combined question
26 format for collecting race and ethnicity data). Accordingly, Defendants’ failure to comply with
27 these mandates may be properly reviewed under the APA. *See* 5 U.S.C. § 706(2).

28 Reviewability of the challenged action is further evident in light of the decades of

1 precedent supporting judicial review of Bureau actions. *See, e.g., Kluznitz*, 637 F.2d at 838 (“We
 2 fully recognize that there is no power to review agency action that is committed to agency
 3 discretion by law, 5 U.S.C. § 701(a)(2), but this is not one of those rare instances where that
 4 exception may be invoked.” (citation and internal quotation marks omitted)); *Dist. of Columbia v.*
 5 *U.S. Dep’t of Commerce*, 789 F. Supp. 1179, 1188 n.16 (D.D.C. 1992) (“We note in passing that
 6 there is no dispute over the ability of the court to review these actions of the Census Bureau under
 7 the Administrative Procedure Act.”); *City of New York v. U.S. Dep’t of Commerce*, 713 F. Supp.
 8 48, 53 (E.D.N.Y. 1989) (“[T]he overwhelming majority of cases considering this issue . . . have
 9 concluded that § 701(a)(2) of the APA is inapplicable to the census statute.”); *City of*
 10 *Willacoochee*, 556 F. Supp. at 555 (“At the very least, the Census Act requires that the
 11 defendants’ decisions not be arbitrary or capricious.”); *City of Philadelphia v. Klutznick*, 503 F.
 12 Supp. 663, 675 (E.D. Pa. 1992) (“To hold that the [Bureau] is not subject to judicial review is to
 13 hold that the Bureau is free to adopt any numbers, regardless of bias, manipulation, fraud or
 14 similarly grave abuse This cannot be.”); *see also City of Camden v. Plotkin*, 466 F. Supp.
 15 44, 52 (D.N.J. 1978); *Borough of Bethel Park v. Stans*, 319 F. Supp. 971, 977 (W.D. Pa. 1970);
 16 *West End Neighborhood Corp. v. Stans*, 312 F. Supp. 1066, 1068 (D.D.C. 1970).¹¹

17 Defendants’ assertion that Congress has reserved to itself the responsibility of overseeing
 18 the challenged action is flawed in view of this authority as well as the total absence of any
 19 supporting law. The fact that the Secretary is required to submit reports regarding the subjects
 20 and questions of the decennial census to Congress does not preclude judicial review. The
 21 proposition “would create an enormous exception to judicial review.” *See, e.g., Armstrong v.*

22 ¹¹ Defendants rely on *Tucker v. United States Department of Commerce*, 958 F.2d 1411, 1417–18
 23 (7th Cir. 1992), and *Senate of State of California v. Mosbacher*, 968 F.2d 974, 977–79 (9th Cir.
 24 1992), for the proposition that Plaintiffs’ action is non-justiciable. Defs.’ Mem. at 28–29. But
 25 *Tucker* was decided before (1) the Supreme Court’s holdings in *Utah* (2002), *Wisconsin* (1996),
 26 and *Franklin* (1992) that challenges to census procedures are justiciable; and (2) the enactment of
 27 the Information Quality Act and the adoption of the information quality standards detailed above.
 28 In addition, *Tucker* supports the justiciability of an action strikingly similar to the present one:
 “We might . . . have a different case if the challenge were not to the Census Bureau’s statistical
 methodology but to some categorical judgment of inclusion or exclusion argued to be in violation
 of history, logic, and common sense.” 958 F.2d at 1418. *Senate*, meanwhile, is inapposite
 because it pertains to the release of adjusted census data — not the conduct of the census. 968
 F.2d at 978 (“This action does not dispute [the conduct of the census] If it did, it would
 squarely present the controversy that other courts have wrestled with”).

1 *Bush*, 924 F.2d 282, 291–92 (D.C. Cir. 1991) (“[T]he fact that Congress retains some direct
2 oversight over [agency conduct] does not necessarily indicate an intent to preclude judicial
3 review. . . Congress exercises oversight over all agencies, gets reports from many, and is often
4 consulted by the executive branch before specific actions are taken.”).

