

1 JOSEPH H. HUNT
Acting Assistant Attorney General
2 BRETT A. SHUMATE
Deputy Assistant Attorney General
3 JOHN R. GRIFFITHS
Director, Federal Programs Branch
4 CARLOTTA P. WELLS
Assistant Director, Federal Programs Branch
5 MARSHA S. EDNEY
Senior Trial Counsel
6 KATE BAILEY
CAROL FEDERIGHI
7 Trial Attorneys
United States Department of Justice
8 Civil Division, Federal Programs Branch
P.O. Box 883
9 Washington, DC 20044
Tel.: (202) 514-9239
10 Email: kate.bailey@usdoj.gov

11 Attorneys for Defendants

12 UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

14
15 CITY OF SAN JOSE, *et al.*,

16 Plaintiffs,

17 v.

18 WILBUR L. ROSS, JR., *et al.*,

19 Defendants.

Civil Action Nos. 3:18-cv-02279-RS

**DEFENDANTS' POST-TRIAL
PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Dept.: 3
Judge: The Honorable Richard G. Seeborg
Trial Date: January 7, 2019
Action Filed: March 26, 2018

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2 Defendants United States Department of Commerce, Wilbur L. Ross, Jr., in his official
3 capacity as Secretary of Commerce, the U.S. Census Bureau, and Dr. Steven Dillingham, in his
4 official capacity as the Director of the U.S. Census Bureau, hereby submit the following revised
5 proposed findings of fact and conclusions of law.
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7 PROPOSED FINDINGS OF FACT

8 I. Background

9 1. The Undisputed Facts, attached as Exhibit A to the Joint Pretrial Statement and
10 Proposed Order, ECF No. 125 in No. 18-2279, are hereby incorporated by reference.

11 II. Facts Relevant to Plaintiffs' Standing

12 A. Injury in Fact.

13 1. NRFU Can Mitigate a Potential Decline in Self-Response

14 2. The Census Bureau's comprehensive non-response follow-up ("NRFU") operation,
15 which includes multiple mailings, in-person follow-up visits, the use of high-quality administrative
16 records, and proxy responses from knowledgeable individuals, "can mitigate the consequences of
17 the decline in self-response with respect to the accuracy of the actual count." Tr. 798:8-12.

18 a. *Any potential decline in self-response is unknown*

19 3. Although the Census Bureau's estimate of "5.8 percent is the best available evidence
20 of the decline in the self-response rate for households that may contain a noncitizen," Tr. 859:18-
21 20, the true extent of any decline is unknown.

22 4. Dr. Barreto's testimony that the Census Bureau's own analysis supports an 11.9
23 percent drop-off in nonresponse, Tr. 487:1-488:8, is inaccurate and misleading. As Dr. Abowd
24 explained, the 11.9 percent figure referenced by Dr. Barreto is not "a reliable predictor of the likely
25 impact on self-response . . . [b]ecause it hasn't been adjusted for the confounding factors." *Id.*
26 860:7-13. On the contrary, "the 5.8 percentage point decline among households that may contain a
27 noncitizen is the best available quantitative evidence." *Id.* 861:4-6.
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1 5. A decline in self-response for a subpopulation is not necessarily associated with an
2 increase in the net undercount of that population. Tr. 917:6-10 (Dr. Abowd testimony that “a
3 substantial number of households avoid[ing] the census and refus[ing] to cooperate with
4 enumerators and NRFU” would not necessarily “lead to an increased undercount”). A decline in
5 self-response means that the non-response follow-up workload may be increased, but the Census
6 Bureau may capture all of the additional nonresponding households during NRFU and subsequent
7 imputation procedures. *Id.* 918:11-16.

8 6. Self-response rates have been steadily declining for decades. AR 162.

9 7. The Census Bureau projects an overall self-response rate in the range of 55.5% to
10 65.5%, and while it uses the midpoint (60.5%) for certain purposes, it uses the low point (55.5%)
11 for budgeting and other planning purposes. Tr. 852:5-10; 877:13-18. These projections are
12 consistent with the decades-long decline in self-response rates. AR 172.

13 8. For the 2020 decennial census, households will be given the option to complete the
14 questionnaire via the Internet or by telephone, in addition to printed questionnaires. AR 165.

15 9. The presence of a citizenship question on the 2020 census will not affect whether
16 addresses are included in the Master Address File.

17 10. Regardless how a household responds to the 2020 census, if the household simply
18 skips the citizenship question, that household will nonetheless be enumerated in full. Tr. 851:10-
19 12. And if a household reaches the citizenship question and refuses to respond beyond that point,
20 that household will nonetheless be enumerated in full. *Id.* 851:13-15. It is only if a household does
21 not substantially complete the questionnaire that the household is included in the NRFU workload.
22 *Id.* 926:22-23.

23 11. Scientists at the U.S. Census Bureau issued a working paper in August 2018
24 evaluating the citizenship question’s impact on the potential decline in self-response rates. *See* PTX
25 160, Brown, J. David, Misty L. Heggeness, Suzanne M. Dorinski, Lawrence Warren, and Moises Yi,
26 U.S. Census Bureau, Center for Economic Studies, Understanding the Quality of Alternative
27 Citizenship Data Sources for the 2020 Census, Working Paper, CES 18-38, Aug., 2018 (“Brown
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1 paper”). Using available data from the 2010 census, the 2010 and 2016 American Community
2 Surveys, and administrative records, the paper produced an estimate of 5.8 percentage points as
3 “the best available evidence of the decline in the self-response rate for households that may contain
4 a noncitizen.” Tr. 859:18-20. Because this number is an estimate, however, it is unknowable to
5 what extent such a decline will occur.

6 12. The analysis of Plaintiffs’ expert, Dr. Matthew Barreto, does not provide reliable
7 evidence of a different or greater decline in self-response rates to the 2020 census. Dr. Barreto
8 conducted a public opinion survey designed to look at response rates to the 2020 census in the face
9 of a citizenship question, Tr. 376:24-25, but his results are unreliable because asking someone about
10 their intention to do something and measuring what they actually do in a field experiment are very
11 different. *Id.* 869:22-870:24. As Dr. Abowd explained, Dr. Barreto’s methodology merely asked
12 people in the context of one interview to predict whether they likely would participate in the
13 census, with no opportunity to validate those results with a comparison to real-world behavior. *Id.*

14 13. Nor does the analysis of Dr. Barreto provide reliable evidence of an undercount.
15 Dr. Barreto conducted a public opinion survey “to evaluate participation in the 2020 census,” Tr.
16 411:15-23, but the fundamental flaws in the design of that survey render its results unreliable. For
17 instance, although Dr. Barreto “fielded a pilot test of the survey to test the efficacy of the
18 questions,” *id.* 566:4-6, he did not test either the wording or ordering of his first two questions,
19 designed to measure nonresponse rates—meaning “no respondents were asked whether they would
20 answer a census with a citizenship question, without having just been asked about a census that did
21 not contain that question,” *id.* 570:23-571:3. Dr. Barreto also failed to test any alternate wording of
22 question two, which asked respondents whether they would respond to a census conducted by *the*
23 *federal government*, rather than the *Census Bureau*, *id.* 576:4-13, and that choice of wording—associating
24 the request for information with the government writ large, rather than the nonpartisan, statistical
25 Census Bureau—likely influenced respondents’ choices.

26 14. Although Dr. Barreto attempted to determine the decline in self-response rates due
27 to a citizenship question by conducting his own opinion poll, the conclusions drawn therefrom are
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1 fatally flawed and not credible. As Dr. Abowd explained in response to a question from the Court,
2 Dr. Barreto's conclusion that "those who will not respond to the census come from statistically
3 larger households than those who say they will respond" is not entitled to "the confidence he gave
4 it" because Dr. Barreto's "very small sample of . . . [l]ess than 200 people . . . suggests that his
5 measures of margins of error are way understated." Tr. 873:19-874:3. Dr. Barreto also failed to
6 control the weighting of his household-size estimates by using objective population totals, with the
7 result that "his estimated household sizes are much bigger than the actual household sizes in the
8 United States, because he didn't control his weights." *Id.* 874:4-9.

9 15. Dr. Barreto classifies as "nonresponses" those individuals who indicated they would
10 participate in the census during question one of his survey, but then changed their answer to "no"
11 in question two, which asked about a census containing a citizenship question. Tr. 568:1-21. But
12 his definition of nonresponse also included individuals whom, upon being told about a census
13 containing a citizenship question in question two of his survey, did not immediately know whether
14 they would respond or needed more time to decide whether they would participate. *Id.* 574:4-8.
15 Dr. Gurrea, Defendants' expert who also has considerable experience with surveys, testified that
16 this classification of responses made Dr. Barreto's, and Dr. Fraga's, interpretations of the results
17 unreliable. *Id.* 695:16-22, 703:21-704:1. Dr. Barreto's survey misclassifies many responses as
18 "nonresponsive" when instead they are neutral regarding a citizenship question, skewing the results
19 in favor of his conclusion. *Id.* 703:21-705:12. Indeed, at trial Dr. Barreto did not know how many
20 of the individuals he classified as "nonresponsive" simply expressed indecision or ambivalence as to
21 whether they would participate in the census with a citizenship question. *Id.* 574:10-20. In fact,
22 approximately a third of respondents classified as unwilling to participate in a census with a
23 citizenship question actually merely refused to answer survey question two. *Id.* 706:2-23. As Dr.
24 Gurrea explained, this misclassification of respondents has the effect of overstating the drop-off in
25 self-response rate that Dr. Barreto allegedly measured by comparing the responses to questions one
26 and two. *Id.* 706:24-707:8.

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1 16. Question two of Dr. Barreto’s survey also required individuals to respond that they
2 would either participate in the census *or not*—meaning it failed to offer the real-world option of
3 responding to the census *without* providing citizenship information. *Id.* This false dichotomy likely
4 captures as “nonresponsive” individuals who either would answer the census but omit their
5 citizenship information, or falsely claim citizenship status—even though, as Dr. Barreto himself
6 admitted, “[i]f somebody submits a partial form, the census will still count household counts for
7 purposes of enumeration.” *Id.* 569:16-17.

8 17. Survey question two was also flawed because it was compound, asking respondents
9 whether they would “participate *and* submit [their] household information.” PTX-824, at 2
10 (emphasis supplied). Therefore, as Dr. Gurrea observed, negative answers to the question did not
11 distinguish between those who would be unwilling to participate entirely in the census and those
12 who would be willing to participate but who would not submit all of the requested household
13 information. Tr. 707:17-708:12. Dr. Gurrea identified this as a flaw in the survey because those
14 latter individuals might still provide enough information to be fully enumerated but the survey does
15 not provide any evidence to determine who will or will not do so. *Id.*: see also *id.* 737:7-14.

16 18. Dr. Barreto opined that the citizenship question is sensitive for Latino communities
17 and immigrant-adjacent communities, Tr. 576:14-21, but his survey did not allow him to distinguish
18 between the proportion of citizens versus noncitizens in his survey that indicated they would not
19 participate in a census containing a citizenship question, *id.* 577:4-7. This incongruity undermines
20 any connection between Dr. Barreto’s results and his ultimate opinions, and it is borne out by the
21 fact that Dr. Barreto’s survey found that “63.9% of African-Americans think the Trump
22 administration will share their information,” when “the share of African Americans nationally who
23 are immigrant or immigrant-adjacent isn’t anywhere near 63.9 percent.” *Id.* 580:12-20. Dr. Barreto
24 insisted that his data reveal that “63.9 percent of blacks think that *Trump will share their citizenship*
25 *status*” while simultaneously admitting that “a large share of those 63.9 percent would be U.S.-born
26 non-immigrants,” *id.* 582:6-20 (emphasis added). This demonstrates that Dr. Barreto’s survey
27 results were highly influenced by respondents’ perceptions of the current political administration as
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1 opposed to concerns purely about citizenship as a census topic. In other words, a lack of trust in
2 the current administration among populations for whom citizenship is not a sensitive topic, such as
3 the 63.9% of African-Americans reporting distrust, has no implication for the inclusion of the
4 citizenship question on the census.

5 19. Dr. Barreto's survey found that the drop-off, or nonresponse rate, *increased for every*
6 *racial and ethnic group* from the beginning of his survey (question two, the first time respondents were
7 asked about a census containing a citizenship question) to the end (question eight, when
8 respondents were asked again about participation in a census containing that question). Tr. 584:5-
9 11; 585:23-586:3. Dr. Barreto used those responses "as a proxy for NRFU." *Id.* 583:10-17. But
10 this is illogical, since, as Dr. Barreto agreed, "you would expect the nonresponse follow-up
11 operations conducted by the Census Bureau to result at least in some . . . increased responses, not
12 a decline overall," *id.* 586:4-10.

13 20. Dr. Barreto testified that, with respect to survey research, there is a process whereby
14 survey research is submitted for academic peer review. Tr. 419:9-12. Despite the existence of this
15 process, Dr. Barreto did not submit the survey underlying his testimony in this case for peer review
16 before it was implemented. *Id.* 566:7-9.

17 21. Plaintiff's expert, Dr. O'Muircheartaigh, testified that the inclusion of a citizenship
18 question on the 2020 census will exacerbate a differential net undercount for certain hard-to count
19 populations, namely non-citizens and Latinos. Tr. 40:1-4. Dr. O'Muircheartaigh admitted that
20 historically there has been a differential net undercount of these populations in the decennial
21 census, including in the 2010 decennial census despite that it did not include a citizenship question.
22 *Id.* 219:17-25. He further acknowledged that therefore the differential net undercount for the 2010
23 census could not be attributed to a citizenship question. *Id.* 220:1-4.