5 Moreover, the challenged action can hardly be viewed in the same light as those truly
6 classic examples of determinations “committed to agency discretion” which involve national
7 security, as in *Webster v. Doe*, 486 U.S. 592, 603–04 (1988), or enforcement actions, as in
8 *Heckler v. Chaney*, 470 U.S. 821, 838–84 (1985). “The taking of the census is not such an area of
9 traditional deference.” *Franklin*, 505 U.S. at 818–19 (Stevens, J., concurring in part). Certainly,
10 “[t]he open nature of the census enterprise and public dissemination of the information collected
11 are closely connected with our commitment to a democratic form of government. The
12 reviewability of decisions related to the conduct of the census bolsters public confidence in the
13 integrity of the process and helps strengthen this mainstay of our democracy.” *Id.*

14 Thus, statutory purposes and text, administrative regulations, agency practices, and
15 decades of decisional law all establish the availability of meaningful and judicially manageable
16 standards for judicial review of the Secretary’s decision. Defendants have not met their “heavy
17 burden of overcoming the strong presumption” in favor of judicial review of administrative
18 actions under the APA. *Bowen*, 476 U.S. at 672.

19 **V. PLAINTIFFS HAVE ADEQUATELY STATED A CLAIM UNDER THE**
20 **ENUMERATION CLAUSE.**

21 The Constitution requires Defendants to conduct an “actual Enumeration” of “the whole
22 number of persons in each State.” Art. I § 2, Am. XIV § 2. Congress and the courts have
23 uniformly interpreted the Enumeration Clause to require not merely a “person-by-person
24 headcount” as Defendants would have it, Defs.’ Mem. at 27, but a good-faith attempt at an
25 *accurate* headcount. *City of Detroit*, 4 F.3d at 1378 (a “failure to conduct a good-faith
26 enumeration, or intentionally reducing some group’s representation or funding” would violate the
27 Enumeration Clause.”) While Congress provided the Secretary discretion to obtain “other census
28 information as necessary,” it specifically limited its grant of authority to the Secretary to methods

1 that obtain a count that is “as accurate as possible, consistent with the Constitution and laws of
2 the United States.” 13 U.S.C. § 141 (note). As argued above, the method chosen by the
3 Secretary must bear “a reasonable relationship to the accomplishment of an actual enumeration of
4 the population, keeping in mind the constitutional purpose of the census.” *Wisconsin*, 517 U.S. at
5 20. And the Second Circuit has held that the government has “the authority to gather reliable
6 statistical data reasonably related to governmental purposes.” *United States v. Rickenbacker*, 309
7 F.2d 462, 463 (2d Cir. 1962).

8 Plaintiffs concede that the Secretary has broad discretion in determining the manner in
9 which to conduct the census, subject to a strong constitutional interest in obtaining accuracy.
10 *Utah v. Evans*, 536 U.S. at 478. When Congress makes “an apparently good-faith choice of a
11 method of apportionment” that decision is likewise entitled to deference. *Montana*, 503 U.S. at
12 464. And while the Enumeration Clause “vests **Congress** with **virtually** unlimited discretion” in
13 conducting the Census, *Wisconsin*, 517 U.S. at 19 (emphasis added), Congress’s grant to the
14 Secretary is predicated on obtaining a count that is “as accurate as possible, consistent with the
15 Constitution and laws of the United States,” 13 U.S.C. § 141 note. “Virtually” unlimited
16 discretion does not mean absolute discretion, as any method chosen by the Secretary must bear “a
17 reasonable relationship to the accomplishment of an actual enumeration of the population,
18 keeping in mind the constitutional purpose of the census.” *Wisconsin*, 17 U.S. at 20.

19 While no court has set forth a minimum standard for satisfying the Enumeration Clause,
20 Plaintiffs offer the standard shaped by the Constitution and case law: in choosing the manner in
21 which to conduct the census, the Secretary must act in good-faith to ensure a proper headcount of
22 the population, and may request additional data that is “reasonably related to governmental
23 purposes.” See *Rickenbacker*, 309 F.2d 463; *Wisconsin*, 517 U.S. at 20. Defendants fail to meet
24 this standard and thus, violate their Constitutional duty.