24 22. Dr. O'Muircheartaigh based his overall conclusion regarding the differential net
25 undercount in part on his opinion that the Census Bureau's NRFU efforts will be deleteriously
26 affected by the introduction of a citizenship question on the 2020 census. Tr. 40:20-41:3. As
27 support, Dr. O'Muircheartaigh relied on the American Community Survey ("ACS") Computer-

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1 Assisted Personal Interviewing (“CAPI”) follow-up data which shows declining follow-up response
2 rates for the ACS between 2010 and 2016. *Id.* 40:20-41:9; 179:19-181:3. Dr. O’Muircheartaigh
3 admitted that this data does not explain why there is a decline in the response rate, and further, that
4 factors other than a citizenship question could be a reason for the decline. *Id.* 220:13-20.

5 Additionally, he admitted that even without a citizenship question on the 2020 census, he would
6 expect that NRFU would be less successful than it was in 2010. *Id.* 220:21-24.

7 23. Dr. O’Muircheartaigh’s use of the ACS CAPI data to support his opinion that
8 NRFU will be deleteriously affected by the introduction of a citizenship question on the 2020
9 census is of limited evidentiary value given the differences in the follow-up processes between the
10 ACS and census. As Dr. Abowd testified, the NRFU for the census is much more exhaustive than
11 the ACS CAPI. Tr. 810:21-811:16.

12 24. Dr. O’Muircheartaigh admitted that he had not performed any quantitative data
13 analysis regarding NRFU success and a citizenship question on the 2020 census. Tr. 220:25-221:7.
14 In fact, Dr. O’Muircheartaigh admitted that he had not produced any quantitative evidence that the
15 citizenship question will increase the differential net undercount or any quantitative evidence for
16 any of his expert opinions in this case. *Id.* 221:4-25.

17 ***b. Partnership and communication/outreach efforts will increase the self-***
18 ***response rate***

19 25. Outreach and communications efforts by the Census Bureau during the 2020
20 census will have the effect not only of increasing the overall self-response rate, but also of reducing
21 the net differential self-response rate. *See generally* 2020 Census Operational Plan (DTX-020); *see*
22 *also* Tr. 799:23-800:14.

23 26. The Census Bureau will utilize an integrated communications and partnership
24 campaign to recruit national, regional, and local partners and develop effective messages stressing
25 the confidentiality of census data, the statistical purposes for census data, and the statutory
26 prohibition against sharing those data with any agency. *See generally* 2020 Census Operational Plan
27 (DTX-020); *see also* Tr. 799:23-800:14.

28 27. Partners will include both state and local governments and private organizations.

1 While partners are welcomed to spend their own money to aid the Census Bureau’s mission, the
2 federal government compensates partners for any expenditures specifically requested by the Census
3 Bureau. *See generally* 2020 Census Operational Plan, [https://www2.census.gov/programs-](https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan3.pdf)
4 [surveys/decennial/2020/program-management/planning-docs/2020-oper-plan3.pdf](https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan3.pdf).

5 ***c. NRFU efforts are comprehensive, well-funded, and flexible***

6 28. At the end of the self-response period, six weeks into the 2020 Census, households
7 without a self-response become part of the NRFU workload. Tr. 851:16-852:2.

8 29. Any decline in the self-response rate due to the citizenship question is currently
9 expected to be well within the budget, planning, and operational design of NRFU and other
10 statistical methods used to mitigate any decrease in the initial self-response rate. Tr. 879:24-880:3.
11 “In general, Congress has produced appropriations for the census of population in what we call the
12 ‘nine and ten years’ that are consistent with what the Census Bureau has requested to conduct the
13 census,” *id.* 877:7-10, and assuming the trend continues and Congress appropriates funds in
14 accordance with the Life Cycle Cost Estimate, the Census Bureau will have \$1.5 billion to conduct
15 NRFU operations, along with another \$1.7 billion in contingency funding, *id.* 876:21-877:3.

16 30. For every one percent increase or decrease in the overall self-response rate above or
17 below the budget planning self-response rate of 55.5%, the Census Bureau assumes \$55 million will
18 be saved or spent in NRFU operations. AR 1282. Even if the Brown paper has accurately
19 predicted a 5.8% decline in self-response rate for potential noncitizen households—*i.e.*, a decline
20 affecting approximately 28.6% of the population—this leads to only a 1.5% decline in the overall
21 self-response rate across the entire population and an extra \$82 million in NRFU expenditures. Tr.
22 878:4-20. A higher, hypothetical 10% decline in the self-response rate among potential noncitizen
23 households results in a 2.5% decline in overall self-response rate with an estimated \$137.5 million in
24 NRFU costs. *Id.* 879:10-17. These estimates are all far below the projected \$1.7 billion in
25 contingency funding, and this remains true even if one assumes six enumerator attempt days per
26 household, rather than three, the impact of which would concomitantly double all estimated NRFU
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1 costs. *Id.* 879:18-23. In other words, the Census Bureau will have the funds necessary to ensure
2 appropriate follow-up efforts in virtually any conceivable self-response scenario.

3 31. Because “the enumerator pool in each area census office is several orders of
4 magnitude larger than the expected number of enumerators that have to be deployed,” Tr. 880:14-
5 16, the Census Bureau will have a sufficient number of enumerators ready to deploy in the event
6 self-response rates decline. *Id.* 880:16-20. These enumerators are drawn from the communities in
7 which they will be deployed, helping households feel comfortable in responding. *Id.* 883:17-
8 884:15.

9 32. Enumerators are also deployed in an efficient manner to best obtain census
10 enumerations. Using a state-of-the-art optimizer, 2020 census enumerators will be assigned
11 households to visit, provided the most efficient route to reach each household, and then given the
12 optimal times to visit each household based on statistical models of the local area. The optimizer
13 also will allow Area Census Office managers and staff to identify the most effective enumerators
14 and adjust NRFU workloads accordingly. Tr. 881:2-6; 881:14-882:19.

15 33. While many of the historical documents describing the number of NRFU attempts
16 use a hypothetical limit of six visits, in the 2020 Field Operational Control System the actual
17 measure is an “attempt day”—the number of days that NRFU enumerators attempt to obtain a
18 response from a household. During an attempt day, there can be multiple attempts. In addition,
19 near the end of NRFU operations, closeout procedures allow the number of attempt days to exceed
20 six. The binding constraint is the date that NRFU operations close, not a maximum number of
21 attempt days. Tr. 884:23-886:13.

22 34. If an address in the NRFU workload receives one unsuccessful in-person visit, it
23 becomes eligible for enumeration by administrative records. Administrative records are electronic
24 records compiled by another unit of the federal government, including the Internal Revenue
25 Service, Health and Human Services, the Bureau of Indian Affairs, the Postal Service, and the
26 Social Security Administration. Tr. 888:18-890:4.

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1 35. If no high-quality administrative records exist for a household, the address stays in
2 the NRFU workload and gets the full NRFU consideration. Tr. 890:5-17.

3 36. There is no credible quantitative evidence that the use of administrative records will
4 exacerbate or increase any differential net undercount. Tr. 890:18-23. Administrative records
5 simply supply a method of low-cost enumeration when high-quality records are available; if no such
6 records exist, then the full NRFU protocol will be used. *Id.* 890:7-17. The fact that hard-to-count
7 groups are relatively underrepresented in administrative records thus does not establish that the use
8 of administrative records will result in those groups ultimately being undercounted when all
9 enumeration operations are completed.

10 37. If a household does not self-respond and cannot be enumerated using
11 administrative records, and the Census Bureau is unable to get a response through in-person visits,
12 enumerators may interview a proxy. A proxy could be a landlord, a neighbor, a postal carrier, or
13 another person with knowledge of the household. The proxy process is specifically designed to
14 obtain a head count for the number of people residing at an address. Tr. 886:14-23.

15 38. The Census Bureau is unaware of any credible empirical evidence suggesting that
16 use of proxies in the census causes a greater net undercount or differential net undercount in
17 comparison to self-response or in-person interviews. Tr. 887:13-888:5. There is no credible
18 evidence that households enumerated via proxy responses are more likely to be undercounted
19 relative to self-responding households due to systematic underreporting of residents by proxy
20 respondents. *Id.* 887:13-888:5.

21 39. The fact that proxy responses tend to generate less accurate demographic data also
22 does not indicate that proxy responses tend to result in higher net undercounts. Inaccurate
23 demographic data does not affect the actual enumeration. Tr. 888:10-15.

24 40. Dr. Barreto’s conclusion that “NRFU . . . will actually exacerbate the gap between
25 response rates” in Latino and immigrant communities,” Tr. 490:3-5, is not credible. Dr. Barreto
26 “simulated nonresponse followup” using the difference in responses to questions seven and eight
27 on his survey—asking again whether respondents would participate in a census without and with a
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1 citizenship question, *id.* 583:10-17. But what Dr. Barreto proffers as “a proxy for NRFU,” *id.*, does
2 not resemble even remotely an actual recontact effort. First, his follow-up consisted of “repeating
3 again in the same phone call” the same questions respondents already had answered, meaning Dr.
4 Barreto “didn’t actually recontact anyone on another day, or even at a later time in the same day.”
5 *Id.* 583:10-22. And this purported “simulated recontact” came on the heels of “the intervening
6 discussion about trust in the Trump administration.” *Id.* 584:1-4. It therefore is unsurprising that
7 *every racial or ethnic group*, including those with low rates of immigrants, evidenced an increase in
8 nonparticipation from the beginning to the end of the survey.

9 41. Dr. Barreto opined that “most members of the general public probably don’t know
10 a huge amount about the Census Bureau,” Tr. 574:21-24, while acknowledging that he “would
11 expect that most people have some opinion of the federal government” before encountering his
12 survey. *Id.* 574:25-575:2. But in the section of his survey purporting to measure trust, Dr. Barreto’s
13 survey pivoted from a description of Title XIII’s assurances of confidentiality to ask “Do you trust
14 *the Trump administration* to protect your personal information, including citizenship, *or do you think*
15 *they will share* this information,” *id.* 578:2-15 (emphasis added). This jarring and unexpected
16 reference to trust in the Trump administration—rather than the Census Bureau—almost certainly
17 colored respondents’ answers, rendering his measure of “trust” unreliable. This is particularly true
18 given that, as Dr. Barreto testified, the President’s approval ratings during the survey fell to the low
19 40s and was “at least 10 points lower” among Latino communities, *id.* 578:20-579:2, and that
20 neither Dr. Barreto’s survey *nor* the pretesting he conducted in advance “included an alternate
21 wording asking respondents whether they trust the Census Bureau—as opposed to the Trump
22 administration—to protect their data,” *id.* 579:3-19. And Dr. Barreto neglected to “include any
23 follow-up qualitative component to determine why respondents reported a lack of trust in the
24 administration,” *id.* 581:11-14.

25 42. Dr. Barreto’s conclusions regarding the likely impact of the citizenship question are
26 further undermined by the fact that in California a full “48 percent of respondents reportedly think
27 the Trump administration will share their citizenship information,” Tr. 579:20-25, even though the
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1 percent of California residents who are immigrants is much lower. *Id.* 580:1-4. This discrepancy
2 demonstrates that Dr. Barreto’s survey results reflect political views of the current administration,
3 not actual concerns over the confidentiality of citizenship data.

4 43. Regarding Dr. Barreto’s “simulated or proxy NRFU,” Dr. Abowd credibly testified
5 “that simulating NRFU by changing questions over the course of a single interview is not a realistic
6 simulation of the operations, especially of the census NRFU.” *Tr.* 873:12-18. This is borne out by
7 the fact that Dr. Barreto’s “proxy NRFU” obtained numbers *wildly* different from the actual success
8 of NRFU in census operations; specifically, his survey found that 29.66 percent of Californians and
9 49.29 percent of non-Californians change to responders in his “simulated NRFU.” *Id.* 587:21-588:7.
10 These numbers are not remotely comparable to the actual NRFU success rate of 98.58 percent in
11 the most-recent decennial census, *see Tr.* 721:11-14, demonstrating that Dr. Barreto’s results bear
12 little resemblance to real-world behavior.

13 44. Dr. Barreto opined that NRFU will be less successful in CA than in the rest of
14 country, *Tr.* 546:8-547:18, but the results underlying these conclusions consisted of *only 186*
15 *respondents* nationwide, and only 84 respondents in California. *Id.* 590:9-591:8; 592:5-10. Although
16 Dr. Barreto attempted to obscure the paltry sample size by relaying that “of people in the state of
17 California . . . 29.6 percent” change to responders in his “simulated NRFU,” as compared to “for
18 the rest of the country . . . 49.2 percent,” *id.* 591:20-592:1, no reliable conclusions can be drawn
19 from the difference between such small samples.

20 45. Dr. Barreto’s conclusions are further undercut by the fact that he omitted from his
21 expert report and failed to disclose to opposing counsel tables of data he had created, *Tr.* 589:19-
22 590:3, the results of which run directly contrary to his ultimate conclusions. For example, the tables
23 inexplicably omitted from Dr. Barreto’s report show that “44 percent of Latino respondents
24 changed their answer at Question 8 [simulated NRFU] to indicate they would participate” with a
25 citizenship question, including “45 percent of *foreign-born Latinos*,” *Id.* 594:15-595:2 (emphasis
26 added), compared to “only 20 percent of white respondents chang[ing] their answer . . . after [his]
27 assurances of confidentiality.” *Id.* 595:3-7. Indeed, Dr. Barreto agreed that his “survey found that
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1 [his] simulated NRFU was more effective for Latino respondents in California than for white
2 respondents.” *Id.* 595:16-21. This finding indicates that Dr. Barreto’s “proxy NRFU” was *twice* as
3 effective for Latinos relative to whites—a result diametrically opposed to Dr. Barreto’s ultimate
4 opinion that NRFU “will be far less effective in 2020 in the Latino and immigrant community.” *Id.*
5 543:1-3.; *see also id.* 490:3-5 (“And where NRFU will be less successful in converting people is in
6 Latino and immigrant communities.”). The missing tables also disclose that the survey found that
7 “followup had no effectiveness for the Asian population,” *id.* 596:9-13, a finding that stands in stark
8 contrast to the results obtained by the Census Bureau in its surveys.

9 46. The tables omitted from Dr. Barreto’s expert report also reveal that his “simulated
10 NRFU” was *more* effective for Latinos in California than Latinos in the rest of the country. *Tr.*
11 598:8-599:1 (44 percent “NRFU” efficacy for California Latinos versus 36 percent for Latinos in
12 other states). This result is irreconcilable with Dr. Barreto’s fourth opinion—that “the impact [of
13 the citizenship question] will be more severe in places like San Jose, or statewide in California,” *id.*
14 547:14-15.

15 47. Further evidence that Dr. Barreto’s survey questionnaire measured respondents’
16 feelings toward the Trump administration, rather than concerns over disclosing citizenship on the
17 census, comes from the fact that he found that whites in California changed to responders in his
18 “simulated NRFU” only 20 percent of the time—versus 50 percent for whites in the rest of the
19 country, *Tr.* 597:7-14, although there is no evidence that the white California population contains a
20 greater share of immigrants or those concerned with their citizenship status. This finding also was
21 first revealed by the tables omitted from Dr. Barreto’s expert report, and provided to defense
22 counsel shortly before trial. *Id.*

23 48. Dr. Barreto tacitly admitted that he had ignored the evidence, outlined above, which
24 ran contrary to his conclusions. *Tr.* 601:23-602:2 (testifying, in response to a question from
25 Plaintiffs’ counsel, “I did not rely on the data in Tables 15 or 16 in my report, at all.”).

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2. Imputation Will Adequately Account for Any Remaining Households

1 2. **Imputation Will Adequately Account for Any Remaining Households**
2 49. The use of imputation to enumerate the limited number of households not captured
3 by self-response and NRFU operations is designed to accomplish a complete and accurate
4 enumeration. Tr. 892:10-19.

5 50. No credible, quantitative evidence demonstrates that whole-person census
6 imputations tend to systematically overcount or undercount the number of people in a household.
7 Tr. 893:14-15.

8 51. The Census Bureau uses imputation to enumerate housing units that remain
9 unresolved after the self-response and NRFU operations (in-person interviews, administrative
10 records, and proxy responses) are exhausted. *See generally* 2020 Census Operational Plan,
11 [https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-](https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan3.pdf)
12 [docs/2020-oper-plan3.pdf](https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan3.pdf).

13 52. The Census Bureau has not yet determined the final imputation algorithms it will
14 use in the 2020 census. Tr. 892:16-19. In general, the Census Bureau uses statistical criteria to
15 aggregate nearby housing units that have characteristics matching those of the missing unit in the
16 Master Address File, taking into account the distribution of household sizes. The Census Bureau
17 then randomly selects one of those nearby units and uses the number of people in that unit to fill in
18 the number of people in the missing unit. *Id.* 892:10-893:11.

19 53. Based on assumptions built into the Life Cycle Cost Estimate, along with the rate of
20 imputation from the 2010 Census, the Census Bureau projects that, without a citizenship question,
21 0.38% of all households would be imputed. Tr. 893:18-895:17. Using these same assumptions,
22 along with the Brown paper's 5.8% estimate for the decline in self-response rate for potential
23 noncitizen households, the Census Bureau projects imputation of 0.40% of all households in the
24 2020 census, assuming the average rate of resolution through the NRFU process. *Id.* 895:18-
25 896:18. Even assuming that all households not self-responding due to a citizenship question would
26 go through the full NRFU process without achieving the average rate for resolution, the result
27 would be a projected imputation of 0.60% of all households. *Id.* 896:19-897:11.

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1 54. In none of these scenarios would a household go uncounted simply because it did
2 not self-respond due to a citizenship question. Even in the worst-case scenario, the result is simply
3 more imputations. Tr. 896:19-897:17.

4 55. Increased imputations by themselves do not lead to an increased differential net
5 undercount. Tr. 897:12-17; 897:25-898:12. To produce a differential net undercount, properties of
6 the imputation model must be credibly linked to non-response due to the presence of a citizenship
7 question, which Plaintiffs have not done.

8 56. The fact that imputation may generate less accurate demographic data does not
9 indicate that imputation tends to result in higher net undercounts. Tr. 893:14-15. Likewise, the fact
10 that a greater number of imputations may impact the accuracy of demographic data does not
11 “necessarily lead to an increased undercount.” *Id.* 917:6-918:10.

12 57. Dr. O'Muircheartaigh testified that imputation methods differentially disfavor
13 subpopulations with lower response rates, including Latinos and noncitizens, Tr. 217:18-20, and
14 that imputation cannot remediate such a differential undercount. *Id.* 212:7-12. Yet, he also
15 acknowledged that the Census Bureau has not yet determined what the imputation process will be
16 for the 2020 census. *Id.* 207:20-208:5; 210:1-11. Moreover, Dr. Abowd testified that he was
17 unaware of any credible quantitative data suggesting that imputation over- or undercounts certain
18 subpopulations, *id.* 893:12-15, and Dr. O'Muircheartaigh did not perform any such quantitative
19 analysis. *Id.* 221:17-25.

20 **3. Plaintiffs Have Not Proven that Any Increased Differential Undercount Will**
21 **Occur After NRFU Operations and Imputation**

22 58. Plaintiffs have not established that inclusion of a citizenship question will increase
23 any differential undercount that may remain after NRFU operations and imputation, meaning an
24 undercount that may impact a particular racial or ethnic group to a greater or lesser extent than the
25 overall net undercount or overcount of the population. Tr. 918:4-919:6.

26 59. There have been net differential undercounts in past censuses, including when there
27 was no citizenship question on the “short form” of the census questionnaire sent to every
28 American.

1 60. Plaintiffs have not proven whether the citizenship question will impact the
2 differential net undercount. Tr. 918:4-919:6.

3 61. That the citizenship question may be “sensitive” for certain persons, or groups of
4 persons, does not, without more, establish that the citizenship question is likely to exacerbate the
5 net differential undercount for the 2020 Decennial Census. Tr. 918:4-919:6.

6 **4. Specific Claims of Injury**

7 62. Any differential undercount that remains after NRFU operations and imputation
8 will not be sufficiently large to cause any impact on apportionment or federal funding or produce
9 any of the other specific injuries claimed by Plaintiffs.

10 a. *Federal funding*

11 63. A differential net undercount would not have an impact on federal funding under
12 the vast majority of federal funding programs. Tr. 667:1-7.

13 64. Out of the approximately 2,249 government funding programs, only approximately
14 320 use census-derived data to allocate funds. Second Updated Trial Declaration of Andrew
15 Reamer, Ph.D (ECF No. 182-1) (“Reamer Trial Decl.”) ¶ 10; Tr. 666:10-25.

16 65. Out of the approximately 320 federal government funding programs that use
17 census-derived data to allocate funds, Plaintiffs’ expert, Dr. Reamer, identified only twenty-four
18 programs which used geographic allocation formulas that rely in whole or part on census-derived
19 data, and he performed calculations for only three such programs. Reamer Trial Decl. ¶¶ 11, 33.
20 Geographic allocation formulas are particularly sensitive to fluctuations in census data. Tr. 667:21-
21 668:11.

22 66. Only one dataset used in federal funding formulas, the Census Bureau’s Urban-
23 Rural Classification, relies solely on decennial census data, reflecting Congress’ judgment that
24 census numbers alone are not an adequate basis to equitably distribute federal funds. Reamer Trial
25 Decl. ¶¶ 24-26; Tr. 664:2-13.

26 67. In performing his calculations for three federal funding programs, Dr. Reamer
27 assumed (1) a 5.8% decrease in self-response among households with at least one individual
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1 without confirmed citizenship (derived from the Brown paper), and (2) a NRFU success rate
2 among these households of 86.63%.

3 68. As he did for Dr. Fraga's apportionment calculations, Dr. Gurrea calculated the
4 effect on the three federal funding programs highlighted by Dr. Reamer using the following
5 alternative assumptions—he assumed a 5.8% decrease in self-response among households with at
6 least one individual without confirmed citizenship (derived from the Brown paper and the number
7 used in both of Dr. Reamer's scenarios), Tr. 701:15-702:2, along with a NRFU success rate among
8 these households in 2020 equal to the 2010 census NRFU success rate, 98.58%. As with his
9 apportionment calculation, Dr. Gurrea assumed no additional undercount mitigation through
10 imputation. *Id.* 728:11-13. With these assumptions, Dr. Gurrea estimated that the distribution of
11 federal funds to the State of California after the 2020 census will be only 0.01% less than it would
12 be in the absence of a citizenship question, for each of these three programs examined by Dr.
13 Reamer. *Id.* 726:17-728:6. Additional mitigation achieved through imputation would reduce this
14 impact even further. *Id.* 728:11-18, 729:18-730:14.

15 69. Dr. Reamer's opinions are of limited evidentiary value because his analysis relies
16 entirely on two flawed undercount scenarios performed by Plaintiff's expert Dr. Fraga; Dr. Reamer
17 acknowledged that he did not take any steps to determine the accuracy or validity of Dr. Fraga's
18 methodology or undercount projections. Tr. 663:4-10. In fact, he admitted that he had no opinion
19 on whether Dr. Fraga's undercount projections were valid. *Id.* 663:11-14.

20 70. Because Dr. Reamer's calculations are based entirely upon undercount scenarios
21 which fail to take into account the effect of full NRFU and imputation on response rates, they are
22 inaccurate, unreliable, and of limited evidentiary value. In contrast, Dr. Gurrea relied on more
23 plausible assumptions for his alternative scenario. In Dr. Gurrea's scenario, the effect on federal
24 funding, without taking into account imputation, is de minimis. This minimal amount will shrink
25 even further once imputation is taken into account. In any event, any attempt to predict the
26 outcome after the 2020 census is speculative at best.

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1 71. Dr. Reamer’s calculations are also of limited evidentiary value because they do not
2 purport to predict what will happen in 2020. Tr. 672:24-672:2. Instead, his calculations look
3 backwards—to what would have happened in fiscal years 2015 and 2016 had there been an
4 additional undercount due to the presence of a citizenship question on the 2010 decennial census.
5 *Id.* 672:9-23; Reamer Trial Decl. ¶ 37.

6 72. The evidentiary value of Dr. Reamer’s calculations is further diminished because his
7 calculations rest upon the assumption that allocation formulas and funding levels for the three
8 programs in question will remain similar in the coming years. Reamer Trial Decl. ¶¶ 18-19; Tr.
9 669:24-670:9. However, as Dr. Reamer testified at trial, Congress could alter the funding amounts
10 and allocation formulas, including the manner and extent to which they rely upon census-derived
11 data. Tr. 671:7-19.

12 73. Plaintiffs have not adduced specific quantitative evidence of the amount of federal
13 funding any specific county, city or municipal government would lose under any federal program if
14 there were an increase in the differential undercount resulting from the inclusion of a citizenship
15 question.

16 74. San Jose presented the testimony of three individuals employed in various city
17 agencies. None of these individuals provided sufficiently specific evidence to establish that the City
18 of San Jose would lose a quantifiable amount of federal funding if the 2020 census resulted in a
19 differential undercount.

20 75. Kristen Clements, Division Manager for the City of San Jose’s Department of
21 Housing, testified that the amount of funds that the City of San Jose receives from the U.S.
22 Department of Housing and Urban Development under two housing-related programs (the
23 Community Development Block Grant program and the Home Investment Partnership program)
24 is dependent on census and ACS data. Revised Clements Trial Decl. ¶¶ 7-14, 20-21, ECF No. 171
25 in No. 18-2279. But she does not assert that the amount of such funding the City of San Jose
26 receives will decrease because of the citizenship question, let alone attempt to quantify any loss.

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1 76. Monique Melchor, Director of work2future, Workforce Development Board,
2 Office of Economic Development, for the City of San Jose, stated that, in her role as director of
3 work2future, she oversees programs funded by federal grant money awarded by the U.S.
4 Department of Labor pursuant to the Workforce Innovation and Opportunity Act (“WIOA”), 29
5 U.S.C. §§ 3101-3361. Melchor Trial Decl. ¶ 7, ECF No. 135 in No. 18-2279. Ms. Melchor asserted
6 that, “[b]ecause WIOA funding is allocated, in part, on data provided by the Census Bureau, if the
7 Census Bureau were to provide lower-than-accurate population data for the City of San Jose
8 relative to other participating jurisdictions, the City of San Jose would receive less funding through
9 WIOA than it would if the data were accurate.” Melchor Trial Decl. ¶ 20. For example, she
10 explained that, with regard to San Jose’s share of the total funds allocated to California (San Jose’s
11 “Sub-State Allocation”), “if the work2future [local workforce development area (‘LWD’)]’s share of
12 disadvantaged adults (compared to other California LWDs) decreases, its Sub-State Allocation will
13 also decrease.” Suppl. Melchor Trial Decl. ¶ 12, ECF No. 158 in No. 18-2279.

14 77. To support the above conclusion, Ms. Melchor explained that WIOA funds are
15 allocated to states, in part, based on “the relative numbers of unemployed individuals in areas of
16 substantial unemployment in each State,” the “relative excess number of unemployed individuals in
17 each State, compared to the total excess number of unemployed individuals in all States,” and “the
18 relative number of disadvantaged [youth or adults, depending on the program] in each State,
19 compared to the total number of disadvantaged [youth or adults] in all States.” Melchor Trial Decl.
20 ¶¶ 9, 10 (citing 29 U.S.C. §§ 3162(b)(1)(C)(ii), 3172(b)(1)(C)(ii)). The WIOA statute further
21 provides that, in determining each state’s allotment, “[a]ll data relating to disadvantaged adults and
22 disadvantaged youth shall be based on the most recent satisfactory data from the Bureau of the
23 Census.” *Id.* ¶ 11; *see also* Ex. 1 to Suppl. Melchor Trial Decl., at 4.