25 Plaintiffs’ allegations survive **any** conceivable standard for an Enumeration Clause claim.
26 Plaintiffs allege Defendants added the citizenship question mere days before the final list of
27 questions was due to Congress despite contrary advice of independent experts; Defendants failed
28 to adequately test the effect of adding a citizenship question on the quality of the census results

1 and its impact on the actual enumeration of the United States population; and Defendants’
2 decision to add the citizenship question will inevitably result in undercounts of minority
3 communities. Compl. ¶¶ 47–48, 81–84. In addition, Plaintiffs allege the rationale provided by
4 Defendants “is a pretext for other unstated and ulterior purposes.” Compl. ¶ 70. On a motion to
5 dismiss, Plaintiffs’ allegations are accepted as true. *Erickson*, 551 U.S. at 94. Therefore, to
6 prevail on their Motion, Defendants must prove that a Secretary does not violate the Enumeration
7 Clause as a matter of law when he rejects the Bureau’s expert findings, fails to test census content
8 according to agency standards, and intentionally depresses the response rates of a politically
9 disfavored group by adding a question that will decrease their responses.¹² Defendants cite no
10 support for this standard.

11 None of Defendants’ cases support dismissal of the Complaint. Defendants contend the
12 Enumeration Clause only requires a census by “a person-by-person headcount, rather than
13 through estimates or conjecture.” Defs.’ Mem. at 27–28. However, the cases that Defendants
14 rely upon have the benefit of an evidentiary record demonstrating what actions the Bureau took to
15 ensure accuracy of the headcount. *See Prieto*, 321 F. Supp. at 422 (defendants presented
16 evidence demonstrating their efforts made to properly count Mexican-Americans to oppose a
17 motion for preliminary injunction and still, the court denied defendants’ motion to dismiss).
18 Notably, two of the cases upon which Defendants rely were not decided on motions to dismiss,
19 but on summary judgment or even after trial. *Utah v. Evans*, 182 F. Supp. 2d 1165, 1167 (D.
20 Utah 2001) (both parties filed motions for summary judgment based on a full record); *Wisconsin*,
21 517 U.S. at 20–24 (courts heard the complicated statistical evidence at the core of the dispute).

22 Defendants cite *Morales v. Daley*, 116 F. Supp. 2d 801, 809 (S.D. Tex. 2000), for the
23 proposition that the Enumeration Clause does not prohibit the Bureau from asking some
24 demographic data in addition to performing a population count. Defs.’ Mem. at 28–29. *Morales*
25 like *Rickenbacker*, was brought by individuals who argued that they should not be subject to

26 _____
27 ¹² Defendants have argued here and elsewhere that such a bad faith claim is not justiciable and
28 may be remedied only by Congress. But they do not argue they will still prevail if the Secretary
added the citizenship question to the 2020 Census to ensure that non-citizens and their families
would not respond.

1 criminal prosecution for refusing to answer census questions they found too intrusive. The court
2 found that “Plaintiffs have not alleged or shown, however, that the data is likely to be used to
3 discriminate against them specifically.” 116 F. Supp. 2d at 811. By contrast, Plaintiffs here have
4 alleged that including a citizenship question will cause them harm by diverting resources and
5 causing diminished representation and funding from Congress. *See* Compl. ¶¶ 85–89.

6 Finally, the historical use of a citizenship question does not favor Defendants’ position.
7 *See* Defs.’ Mem. at 28. When the Court acknowledged in *Wisconsin* “the importance of
8 historical practice in this area,” it was referring to cases that endorse using “rules that are
9 consistently applied year after year” when conducting a census. 517 U.S. at 21. The Court
10 specifically noted in *Wisconsin* that implementing a method at odds with *recent* practices
11 suggested additional scrutiny. 517 U.S. at 21 Here, adding the citizenship question would *depart*
12 from 70 years of recent historical practice. Defendant’s emphasis on earlier Census Acts such as
13 the Census Act of 1790, which required identifying slaves so that they could be counted as only
14 three-fifths of a person, highlights the inapplicability of earlier censuses when considering the
15 form of the 2020 Census. *See* Census Act of 1790, 1 Stat. 101 (1790).

16 Defendants cannot prove as a matter of law that they acted in good-faith to ensure an
17 accurate headcount of the population, or that the citizenship data they seek to obtain through the
18 2020 Census is “reasonably related to governmental purposes.” *Rickenbacker*, 309 F.2d at 463;
19 *Wisconsin*, 517 U.S. at 20. Plaintiffs plausibly allege a violation of the Enumeration Clause.

20 CONCLUSION

21 For the foregoing reasons, Defendants’ motion to dismiss should be denied in its entirety.
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Respectfully submitted,

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