24 78. The above provisions govern allocation of funds *as between states*. Ms. Melchor
25 explains that, once funding is delivered to the State of California under WIOA, “it is delivered to
26 sub-divisions of the state according to the statutory formula for sub-state allocations,” which
27 considers, *inter alia*, the local area’s relative share of disadvantaged or unemployed youths or adults
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1 “(using ACS data).” Melchor Trial Decl. ¶ 12; *see also* Suppl. Melchor Trial Decl. ¶¶ 5, 9, 10. The
2 use of Census Bureau data to perform this intra-state allocation appears to be California’s voluntary
3 choice, however. In fact, in promulgating regulations implementing WIOA, the Departments of
4 Labor and Education stated, with reference to funds for the adult programs, that they

5 encourage States to use a variety of accurate, reliable, and timely labor
6 market information on which to base analysis and priority of service.
7 Indeed, priority for use of adult funds can be made using a variety of
8 available data, in addition to the use of Census data. However, to
9 minimize the burden for each individual State, *the Departments will not*
10 *require States to use a particular dataset, leaving it to the discretion of the States*
11 *to choose the appropriate data sources.*

12 81 Fed. Reg. 55792, 55807 (Aug. 19, 2016). As for funds for youth programs, the WIOA guidelines
13 specify that the state must use Census Bureau or BLS tabulations. Ex. 1 to Melchor Trial Decl., at
14 4-5. However, here, again, the guidelines assert that states may, in the alternative, use a
15 discretionary formula that can incorporate “additional factors” and that the states “have flexibility
16 in choosing what data they want to use related to youth poverty and excess unemployment above
17 the state average.” *Id.* at 6. Thus, it does not appear that California is required to use census or
18 ACS data to allocate funds *between the different LWDs* in its state.

19 79. Although California currently appears to base its allocations principally on Census
20 Bureau or Bureau of Labor Statistics data, the formulas are not entirely straightforward. *See*
21 <https://www2.ed.gov/about/offices/list/osers/rsa/wioa/state-plans/ca.pdf>, at 234-241. Ms.
22 Melchor did not explain how any potential undercount caused by the citizenship question will
23 impact the calculation of San Jose’s “share of disadvantaged” individuals compared to that of other
24 areas under these complicated formulas, let alone attempt to quantify the impact of a given
25 undercount amount on the funds received by San Jose.

26 80. Richard Riordan, Director of Emergency Management for the City of San Jose,
27 testified that he obtains grants from the Federal Emergency Management Agency (“FEMA”) by
28 providing certain information about the damage incurred in a disaster, including the number of
people affected, Riordan Trial Aff. ¶¶ 5-7, ECF No. 136 in No. 18-2279, and that, in turn, “FEMA
determines whether to provide funding under the Individual Disaster Assistance Program based

1 upon, among other concerns, the number of people affected by the disaster.” *Id.* ¶ 10. He stated
2 that FEMA specifies that a “Preliminary Damage Assessment” (“PDA” or “Joint PDA”) should
3 use Census data as the source of demographic data on the affected area. Suppl. Riordan Trial Aff. ¶
4 5 (citing Ex. B (PDA Manual) at II-3), ECF No. 156 in No. 18-2279. Accordingly, he asserted that
5 his office uses census data on population to determine the number of people affected by a disaster
6 and to prepare reports. Riordan Trial Aff. ¶ 10; *see also* Suppl. Riordan Trial Aff. ¶ 3.

7 81. However, the City of San Jose is not limited to using only census data in completing
8 its PDAs or Joint PDAs. FEMA’s Damage Assessment Operations Manual explains that, although
9 “FEMA uses U.S. Census Bureau information to estimate demographic, income, homeownership,
10 occupancy, and insurance trends and identify areas of potential greater need,” “[i]f local, State, or
11 Tribal Governments would like FEMA to consider more localized or more recently updated
12 information, that information should be provided to FEMA before the conclusion of the Joint
13 PDA.” Ex. A to Suppl. Riordan Trial Aff., at 46, ECF No. 156-1 in No. 18-2279. In addition,
14 FEMA explains that, “[i]f current data does not exist or does not appear to be correct, Joint PDA
15 assessment teams may be used to collect or verify critical elements of information from residents or
16 other knowledgeable local sources.” *Id.* The PDA manual further notes that “[f]ield surveys are
17 often more accurate when a high degree of variability exists in a county and the damage is more
18 isolated” and that “[i]t is important to determine which form of demographic information is right
19 for the PDA operation being conducted.” Ex. B to Suppl. Riordan Aff., at II-4.

20 82. Mr. Riordan further testified that the City of San Jose was denied FEMA funding
21 for individual assistance for the Coyote Creek Flood because “the number of people affected by the
22 flood did not meet the thresholds for declaration of individual assistance.” Suppl. Riordan Aff.
23 ¶ 10. He stated that, when individuals and families sought private funding, he observed that the
24 number of individuals living in each household far exceeded the numbers in the Census Bureau
25 data he had earlier provided to FEMA. *Id.* ¶ 12. However, as this example points out, the problem
26 of undercounting certain households exists independently of the inclusion of a citizenship question
27 on the forthcoming census questionnaire. And, after now being apprised of problems with
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1 undercounting, the City of San Jose can look for other data sources or information to bolster its
2 FEMA applications.

3 83. Plaintiff Black Alliance for Just Immigration (“BAJI”) did not adduce any
4 quantitative evidence of the amount of federal funding it or any of its members would lose under
5 any federal program if there is an increase in the differential undercount resulting from the
6 inclusion of a citizenship question. BAJI’s Executive Director, Opal Tometi, asserted only very
7 conclusorily that a potential undercount could result in a loss of federal funding to the immigrant
8 communities it serves but did not identify the federal funding programs at issue or quantify the
9 impact. *See, e.g.*, Tometi Summ. J. Decl. ¶ 9, ECF No. 99-4, in No. 18-2279.

10 ***a. Other financial harm***

11 84. Jeff Ruster, the Assistant Director in the Office of Economic Development of the
12 City of San Jose, testified that the city has had to, and will in the future, divert time and resources to
13 address the effect of the inclusion of the citizenship question on participation in the census by its
14 residents, to try to ensure that participation is maximized. Ruster Trial Aff. ¶ 10-19, ECF No. 130
15 in No. 18-2279. He provided the total amounts that the City has currently budgeted for outreach,
16 *id.* ¶¶ 13, 15, but neither quantified the specific amount of the resources that have been or will be
17 diverted from other uses nor established that any specific amount of the alleged diverted
18 expenditures is attributable to or made necessary solely as a result of the citizenship question. *See*
19 *id.* ¶¶ 14, 16-18; *see also* Ruster Summ. J. Decl. ¶¶ 10-16, ECF No. 99-5 in No. 18-2279. Further,
20 because Plaintiffs have not adduced any evidence indicating that there will be a differential net
21 undercount in the San Jose area after taking full account of the Census Bureau’s non-response
22 follow-up and imputation procedures, any decision by the City of San Jose to spend or divert
23 resources specifically because of the citizenship question is not based on a reasonable fear that the
24 citizenship question will result in such a net undercount in that jurisdiction.

25 85. Although BAJI alleges that it has to or will need to divert or expend resources as a
26 result of the inclusion of the citizenship question, it neither quantified the specific amount of the
27 resources diverted or expended nor established that any specific amount of the alleged diverted or
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1 increased expenditures is attributable to or made necessary by the citizenship question. *See* Tometi
2 Summ. J. Decl. ¶¶ 12-19.

3 86. BAJI's Executive Director testified only that BAJI has, and will, divert and expend
4 "time and money" in unspecified amounts as a result of the citizenship question. *See, e.g.*, Tometi
5 Summ. J. Decl. ¶ 12 (stating only that BAJI has "taken steps to divert some of its essential and
6 limited resources"), ECF No. 99-4 in No. 18-2279. To the extent that Ms. Tometi mentioned
7 amounts, she stated only that "BAJI has expended many hours of additional staff time and related
8 financial resources" and that it "expects to allocate at least an additional \$200,000 in the next two
9 (2) years." *Id.* ¶ 20. However, she did not indicate what those amounts would be spent on or
10 explain how such expenditures were necessary. She also did not indicate that those "expected"
11 allocations are reasonably imminent or indicate whether such future allocations could be provided
12 from new, not otherwise anticipated donations made as a result of the present litigation and the
13 inclusion of a citizenship question in the 2020 census. *See id.* ¶ 18 (stating that BAJI is soliciting
14 potential funding for census outreach and education). Further, Ms. Tometi did not adduce any
15 evidence establishing that any decision by BAJI to spend or divert resources specifically because of
16 the citizenship question is based on a reasonable fear that the citizenship question will result in a
17 net differential undercount in the communities where its members reside, taking into account the
18 Census Bureau's non-response follow-up and imputation procedures in assessing the risk of any net
19 undercount.

20 87. Plaintiffs did not introduce any evidence that there is a direct conflict between
21 BAJI's mission and the inclusion of a citizenship question on the census.

22 88. Overall, Plaintiffs have not established that their perceived need to increase or
23 divert expenditures is caused by the citizenship question rather than by the general fear and distrust
24 of government among immigrants and communities of color due to the macro-environment.

25 ***b. Decrease in data quality***

26 89. Plaintiffs did not provide sufficient evidence that, should the inclusion of the
27 citizenship question result in inaccurate demographic data, that result will be harmful to them.

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1 90. Plaintiff City of San Jose presented the testimony of four individuals employed in
2 various city agencies. None of these individuals provided sufficiently specific testimony to establish
3 that the City of San Jose or its residents face a substantial risk of an injury should data quality be
4 compromised.

5 91. Kristen Clements, Division Manager for the City of San Jose’s Department of
6 Housing, testified only generally that “inaccurate demographic data from the Census will affect the
7 City’s ability to identify and address key housing and other social needs within the City.” Revised
8 Clements Trial Decl. ¶ 1, ECF No. 171 in No. 18-2279. She explained that the City of San Jose
9 “identifies housing needs based, in part, on income data from the Census and the American
10 Community Survey,” *id.* ¶ 22, which enable them to “identify Census tracts where the needs for
11 affordable housing and community improvements appear to be most acute and address those
12 areas.” *Id.* ¶ 24. If data quality is affected, for example, “if family size is under-reported in the
13 Census and ACS, income levels will likewise be overstated, thereby understating the needs of San
14 Jose communities.” *Id.* ¶ 22. As another example, she asserted that inaccurate data would
15 negatively impact decisions about where to site development projects. *Id.* ¶ 27.

16 92. But Ms. Clements stated that census data is only *part* of the factors used to identify
17 housing needs and did not identify the other factors that play a role in this endeavor. Nor did she
18 explain whether the City is able to compensate for inaccurate census data by reliance on these other
19 factors or on other data or by conducting surveys or other research of its own. She also did not
20 explain the degree of inaccuracy that would be sufficient to affect the City’s targeting of
21 communities for housing assistance or its placement of new development. Finally, she stated that
22 the City of San Jose “is also examining” a possible partnership with the Urban Displacement
23 Project at the University of California at Berkeley to engage in “San Jose-specific studies on
24 housing displacement,” *id.* ¶ 28, but the possible future existence of such a partnership and its
25 studies, which may or may not use census data, is entirely speculative.

26 93. Monique Melchor, Director of work2future, Workforce Development Board,
27 Office of Economic Development, for the City of San Jose, also provided testimony about data
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1 quality. Melchor Trial Decl. ¶ 1, ECF No. 135. She explained that the work2future program
2 provides workplace training and placement services to San Jose residents who seek employment or
3 education assistance. *Id.* ¶ 2. She further stated that she personally developed and implemented a
4 “Limited English Proficiency” (“LEP”) Plan for work2future which addresses the language needs,
5 by location, of the populations that work2future serves. *Id.* ¶ 17. She said that she uses data from
6 the Census Bureau “to determine the language needs at the three work2future locations, and hire
7 counselors with those language skills in accordance with the LEP Plan.” *Id.* ¶ 18. She asserted that
8 “[i]f the quality of the data on language proficiency” provided by the Census Bureau “were to be
9 less accurate in the future than it is today, . . . work2future would not serve the linguistic needs of
10 the local workforce area.” *Id.* ¶ 19. But she neither identified the location-specific language needs
11 at issue here nor explain how inaccuracies in data quality would alter her decisions about how to
12 implement the LEP Plan.

13 94. Richard Riordan, Director of Emergency Management for the City of San Jose,
14 asserted that his office uses census data, such as data about the locations of senior citizens, to make
15 decisions regarding the deployment of assets prior to and during emergencies and that inaccurate
16 data will “endanger[] the lives of San Jose residents during emergencies. Riordan Trial Aff. ¶¶ 13-
17 18. But he did not explain how *less accurate* data (as opposed to *no* data) about the location of senior
18 citizens would materially impact his decisions about the deployment of resources in such a way as
19 to endanger the lives of such individuals.

20 95. Likewise, Jill Bourne, the Director of the San Jose Public Library (“SJPL”), testified
21 that the SJPL system uses census data to draw up Branch Community Profiles for each SJPL
22 branch library, which in turn help her decide what resources and materials to allocate to the
23 different branches and what types of programs to offer and where to offer them. Bourne Trial Aff.
24 ¶¶ 11-20, ECF No. 131. She asserted that, “if the accuracy or quality of the Census data decline,
25 the accuracy and quality of the Community Branch Profiles will likewise decline,” and she
26 accordingly “will be less able to make appropriate decisions regarding resource allocation, collection
27 management, and program management for the SJPL.” *Id.* ¶¶ 21-22. But she stated only that she
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1 will be “less able” to make “appropriate” decisions, not that she will be unable to do so. She did
2 not assert that she ultimately might still be “able” to make “appropriate decisions” even with less
3 accurate data, for example, through using *other* available data; notably, Ms. Bourne did not testify
4 that she is required to use census data. She also did not identify which resources, materials, or
5 programs she might allocate less “appropriately” if the census results were inaccurate in the ways
6 plaintiffs expect or specifically identify or quantify the “direct negative impact” that any allocation
7 decision would have on the communities the SJPL serves. *See id.* ¶ 24.

8 ***c. Loss of privacy***

9 96. The Census Bureau is barred from disclosing individual responses to a citizenship
10 question on the decennial census questionnaire, and cannot disclose any information through which
11 the data furnished by any particular establishment or individual can be identified. Tr. 900:23-
12 901:17.

13 97. The Census Bureau does not disclose citizenship information that has not gone
14 through an approved disclosure avoidance process. Tr. 900:23-901:17. The disclosure avoidance
15 “procedure that’s going to be used for the 2020 data is much stronger than the one that was used in
16 2010” and is “known in the scientific literature as differential privacy.” *Id.* 902:4-7. This process
17 will ensure and “quantif[y] the extent to which you have protected the confidentiality of every
18 person in the United States in every publication from the 2020 census.” *Id.* 901:8-10.

19 98. Plaintiffs’ alleged confidentiality or privacy concerns about the possible disclosure
20 of their citizenship information are wholly lacking in any evidentiary basis and therefore untethered
21 to any actual risk. *See Suppl. Tometi Trial Aff.* ¶¶ 9, 10, ECF No. 154 (referencing newspaper
22 articles).

23 **B. Causation and Redressability**

24 99. No credible, quantitative evidence proves that any differential undercount that
25 occurs in 2020 can specifically be attributed to the citizenship question separate from other,
26 independent factors such as the general macro-environment. As Dr. Abowd testified, “the macro
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1 environment is going to be a serious problem in conducting the 2020 census” and that would be
2 the case absent inclusion of a citizenship question. Tr.862:4-19.

3 100. Dr. Abowd confirmed that the macro-environment, including the political
4 environment, can affect response rates. Tr. 861:10-863:3.

5 101. The macro-environment may make persons from some subgroups reluctant to
6 respond to the census questionnaire regardless whether it contains a citizenship question.
7 Tr. 861:10-863:3.

8 102. There is no evidence that removal of the citizenship question from the census will
9 redress Plaintiffs’ claimed injuries because the macro environment would remain problematic.
10 Tr. 862:16-19.

11 103. The Census Bureau’s own research demonstrated that concerns about
12 confidentiality predate the Secretary’s decision to include a citizenship question. For example, a
13 presentation by a Census Bureau researcher in November 2017—more than four months before
14 the Secretary’s decision—included findings that respondents had spontaneously expressed fears
15 that, *inter alia*, “the Census could give my information to internal security and immigration could
16 come and arrest me,” and that in “our current political climate, the Latino community will not sign
17 up because they will think that Census will pass their information on.” PTX-326 at 8. The same
18 2017 presentation relayed anecdotes in which census field staff reported “unusual respondent
19 behavior” when approached to take part in surveys. *Id.* at 12.

20 104. The Census Bureau’s CBAMS research found that 28% of respondents were
21 “extremely” or “very” concerned with confidentiality. PTX-465 at 29. These concerns would exist
22 absent a question on citizenship.

23 105. One respondent reported in during a CBAMS focus group that, “[f]or this census, a
24 lot of people are afraid. It doesn’t matter if they ask you whether or not you’re a citizen. The first
25 question they ask you, are you Hispanic or Latino ... that’s enough.” PTX-465 at 43.

26 106. Dr. Barreto testified extensively as to the impact of the current macro environment
27 on survey participation. He opined specifically that currently “many in the immigrant community
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1 feel at threat because of the immigration policies that our country currently faces,” and that “it is
2 not just a political attitude that they don’t like that might be creating discomfort, but it is an actual
3 real threat to themselves and to their families.” Tr. 397:1-9.

4 107. As a result, the harm Plaintiffs allege cannot be shown to be specifically attributable
5 to the citizenship question rather than to other, independent factors, such as the general macro-
6 environment.

7 **III. Administrative Record Facts**

8 Defendants agree with Plaintiffs that their Administrative Procedure Act (“APA”) claim
9 must be decided on the basis of the administrative record, but disagree that the Court may consider
10 extra-record evidence produced at discovery or at trial to decide the merits of Plaintiffs’
11 Enumeration Clause claim. On the contrary, the administrative record forms the proper basis for
12 review of both of Plaintiffs’ claims; accordingly, set forth below are those facts from the
13 administrative record on which this Court should base its legal review of the Secretary’s decision.

14 **A. Secretary Ross’s Examination of Census Issues**

15 108. Soon after Wilbur L. Ross was appointed and confirmed as Secretary of Commerce,
16 he “began considering various fundamental issues” regarding the 2020 census, “including funding
17 and content,” as well as schedule, contracting issues, systems readiness, and the upcoming 2018
18 End-to-End Test. AR 1321; *see also* AR 317-322, 1416-1470. The Secretary’s ultimate goal in
19 reviewing these issues is “make every effort to provide a complete and accurate decennial census.”
20 AR 1313.

21 109. One of the issues Secretary Ross examined early in his tenure “included whether to
22 reinstate a citizenship question,” which he and his staff “thought . . . could be warranted.” AR
23 1321, 2521-2522, 12465, 12541-12543; *see also* AR 3699 (referring in a May 2017 email to his
24 “months['] old request that we include the citizenship question”).

25 110. Secretary Ross and his staff “had various discussions with other governmental
26 officials about reinstating a citizenship question to the Census” and, “[a]s part of that deliberative
27 process, [they] consulted with Federal governmental components.” AR 1321. In particular, they
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1 inquired “whether the Department of Justice (DOJ) would support, and if so would request,
2 inclusion of a citizenship question as consistent with and useful for enforcement of the Voting
3 Rights Act.” *Id.*

4 111. DOJ has requested a special tabulation of citizenship data derived from the
5 American Community Survey (“ACS”) for the purposes of carrying out its enforcement
6 responsibilities under the Voting Rights Act. AR 278-283, 9203-9216.

7 112. Department of Commerce Deputy Chief of Staff and Chief of Policy Earl
8 Comstock initially reached out to DOJ in May 2017. AR 2462, 12755.

9 113. In August and September 2017, Secretary Ross requested an update on the status of
10 the inquiries regarding the reinstatement of a citizenship question. AR 2034, 2424, 2459-2460,
11 4004, 12476.

12 114. Secretary Ross spoke with the Attorney General on September 18, 2017, about
13 whether DOJ would find citizenship data from the decennial census useful. AR 2528, 2636.

14 **B. DOJ’s Request to Reinstate a Citizenship Question on the 2020 Decennial**
15 **Census to Facilitate Enforcement of the Voting Rights Act**

16 115. On December 12, 2017, Arthur E. Gary, General Counsel of DOJ’s Justice
17 Management Division, sent a letter to Dr. Ron Jarmin, who was then performing the non-exclusive
18 functions and duties of the Director of the Census Bureau. AR 663-65.

19 116. In that letter, Mr. Gary stated that “[t]he Department of Justice is committed to
20 robust and evenhanded enforcement of the Nation’s civil rights laws and to free and fair elections
21 for all Americans. In furtherance of that commitment, I write on behalf of the Department to
22 formally request that the Census Bureau reinstate on the 2020 Census questionnaire a question
23 regarding citizenship, formerly included in the so-called ‘long form’ census. This data is critical to
24 the Department’s enforcement of Section 2 of the Voting Rights Act and its important protections
25 against racial discrimination in voting. To fully enforce those requirements, the Department needs
26 a reliable calculation of the citizen voting-age population in localities where voting rights violations
27 are alleged or suspected. As demonstrated below, the decennial census questionnaire is the most
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1 appropriate vehicle for collecting that data, and reinstating a question on citizenship will best enable
2 the Department to protect all American citizens' voting rights under Section 2." AR 663.

3 117. Mr. Gary noted the importance of obtaining citizen voting-age population for
4 determining whether a racial group could constitute a majority in a single-member district, and its
5 utility for avoiding the "wrong result" of drawing a single-member district in which a minority
6 group constituted a majority of the voting-age population but not the majority of the citizen voting-
7 age population. AR 663-64.

8 118. Mr. Gary stated that "in order to assess and enforce compliance with Section 2's
9 protection against discrimination in voting, the Department needs to be able to obtain citizen
10 voting-age population data for census blocks, block groups, counties, towns, and other locations
11 where potential Section 2 violations are alleged or suspected." AR 664.

12 119. Mr. Gary stated that the Census Bureau had included a citizenship question on the
13 "long form" questionnaire from 1970 to 2000, and that DOJ had formerly used that data to assess
14 compliance with Section 2 and in Section 2 enforcement litigation. AR 664.

15 120. Mr. Gary noted that DOJ had begun using citizenship data from the ACS after the
16 Census Bureau discontinued the use of the "long form" questionnaire, but he explained that the
17 ACS does not yield the ideal data for such purposes for four reasons. AR 664-65.

18 121. First, Mr. Gary explained that "[j]urisdictions conducting redistricting, and the
19 Department in enforcing Section 2, already use the total population data from the census to
20 determine compliance with the Constitution's one-person, one-vote requirement, *see Evenwel v.*
21 *Abbott*, 136 S. Ct. 1120 (Apr. 4, 2016). As a result, using the ACS citizenship estimates means
22 relying on two different data sets, the scope and level of detail of which vary quite significantly."
23 AR 664.

24 122. Second, because the ACS estimates are rolling and aggregated into one-year, three-
25 year, and five- year estimates, Mr. Gary stated that "they do not align in time with the decennial
26 census data. Citizenship data from the decennial census, by contrast, would align in time with the
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1 total and voting-age population data from the census that jurisdictions already use in redistricting.”
2 AR 665.

3 123. Third, Mr. Gary explained that “the ACS estimates are reported at a ninety percent
4 confidence level, and the margin of error increases as the sample size—and, thus, the geographic
5 area—decreases. *See* U.S. Census Bureau, Glossary: Confidence interval (American Community
6 Survey), https://www.census.gov/glossary/#term_ConfidenceintervalAmericanCommunitySurvey
7 (last visited Nov. 22, 2017). By contrast, decennial census data is a full count of the population.”
8 AR 665.

9 124. Fourth, Mr. Gary noted that “[c]ensus data is reported to the census block level,
10 while the smallest unit reported in the ACS estimates is the census block group. *See* American
11 Community Survey Data 3, 5, 10. Accordingly, redistricting jurisdictions and the Department are
12 required to perform further estimates and to interject further uncertainty in order to approximate
13 citizen voting-age population at the level of a census block, which is the fundamental building block
14 of a redistricting plan.” AR 665. Mr. Gary explained that “[h]aving all of the relevant population
15 and citizenship data available in one data set at the census block level would greatly assist the
16 redistricting process.” *Id.*

17 125. For all these reasons, DOJ stated that it “believes that decennial census
18 questionnaire data regarding citizenship, if available, would be more appropriate for use in
19 redistricting and in Section 2 litigation than the ACS citizenship estimates.” Accordingly, “the
20 Department formally request[ed] that the Census Bureau reinstate into the 2020 Census a question
21 regarding citizenship” and “that the Census Bureau release this new data regarding citizenship at
22 the same time as it releases the other redistricting data, by April 1 following the 2020 Census.” AR
23 677.

24 **C. The Department Of Commerce’s Analysis of DOJ’s Request**

25 126. Following receipt of DOJ’s request, the Secretary of Commerce “set out to take a
26 hard look at the request and ensure that [he] considered all facts and data relevant to the question
27 so that [he] could make an informed decision on how to respond.” AR 1313. To that end,
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1 Commerce “immediately initiated a comprehensive review process led by the Census Bureau.” *Id.*
2 “The Census Bureau and the Department’s Office of the Secretary began a thorough assessment
3 that included legal, program, and policy considerations.” *Id.* As part of this process, the Secretary
4 “met with Census Bureau leadership on multiple occasions to discuss their process for reviewing
5 the DOJ request, their data analysis, [his] questions about accuracy and response rates, and their
6 recommendations.” *Id.*

7 127. The Census Bureau assembled a team to perform the technical analysis, led by Dr.
8 John M. Abowd, Chief Scientist and Associate Director for Research and Methodology. AR 3354,
9 5539-5542, 9339; *see also, e.g.*, AR 8990, 9005, 9244. That team conducted preliminary analyses
10 during the period from December 2017 to January 2018. *See* AR 5495-5511; *see also* AR 3713-3720,
11 5538, 5539-5542, 5553-5564, 5658-5677, 5656-5717, 6489-6495, 6533-6542, 7763-8261.

12 128. On January 19, 2018, Dr. Abowd and his team, on behalf of the Census Bureau,
13 submitted a detailed memorandum (hereinafter referred to as the “January 2018 Abowd Memo”) to
14 Secretary Ross. AR 1277-85. This memorandum analyzed three alternatives to provide DOJ with
15 the data it had requested—Option A (make no change), Option B (add the question on the 2020
16 census questionnaire), and Option C (use administrative data to provide citizenship information).
17 AR 1277.

18 129. The January 2018 Abowd Memo described certain advantages of Option B, adding
19 a citizenship question to the 2020 decennial census, including that it would improve block-level
20 data and would provide a direct measure of self-reported citizenship for the whole population.
21 AR 1278.

22 130. The January 2018 Abowd Memo also reported that because the citizenship question
23 was already asked on the ACS, the Census Bureau “would accept the cognitive research and
24 questionnaire testing from the ACS instead of independently retesting the citizenship question.
25 This means that the cost of preparing the new question would be minimal.” AR 1279; *see also*
26 AR 415 (Census Bureau presentation on adding questions to the census, stating that “[i]f the
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1 question is not currently used in an ongoing survey, the Census Bureau must test the wording of
2 the question”).

3 131. The January 2018 Abowd Memo also addressed the potential shortcomings of
4 including a citizenship question on the census, including that there would likely be a decrease in the
5 self-response rate, which would lead to higher nonresponse follow-up costs and fewer correct
6 enumerations. AR 1280-82. The Memo estimated a potential 5.1% decrease in self-response
7 among noncitizen households. AR 1280; *see also* AR 456. The Memo also concluded that the
8 anticipated decrease in self-response would lead to lower quality citizenship data. AR 1280.

9 132. The Census Bureau’s conservative estimate that an additional 5.1% of households
10 with at least one noncitizen may not self-respond to the 2020 census questionnaire if a citizenship
11 question were included was based, in the absence of a randomized controlled experiment, on a
12 natural experiment that could not definitively assign causation to the citizenship question itself.
13 AR 1280.

14 133. The January 2018 Abowd Memo concluded that Option C, using administrative
15 records for citizenship data, would yield more accurate results—because administrative records
16 relating to citizenship are more accurate than self-reports—and would be less costly. AR 1283-
17 1285; *see also* AR 284-310. *But see* AR 534-544. However, high-quality administrative records on
18 citizenship do not cover the entire population. AR 1283-1285; *see also* AR 66-67, 108-09, 116, 660-
19 62.

20 134. The January 2018 Abowd Memo recommended that the Secretary either make no
21 change to the Census Bureau’s data collection on citizenship or obtain citizenship status from
22 administrative records for the whole 2020 census population. AR 1277.

23 135. Following submission of the January 2018 Abowd Memo to Commerce leadership,
24 Commerce prepared a list of 35 questions to the Census Bureau to obtain more details about and to
25 probe the rationale underlying its analysis. AR 1286-1303, 8987. The questions represented a range
26 of perspectives and concerns among the Secretary and his staff regarding the Census Bureau’s
27 analysis and recommendations. *See* AR 1335, 1976-1978, 1980, 2043-44, 2046, 2472-2475, 2504-
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1 2505, 8678-8680. The final list of questions was delivered to the Census Bureau on January 30,
2 2018. AR 1974, 12902-12904.

3 136. The Census Bureau provided answers to the questions through an iterative process,
4 whereby Commerce received many drafts and partial responses before receiving the final response.
5 *See, e.g.*, AR 1340-1352, 1599-1626, 1903-1963, 2316-2376, 5212-5215, 5583-5589, 7638-7645. The
6 Census Bureau provided its final draft of the responses to Commerce on February 2, 2018. AR
7 2292-2315, though some further revisions were made resulting in an updated final draft on
8 February 6, 2018. AR 2954-2981, 3441-3459; *see, e.g.*, AR 2702-2711, 3142-3181, 6222-6232. The
9 final version of the questions and answers included a revised answer to question 31, regarding the
10 process that had been used in the past to add questions to the decennial census. AR 1286-1303,
11 13023. The revised answer specified that, because no new questions had been added to the
12 decennial census in recent years, past precedent relating to changes to the ACS did not govern the
13 process for considering DOJ's request. AR 1296; *see* AR 13023.

14 137. Secretary Ross and his immediate staff reviewed Census's analyses. *See, e.g.*, 12479.

15 138. On February 12, 2018, Commerce and Census Bureau personnel, including
16 Secretary Ross, met to discuss the Census Bureau's analysis to date. AR 9334-9335. At this
17 meeting, the Secretary requested that the Census Bureau analyze a fourth alternative, Option D,
18 which would combine Options B and C. AR 1309; AR 9433-9434.

19 139. The Census Bureau provided two memoranda analyzing Option D on February 23,
20 2018, and March 1, 2018. AR 1304-1312, 2935-2940, 4713-4721; *see, e.g.*, AR 2180-2198, 4454-
21 4462, 5613-22, 5945-5948, 5967-6155, 6159-6173. In addition, the Census Bureau continued to
22 answer questions posed by Commerce until late March, 2018. *See, e.g.*, AR 2670-2680, 2894-2901,
23 5577-5581, 5608-5610, 5798-5803, 9370, 9680-9721.

24 140. The Secretary reviewed over 50 incoming letters and emails from stakeholders,
25 interest groups, Members of Congress, and state and local officials regarding reinstatement of a
26 citizenship question on the 2020 decennial census. AR 1313; *see* AR 775-792, 794-1165, 1176-1193,
27 1195-1197, 1210-1212, 1217-1220, 1222-1255, 1262-1273; *see also* AR 1768-1771, 3563-3565, 3915-
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1 3917. He also monitored views of the public more generally, as represented in media accounts. AR
2 1313; *see* AR 666-733. In addition, he discussed the citizenship question with over 24 diverse, well-
3 informed and interested parties, selected by his staff to represent a broad range of views. AR 1313;
4 *see* AR 1194, 1198-1209, 1213-1216, 1221, 1256-1261, 1274-1276; *see also* AR 1638, 1798, 1807-08,
5 1815-1816, 2599-2600, 2604, 3491, 8392-8467.

6 141. In considering all available information in determining whether to include a
7 citizenship question, officials at the Department of Commerce recognized that citizenship is one of
8 the core recommendations in the United Nations Principles and Recommendations for Population
9 and Housing Censuses. AR 1319.

10 **D. The Secretary's Decision Memorandum**

11 142. On March 26, 2018, Secretary of Commerce Wilbur Ross announced his decision to
12 reinstate a citizenship question on the 2020 decennial census. AR 1313-20.

13 143. In the decision memo, the Secretary stated that the decision was being made in
14 response to the December 12, 2017, DOJ letter, and that, after he had received the DOJ request, "I
15 set out to take a hard look at the request and ensure that I considered all facts and data relevant to
16 the question so that I could make an informed decision on how to respond. To that end, the
17 Department of Commerce ('Department') immediately initiated a comprehensive review process
18 led by the Census Bureau." AR 1313.

19 144. The Secretary stated that this review included legal, program, and policy
20 considerations, and that he had met with Census Bureau leadership on multiple occasions to discuss
21 their review of the DOJ request and their recommendations. He also noted that he had received
22 and reviewed over fifty letters from stakeholders regarding the issue of reinstatement of a
23 citizenship question on the 2020 Census. AR 1313.

24 145. The Secretary first observed that the citizenship question had been a feature of
25 almost every decennial census for over a century, and had been included in some form on the "long
26 form" or ACS for decades, and was thus a well-tested question. AR 1314.

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1 146. The Secretary stated that many stakeholders as well as the Census Bureau itself had
2 raised concerns that the reinstatement of a citizenship question would have a negative impact on
3 the response rate for non-citizens, but also noted that no one had produced evidence that the
4 response rate would decline “materially” as a result of the inclusion of a citizenship question. AR
5 1315.

6 147. The Secretary observed that although there was recent evidence that self-response
7 rates to the ACS were lower than in the 2010 decennial census, there were a number of potential
8 causes for this separate and apart from the citizenship question, including the outreach efforts
9 resulting in increased public awareness for the decennial census and the greater burden of
10 responding to the much longer ACS. AR 1315.

11 148. Weighing the information that had been provided, the Secretary concluded that,
12 “while there is widespread belief among many parties that adding a citizenship question could
13 reduce response rates, the Census Bureau’s analysis did not provide definitive, empirical support for
14 that belief.” AR 1316.

15 149. The Secretary considered the alternative option of only using administrative records
16 to provide the citizenship data requested by DOJ, but noted that the Census Bureau “is still
17 evolving its use of administrative records, and the Bureau does not yet have a complete
18 administrative records data set for the entire population.” AR 1316. The Secretary specifically
19 noted that this meant that a significant portion of the American voting age population could not be
20 matched to administrative records and, thus, would have to have citizenship information be
21 imputed. AR 1316.

22 150. The Secretary concluded that a combination of using administrative records, the
23 development of which the Census Bureau could prioritize before the 2020 census, and reinstating a
24 citizenship question on the 2020 decennial census questionnaire was the best option to provide
25 DOJ the data it requested. AR 1317.

26 151. In making this determination, the Secretary explained that including the question on
27 the 2020 decennial census will give each person an option to provide an accurate answer, and
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1 would only impose a minimal imposition of a single extra question which by law could only be used
2 anonymously and for statistical purposes. AR 1317.

3 152. The Secretary also noted that the use of administrative records in conjunction with
4 a question on the 2020 decennial census questionnaire would provide a method for obtaining
5 citizenship data for people who do not respond, as well as providing a check for accuracy for those
6 who respond with an inaccurate answer. AR 1317.

7 153. The Secretary noted that “I have carefully considered the argument that the
8 reinstatement of a citizenship question on the decennial census would depress response rate.”
9 AR 1317. However, the Secretary determined that the “need for accurate citizenship data”
10 outweighed such concerns, particularly in light of the lack of empirical evidence that the self-
11 response rate would be materially impacted by the reinstatement of a citizenship question. AR
12 1317.

13 154. The Secretary also considered the concern that reinstatement of a citizenship
14 question would increase non-self-response rates by imposing an additional burden on those
15 responding to the questionnaire. However, the Secretary noted that there was very limited
16 empirical evidence that the inclusion of one additional question would have any material impact on
17 self-response rates. AR 1318.

18 155. In addition, the Secretary considered whether the sensitivity of a question about
19 citizenship could lead to a decrease in self-response rates. The Secretary noted that there was
20 evidence from Nielsen studies, as well as past census initiatives, that the inclusion of such a
21 sensitive question would not materially change the response rate. AR 1318.

22 156. The Secretary further considered the potential that the reinstatement of a
23 citizenship question on the 2020 decennial census would lead to increased costs. The Secretary
24 determined that it was difficult to assess whether, if the citizenship question led to lower initial self-
25 response rates, it would lead to an increase in costs for NRFU efforts. The Secretary noted that the
26 available evidence demonstrated that the impact on the cost of NRFU would likely be very small as
27 the percent decrease in overall self-response estimated to be potentially caused by the citizenship
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1 question (.5%) was within the percent decrease (3%) accounted for in the Department's recent Life
2 Cycle Cost Estimate for the 2020 census. AR 1319; *see* AR 173.

3 157. The Secretary noted not only that some form of citizenship question had been a
4 part of census questionnaires for centuries, but also that censuses in many other major democratic
5 nations, including Australia, Canada, France, Germany, Indonesia, Ireland, Mexico, Spain, and the
6 United Kingdom, include a question asking about citizenship. AR 1319.

7 158. The Secretary ultimately concluded that, while it could not definitively be
8 determined what the impact of a citizenship question would be on response rates, the value of
9 having more complete and accurate citizenship data outweighed those concerns. AR 1319.

10 159. The Secretary announced that "after a thorough review of the legal, program, and
11 policy considerations, as well as numerous discussions with the Census Bureau leadership and
12 interested stakeholders, I have determined that reinstatement of a citizenship question on the 2020
13 decennial census is necessary to provide complete and accurate data in response to the DOJ
14 request. To minimize any impact on decennial census response rates, I am directing the Census
15 Bureau to place the citizenship question last on the decennial census form." AR 1320.

16 160. The Census Bureau's August 2018 analysis estimating a potential 5.8 percentage
17 point decline in self-response from households containing a noncitizen (the "Brown Paper") did
18 not exist and was not considered or relied upon by the Secretary when he reached his decision to
19 include a citizenship question on the 2020 questionnaire.

20 PROPOSED CONCLUSIONS OF LAW

21 I. Plaintiffs Have Failed to Prove Standing.

22 A. General Legal Standards for Article III Standing

23 1. The doctrine of constitutional standing, an essential aspect of an Article III case or
24 controversy, demands that a plaintiff have "a personal stake in the outcome of the controversy [so]
25 as to warrant his invocation of federal-court jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 498 (1975)
26 (internal citation omitted).

1 2. At its “irreducible constitutional minimum,” the doctrine requires a plaintiff, as the
2 party invoking the Court’s jurisdiction, to establish three elements: (1) a concrete and particularized
3 injury-in-fact, either actual or imminent; (2) a causal connection between the injury and defendants’
4 challenged conduct, such that the injury is “fairly . . . trace[able] to the challenged action of the
5 defendant”; and (3) a likelihood that the injury suffered will be redressed by a favorable decision.
6 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

7 3. The standing requirement of “injury in fact” requires proof that the plaintiff “has
8 sustained or is immediately in danger of sustaining a direct injury” as a result of the challenged
9 action. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1552 (2016) (citations omitted).

10 4. The injury must be “concrete and particularized,” *Defs. of Wildlife*, 504 U.S. at 560
11 (citations omitted), and not “merely ‘conjectural’ or ‘hypothetical’ or otherwise speculative.”
12 *Summers v. Earth Island Inst.*, 555 U.S. 488, 505 (2009) (quoting *Defs. of Wildlife*, 504 U.S. at 560).

13 5. Thus, an alleged future injury must be “*certainly* impending”; “[a]llegations of
14 possible future injury’ are not sufficient.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013)
15 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990), emphasis in *Clapper*).

16 6. The “fairly traceable” prong of standing requires Plaintiffs to prove that their
17 certainly impending injuries “fairly can be traced to the challenged conduct of the defendant, and
18 not injury that results from the independent action of some third party not before the court.” *Simon*
19 *v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

20 7. In the census context, a mere showing of differential net undercount is not enough,
21 as there has never been a perfect census count. *See Carey v. Klutznick*, 653 F.2d 732, 735 (2d Cir.
22 1981). Plaintiffs instead must prove by a preponderance of the evidence that any differential net
23 undercount (1) is specifically attributable to the citizenship question and (2) has an actual injurious
24 effect on Plaintiffs.

25 8. As the parties invoking federal jurisdiction, Plaintiffs bear the burden of establishing
26 these elements of standing “with the manner and degree of evidence required at the successive
27 stages of the litigation.” *Defs. of Wildlife*, 504 U.S. at 561. “And at the final stage, those facts (if
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1 controverted) must be ‘supported adequately by the evidence adduced at trial.’” *Id.* (quoting
2 *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n.31 (1979)).

3 9. If Plaintiffs cannot prove standing by a preponderance of the evidence, *Leite v. Crane*
4 *Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014), the Court must refrain from addressing the merits of
5 Plaintiffs’ APA and Enumeration and Apportionment Clause claims because “[f]ederal courts may
6 not decide questions that cannot affect the rights of litigants in the case before them or give
7 opinions advising what the law would be upon a hypothetical state of facts.” *Chafin v. Chafin*, 568
8 U.S. 165, 172 (2013) (alterations and citations omitted).

9 10. Plaintiffs have not established, by a preponderance of the evidence, the three
10 elements of Article III standing: Plaintiffs have not established a concrete and particularized injury-
11 in-fact, that there is a fairly traceable causal connection between their alleged injury and the
12 inclusion of the citizenship question, and a likelihood that the injury will be redressed by a favorable
13 decision. *Devs. of Wildlife*, 504 U.S. at 560.

14 **B. Plaintiffs Have Failed to Prove a Concrete, Non-Speculative Injury That Is**
15 **Certainly Impending.**

16 **1. Plaintiffs Failed to Prove that They Face Any Imminent Risk of Concrete**
17 **Injury in the Form of Lost Federal Funding.**

18 11. Plaintiffs’ claims regarding a loss of funding due to a net undercount resulting from
19 the inclusion of a citizenship question are too speculative to satisfy Article III’s requirements. *See*
20 *Nat’l Law Ctr. on Homelessness & Poverty v. Kantor*, 91 F.3d 178, 185 (D.C. Cir. 1996) (finding lack of
21 standing where court could not determine “what effect any methodology for counting the homeless
22 would have on the federal funding of any particular appellant,” noting that “if a more accurate
23 count would have enlarged some of the communities’ shares, it likely would have reduced the
24 shares of other communities”); *id.* at 186 (“interstate vote dilution injury is difficult to establish”);
25 *Strunk v. U.S. Dep’t of Commerce*, Civ. A. No. 09-1295, 2010 WL 960428, at *3 (D.D.C. Mar. 15,
26 2010) (rejecting vote dilution claim for lack of standing where plaintiff was “but one citizen of New
27 York and one voter in New York’s 11th Congressional District”); *Ridge v. Verity*, 715 F. Supp. 1308,
28 1318 (W.D. Pa. 1989) (finding no standing to bring an apportionment claim when “none of the

1 plaintiffs in this case can show which states would gain and which states would lose representation
 2 in Congress”); *Fed’n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 570 (D.D.C. 1980)
 3 (holding that “none of the plaintiffs are able to allege that the weight of his or her vote in the next
 4 decade will be affected” where plaintiffs “can do no more than speculate as to which states might
 5 gain and which might lose representation” which depends, inter alia, on “the interplay of all other
 6 population factors which affect apportionment”); *see also Sharrow v. Brown*, 447 F.2d 94, 97 (2d Cir.
 7 1971) (noting that plaintiff’s claim of standing to challenge method of apportionment “presents
 8 difficulty” because plaintiff “would have to show, at least approximately, the apportionment his
 9 interpretation . . . would yield, not only for New York but for every other State as well”).

10 12. Plaintiffs also have not shown by a preponderance of the evidence that any
 11 potential differential undercount that may remain after NRFU operations and imputation will have
 12 an impact on federal funding. *Def. of Wildlife*, 504 U.S. at 560; *see* PFOFs ¶¶ 63-88.

13 **2. Plaintiffs Failed to Prove They Have Been Required to Expend Additional**
 14 **Resources**

15 13. BAJI does not have standing to sue on its own behalf because it has not
 16 demonstrated it has suffered a “concrete and demonstrable injury to its activities—with a
 17 consequent drain on its resources—constitut[ing] . . . more than simply a setback to the
 18 organization’s abstract social interests.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982);
 19 *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010)
 20 (organization cannot simply “manufacture the injury by incurring litigation costs or simply choosing
 21 to spend money fixing a problem that otherwise would not affect the organization at all.”); *accord*
 22 *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 416 (2013) (plaintiff “cannot manufacture standing
 23 merely by inflicting harm on [itself] based on [its] fears of hypothetical future harm that is not
 24 certainly impending”); *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002) (finding
 25 standing because organization showed that “a drain on its resources from both a diversion of its
 26 resources and frustration of its mission”); *Nat’l Treasury Emps. Union v. United States*, 101 F.3d 1423,
 27 1429–30 (D.C. Cir. 1996) (organization must show that its expenditure of resources was “a
 28 necessary link in achieving the organization’s ultimate purpose” and not just a product of

1 “unnecessary alarmism constituting a self-inflicted injury”); *Fair Employment Council of Greater Wash.,*
2 *Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994) (organization’s reallocation of
3 resources not sufficient for standing when organization “and its programs would have been totally
4 unaffected [by defendant’s conduct] if it had simply refrained from making the re-allocation).

5 14. BAJI’s alleged expenditure of resources is not sufficient to establish Article III
6 injury because it has not shown whether, absent any expenditure of resources it chooses to make,
7 the inclusion of a citizenship question on the 2020 census would likely cause a differential net
8 undercount. *La Asociacion de Trabajadores*, 624 F.3d at 1088; *see Clapper*, 133 S. Ct. at 1151 (Plaintiffs
9 “cannot manufacture standing merely by inflicting harm on themselves based on their fears of
10 hypothetical future harm that is not certainly impending.”). A plaintiff’s expenditure of resources is
11 also insufficient to establish Article III standing unless it is “beyond those normally expended” in
12 the absence of the challenged action. *Nat’l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434
13 (D.C. Cir. 1995); *accord Nat’l Law Ctr. on Homelessness & Poverty v. Kantor*, 91 F.3d 178, 182–83 (D.C.
14 Cir. 1996) (organization’s expenditure of resources not sufficient to create standing because it was
15 “part of its ordinary program expenditures”). BAJI has failed to show that it is expending any
16 *additional* resources to counteract a sufficiently concrete, impending injury. *See* PFOFs ¶¶ 84–88.

17 15. BAJI also has not established standing because it has not shown a direct conflict
18 between the defendant’s conduct and its mission. *Am. Soc’y for Prevention of Cruelty to Animals v. Feld*
19 *Entertainment, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011); *accord Nat’l Treasury Emps. Union*, 101 F.3d at
20 1429–30 (“[I]n those cases where an organization alleges that a defendant’s conduct has made the
21 organization’s activities more difficult, the presence of a direct conflict between the defendant’s
22 conduct and the organization’s mission is necessary—though not alone sufficient—to establish
23 standing.”).

24 16. When an organization’s mission is to vindicate the rights of a particular group, there
25 can be no such “direct conflict” between that mission and an undercount of that group in the
26 census because the undercount does not prevent the organization from continuing to pursue its
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1 mission of helping that group. *Nat'l Law Ctr. on Homelessness & Poverty v. Kantor*, 91 F.3d 178, 181–
2 82 (D.C. Cir. 1996).

3 17. The evidence demonstrates that BAJI lacks standing because it failed to
4 demonstrate concrete and demonstrable injuries to its activities that could be directly attributed to
5 the inclusion of a citizenship question on the 2020 decennial census. *See* PFOFs ¶¶ 84-88.

6 **3. Plaintiffs Failed to Prove That Any Lower Quality Demographic Data Will**
7 **Perceptibly Impair Any Concrete and Cognizable Interest.**

8 18. Lower quality data in the abstract is insufficiently “concrete” and “tangible” to
9 constitute an Article III injury in fact. *See Warth*, 422 U.S. at 508. Instead, Plaintiffs must show
10 that that lower quality data will perceptibly impair some concrete and tangible cognizable interest.
11 *See Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992) (plurality op.) (no standing for claim
12 challenging use of inaccurate data in reapportionment because plaintiffs “have neither alleged nor
13 shown ... that Massachusetts would have had an additional Representative if the allocation had
14 been done using some other source of ‘more accurate’ data”); *id.* at 823–29 (Scalia, J., concurring in
15 judgment) (no standing for any claims); *Whitmore v. Arkansas*, 495 U.S. 149, 156–57 (1990) (death-
16 row inmate lacked standing to challenge state’s incomplete and skewed database of other capital
17 crimes against which his case could be compared because he failed to show that corrected database
18 would lead state court to set aside his death sentence).

19 19. Plaintiffs failed to adduce evidence necessary to establish any tangible, cognizable
20 harm based on alleged lower quality data resulting from the inclusion of a citizenship question on
21 the 2020 decennial census. *See* PFOFs ¶¶ 89-95.

22 **4. Plaintiffs Failed to Prove a Nonspeculative Risk of Loss of Confidentiality or**
23 **Privacy**

24 20. Plaintiffs failed to establish that BAJI members’ sense of “fear and intimidation”
25 based on concerns that their census responses will not be kept confidential rise to the level of
26 injury-in-fact. Plaintiffs must demonstrate a substantial risk that BAJI members’ confidentiality or
27 privacy is actually in danger—speculative worry does not satisfy Article III. *Clapper*, 133 S. Ct. at
28 1151. Plaintiffs have not pointed to a single piece of evidence indicating that the Census Bureau

1 will alter its longstanding and deeply held commitment to preserving the confidentiality of census
2 responses, or make any other change that would lead to the disclosure of census responses. *See*
3 PFOFs ¶¶ 96-98.

4 **C. Plaintiffs Failed to Prove That Any Injury is Traceable to the Inclusion of the**
5 **Citizenship Question or that Any Alleged Injury Could be Redressed.**

6 21. To ensure that a plaintiff's allegations of harm are fairly attributable to the
7 challenged action, it is necessary to allege "a causal connection between the injury and conduct
8 complained of so that the injury is fairly traceable to the challenged action of the defendant and not
9 the result of the independent action of some third party who is not before the court." *Defs. of*
10 *Wildlife*, 504 U.S. at 560; *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 ("[A] federal court
11 [must] act only to redress injury that fairly can be traced to the challenged conduct of the
12 defendant, and not injury from independent action of some third party not before the court."); *see*
13 *also Warth*, 422 U.S. at 504 (finding standing lacking where alleged injury resulted from outside
14 forces, "rather than . . . respondents' assertedly illegal acts").

15 22. The evidence demonstrates that Plaintiffs did not meet their burden of establishing
16 that any differential undercount remaining after NRFU operations and imputation is traceable
17 specifically to the citizenship question rather than to the general macro-environment and political
18 climate. Plaintiffs' own expert testified about challenges facing the census in the current macro-
19 environment, and did not attempt to uncouple any incremental impact on census participation from
20 those pre-existing factors. *See* PFOFs ¶ 106.

21 23. Because Plaintiffs cannot decouple any impact on census participation due to the
22 purported impact of the citizenship question from other, pre-existing factors, it follows they cannot
23 demonstrate that their alleged injuries would be redressed by the removal of the citizenship
24 question. *Defs. of Wildlife*, 504 U.S. at, 560.

1 **II. Plaintiffs Failed to Prove that the Secretary’s Decision to Reinstate a Citizenship**
2 **Question was Arbitrary and Capricious.**

3 **A. Legal Standards for Review Under the Administrative Procedure Act**

4 24. Under the APA, a court is not authorized to set aside agency action as arbitrary and
5 capricious if the agency’s decision “was the product of reasoned decisionmaking.” *Motor Vehicle*
6 *Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* (“*State Farm*”), 463 U.S. 29, 52 (1983). “This
7 standard of review is highly deferential, presuming the agency action to be valid and affirming the
8 agency action if a reasonable basis exists for its decision.” *Pacific Dawn LLC v. Pritzker*, 831 F.3d
9 1166, 1173 (9th Cir. 2016) (citation omitted).

10 25. An agency decision will only be set aside if it “has relied on factors which Congress
11 had not intended it to consider, entirely failed to consider an important aspect of the problem,
12 offered an explanation for its decision that runs counter to the evidence before the agency, or is so
13 implausible that it could not be ascribed to a difference in view or the product of agency expertise.”
14 *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1244 (9th Cir. 2013) (citation omitted).

15 26. The Court’s role is limited to determining whether the agency has “examine[d] the
16 relevant data and articulate[d] a satisfactory explanation for its action including a rational
17 connection between the facts found and the choice made.” *State Farm*, 463 U.S. at 43. And “[t]hat
18 requirement is satisfied when the agency’s explanation is clear enough that its ‘path may reasonably
19 be discerned.’” *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citation omitted).

20 27. The Court’s review in this case must be particularly deferential because Plaintiffs
21 challenge the Secretary’s broad discretion over the census. “The text of the Constitution vests
22 Congress with virtually unlimited discretion in conducting the decennial ‘actual Enumeration,’” and
23 “there is no basis for thinking that Congress’ discretion is more limited than the text of the
24 Constitution provides.” *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996) (quoting art. 1, § 2, cl. 3)
25 (emphasis added).

26 28. Congress, in turn, “has delegated its broad authority over the census to the
27 Secretary.” *Wisconsin*, 517 U.S. at 19 (citing 13 U.S.C. § 141(a)).
28

1 29. Plaintiffs' arbitrary-and-capricious claim should be resolved as a matter of law based
2 on an evaluation of the record before the agency decisionmaker. Where, as here, "a party seeks
3 review of agency action under the APA . . . , the district judge sits as an appellate tribunal," and
4 "[t]he entire case on review is a question of law." *Herguan Univ. v. ICE*, 258 F. Supp. 3d 1050, 1063
5 (N.D. Cal. 2017) (quoting *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009)).

6 30. The testimony on the merits introduced by Plaintiffs at trial should not properly be
7 considered on APA review because such evidence was not before the Secretary and thus is
8 irrelevant to his decision. Considering expert testimony after the fact is inconsistent with the APA
9 standard of review and the required deference to the agency's factfinding. *See, e.g., Vt. Yankee*
10 *Nuclear Power Corp. v. Nat. Resources Def. Council, Inc.*, 435 U.S. 519, 549 (1978); *Walter O. Boswell Mem'l*
11 *Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984).

12 31. Similarly, materials produced in discovery are not, as a general matter, properly
13 considered in a review of agency action under the APA because those materials are not considered
14 part of the "whole record" before the agency. 5 U.S.C. § 706; *see e.g., Camp v. Pitts*, 411 U.S. 138,
15 142 (1973) (per curiam); *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988)
16 (discussing exceptions).

17 32. The Administrative Record contains all relevant information pertaining to Secretary
18 Ross's decision.

19 33. Under Title 13, Secretary Ross has virtually unlimited discretion to consider and
20 weigh evidence in the record to make policy decisions regarding the census, including such
21 decisions made in response to agency requests.

22 **B. The Secretary's Decision to Reinstate a Citizenship Question on the 2020**
23 **Decennial Census was Reasonable.**

24 34. The administrative record demonstrates that the Secretary of Commerce's decision
25 to reinstate a citizenship question on the 2020 decennial census was reasonable and fully consistent
26 with the APA. *See* AR 1-13,024.

1 35. The Secretary’s decision is reasonable because his memorandum reflects that he
2 conducted “a thorough review of the legal, program, and policy considerations, as well as numerous
3 discussions with the Bureau leadership and interested stakeholders.” *See, e.g.*, AR 1320.

4 36. The Secretary’s decision is reasonable, and specifically his Decision Memorandum
5 does not run counter to the evidence, because the memorandum reflects that he determined that
6 adding the citizenship question “is necessary to provide complete and accurate data in response to
7 the DOJ request.” AR 1320.

8 37. The Secretary’s decision is reasonable because he considered and accounted for the
9 effect of a citizenship question on census response rates and correctly noted in his decision the lack
10 of evidence that response rates would decline materially because of the question, and because the
11 Secretary expressly addressed how the Bureau’s budget provided sufficient funding for NRFU
12 efforts to prevent an undercount. AR 1315-1319.

13 38. The Secretary’s decision is reasonable because he explicitly recognized that both
14 stakeholders and the Census Bureau had raised concerns that the inclusion of a citizenship question
15 on the census could have a negative impact on self-response rates for non-citizens, but correctly
16 noted that no one had produced evidence that the response rate would decline materially as a result
17 of the inclusion of a question that had previously been on the census for decades. AR 1315.

18 39. The Secretary’s decision is reasonable because, as he explained in his Decision
19 Memorandum, asking a citizenship question in conjunction with using administrative records allows
20 the Bureau to compare the responses to the records to establish the most accurate, usable, and
21 complete citizenship data and could reduce the Bureau’s burden of imputing missing citizenship
22 data. AR 1317.

23 40. The Secretary’s decision is reasonable because he considered alternative options,
24 such as the use of administrative records only, but concluded that the Census Bureau “is still
25 evolving its use of administrative records, and the Bureau does not yet have a complete
26 administrative records data set for the entire population.” AR 1316.

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1 41. The Secretary’s decision is reasonable because he carefully considered the possibility
2 of depressed self-response rates before making the determination that “the need for accurate
3 citizenship data and the limited burden that the inclusion of the citizenship question would impose
4 outweigh fears about a potentially lower response rate.” AR 1317.

5 42. The Secretary acknowledged the macro-environment and that there may be distrust
6 of government, and recognized that this distrust would exist regardless of a citizenship question.
7 AR 1317. The Secretary correctly noted that no one could provide an analysis showing a material
8 decline in self-response rates among those who generally distrusted the government. *Id.*

9 43. The Secretary’s decision to add the citizenship question is reasonable because the
10 Secretary expressly addressed how the Bureau’s budget provided sufficient funding for NRFU
11 efforts to prevent an undercount, and because “[t]he citizenship data provided to DOJ will be more
12 accurate with the question than without it, which is of greater importance than any adverse effect
13 that may result from people violating their legal duty to respond.” AR 1319.

14 44. The Secretary’s decision is reasonable because he weighed the evidence, including
15 the possible cost and quality implications of reinstating a citizenship question, and concluded that a
16 combination of using administrative records and reinstating a citizenship question on the 2020
17 decennial census, was the best option to provide DOJ the data it requested. AR 1317.

18 45. Secretary Ross’s decision to add the citizenship question was not contrary to law
19 because he reasonably explained why pretesting wasn’t required. The Bureau’s internal data
20 collection standards do not require pretesting for questions that perform adequately in another
21 survey, and the Bureau’s senior executive staff determined and informed Secretary Ross that the
22 question was adequately tested, given the thorough cognitive and field testing of the citizenship
23 question on the American Community Survey and the logistical constraints that prevented further
24 pretesting. AR 1279. In any event, the Census Bureau’s guidelines are not legally binding on the
25 Secretary. “There is no authority for the proposition that a lower component of a government
26 agency may bind the decision making of the highest level.” *Comcast Corp. v. F.C.C.*, 526 F.3d 763,
27 769 (D.C. Cir. 2008).

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1 46. The administrative record demonstrates that the Secretary of Commerce’s decision
2 to reinstate a citizenship question on the 2020 decennial census was reasonable and fully consistent
3 with the APA. *See* PFOFs ¶¶ 142-60.

4 **III. The Secretary’s Decision to Reinstate a Citizenship Question Was in Accordance**
5 **With Law.**

6 **A. The Secretary’s Decision Fully Complies with 13 U.S.C. § 6(c).**

7 47. There is a statutory requirement that, “[t]o the maximum extent possible and
8 consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall
9 acquire and use information available from any source referred to in subsection (a) or (b) of this
10 section instead of conducting direct inquiries.” 13 U.S.C. § 6(c).

11 48. DOJ specifically requested that a citizenship question be included on the 2020
12 decennial census to gather census-block level data to facilitate its enforcement efforts under Section
13 2 of the Voting Rights Act (VRA). AR 663-64.

14 49. The Secretary determined that the information that could be gained from
15 administrative records alone was not of “the kind, timeliness, quality, and scope of the statistics
16 required” for DOJ’s VRA enforcement efforts because administrative records would be inadequate
17 for a significant portion of the population. *See* AR 1316. Therefore, 13 U.S.C. § 6(c) does not
18 prohibit the Secretary from including a citizenship question on the 2020 decennial census in
19 addition to the use of administrative records.

20 **B. The Secretary’s Decision Was in Accordance with 13 U.S.C. § 141(f).**

21 **1. The Court Lacks Jurisdiction to Review Plaintiffs’ Claim that Secretary Ross**
22 **Violated the Reporting Requirement of § 141(f)(3).**

23 50. Plaintiffs’ assertion that the Secretary violated Section 141(f) of the Census Act
24 because he did not identify “citizenship” as a subject for the 2020 census in his March 2017 report
25 to Congress, and “there are no ‘new circumstances . . . which necessitate’ the inclusion of the
26 citizenship question on the census” must be rejected as a matter of law.

27 51. Congressional reporting requirements—like § 141(f)—are beyond the courts’
28 jurisdiction to review for two reasons: (1) the courts cannot redress any injury resulting from an

1 inadequate report because it is Congress’s sole decision how to respond to a report, adequate or
2 inadequate; and (2) submitting an informational report to Congress is not the type of “final agency
3 action” covered by APA review because it does not determine rights or obligations or trigger legal
4 consequences. 5 U.S.C. §§ 551 (13), 701(a); *Guerrero v. Clinton*, 157 F.3d 1190, 1191-92, 1196 (9th
5 Cir. 1998) (“[T]his issue seems to us quintessentially within the province of the political branches to
6 resolve as part of their ongoing relationships.” (quoting *Nat. Resources Def. Council, Inc. v. Hodel*, 865
7 F.2d 288, 318-19 (D.C. Cir. 1988)); *see also, e.g., Renee v. Duncan*, 686 F.3d 1002, 1016-17 (9th Cir.
8 2012) (explaining that the courts could not redress an injury based on an alleged violation of a
9 requirement “to file an annual report to Congress”); *Wilderness Soc’y v. Norton*, 434 F.3d 584, 591
10 (D.C. Cir. 2006) (declining to review agency’s required submission of recommendations to the
11 President, because “[t]here is no good reason to believe that such an order will redress [plaintiffs’]
12 injuries. No legal consequences flow from the recommendations”); *Taylor Bay Protective Ass’n v.*
13 *Adm’r, EPA*, 884 F.2d 1073, 1080-81 (8th Cir. 1989) (declining to review agency compliance with a
14 congressional reporting provision because “nothing in the scheme indicat[es] that judicial review . .
15 . is necessary or advisable. . . . Additionally, the nature of the agency action here is distinct from the
16 type of agency action normally reviewable”); *United States v. White*, 869 F.2d 822, 829 (5th Cir. 1989)
17 (declining to review an agency’s compliance with a congressional reporting requirement because
18 “[t]his court will not scrutinize the merits or timeliness of reports intended solely for the benefit of
19 Congress”); *Natural Resources Def. Council, Inc. v. Hodel*, 865 F.2d 288, 318-19 (D.C. Cir. 1988)
20 (declining to review an agency’s allegedly insufficient report under a congressional reporting
21 provision because managing the reports should be left to Congress, and the Court “despair[ed] at
22 formulating judicially manageable standards” to evaluate the reports on Congress’s behalf); *Coll.*
23 *Sports Council v. Gov’t Accountability Office*, 421 F. Supp. 2d 59, 68 (D.D.C. 2006) (holding that
24 plaintiffs could not bring an APA claim to challenge an agency’s misstatements to Congress under a
25 reporting statute because “[w]here a report is not explicitly or implicitly intended as anything more
26 than a vehicle to inform Congress, it is for Congress alone to determine if the Report satisfies the
27 statutory requirements it enacted” (internal quotation marks and citation omitted)).
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1 52. Furthermore, even if § 141(f) represented a substantive requirement rather than a
2 reporting requirement, it would not be reviewable under the APA. Under 5 U.S.C. § 701(a), APA
3 review is precluded where “Congress expressed an intent to prohibit judicial review.” *Webster v. Doe*,
4 486 U.S. 592, 599 (1988). Congress has expressed its intent to prohibit judicial review of the
5 Secretary’s compliance with § 141(f) in two ways. First, § 141(f)(3) explicitly leaves the decision of
6 when to modify questions or topics to the Secretary. *See* § 141(f)(3) (calling for a report “if *the*
7 *Secretary finds* new circumstances exist” (emphasis added)). Second, § 141(f)(3) requires only that the
8 Secretary inform Congress of modifications to subjects or questions, not the “new circumstances”
9 leading thereto. *See* § 141(f)(3) (requiring the Secretary to submit “a report containing the
10 Secretary’s determination of the subjects, types of information, or questions as proposed to be
11 modified”). Congress, let alone the courts, would therefore have little basis to review the Secretary’s
12 exclusive determination of “new circumstances.”

13 2. Secretary Ross’s Submission of § 141(f) Reports Was Entirely Proper

14 53. Even if this claim were reviewable, Section 141(f) has been fully satisfied. Pursuant
15 to 13 U.S.C. § 141(f)(2), the intended questions for the 2020 decennial census have been submitted
16 to Congress. *See* Questions Planned for the 2020 Census and American Community Survey (Mar.
17 29, 2018), [https://www2.census.gov/library/publications/decennial/2020/operations/planned-](https://www2.census.gov/library/publications/decennial/2020/operations/planned-questions-2020-acs.pdf)
18 [questions-2020-acs.pdf](https://www2.census.gov/library/publications/decennial/2020/operations/planned-questions-2020-acs.pdf). Through that report, Secretary Ross informed Congress of the questions
19 for the 2020 decennial census, including the citizenship question, *id.* at 7, thus satisfying the
20 requirements of § 141(f)(3), if a 141(f)(3) report were required. There is no requirement that the
21 Secretary inform Congress of the new circumstances triggering modifications to subjects submitted
22 under (f)(1). 13 U.S.C. § 141(f)(3).

23 54. The Secretary’s decision to add the citizenship question also was not contrary to law
24 because his Decision Memorandum responds to a new circumstance—DOJ’s request to the Bureau
25 for block-level CVAP data to enforce the Voting Rights Act—and reflects the Secretary’s
26 understanding of the value of such data, and because the Secretary made an explicit determination
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1 based on the information provided by the Census Bureau that using administrative records alone
2 would be inadequate for a significant portion of the population. AR 1316.

3 55. In any event, Secretary Ross could remedy any error by simply submitting a
4 §141(f)(3) report at any time between now and the 2020 census. See 13 U.S.C. § 141(f)(3)
5 (permitting submission of such a report at any time after the submission of a § 141(f)(1) or (2)
6 report and “before the appropriate census date”). Accordingly, if a §141(f)(3) report is required,
7 the Secretary has fully satisfied the Census Act, or could do so any time before April 1, 2020.

8 **IV. Plaintiffs’ Enumeration Clause Claim Must Be Rejected**

9 56. The Enumeration Clause of the Constitution confers upon Congress (which has
10 delegated to the Secretary of Commerce) “virtually unlimited discretion” to conduct an “actual
11 Enumeration” of the American public every 10 years, with the primary purpose of providing a basis
12 for apportioning political representation among the states. *Wisconsin v. City of New York*, 517 U.S. 1,
13 19, 24 (1996).

14 57. The Supreme Court has found that the clause “suggests that the Framers expected
15 census enumerators to seek to reach each individual household” and that the constitutional choices
16 embodied in the Enumeration Clause “suggest a strong constitutional interest in accuracy.” *Utah v.*
17 *Evans*, 536 U.S. 452, 478 (2002).

18 58. The Supreme Court reviews decisions pertaining to the administration of the
19 decennial census under the Enumeration Clause with an eye to whether the challenged decision
20 bears “a reasonable relationship to the accomplishment of an actual enumeration of the population,
21 keeping in mind the constitutional purpose of the census.” *Wisconsin*, 517 U.S. at 20.

22 59. In denying Defendants’ motion to dismiss, this Court interpreted the foregoing
23 authorities as dictating that “[t]he Secretary’s decision to alter the census in a way that affirmatively
24 interferes with the actual enumeration, and does not fulfill any other reasonable governmental
25 purpose, is subject to a challenge under the Enumeration Clause.” ECF No. 75, at 29.

26 60. The Court further held that, “while the content of the census questionnaire,
27 including the specific questions that appear on it, is nearly always committed to the Secretary’s
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1 sound discretion, there may be a rare question that is so uniquely impactful on the process of
2 counting itself, that it becomes akin to a mechanics-of-counting-type challenge, which is plainly
3 reviewable under the Enumeration Clause.” ECF No. 75, at 28.

4 61. The “standard for evaluating a challenge under the Enumeration Clause is an
5 objective one—that is, the Secretary’s actions either satisfy the constitutional mandate or they do
6 not.” ECF No. 75, at 27.

7 62. Plaintiffs’ Enumeration Clause claims must be decided on the basis of the
8 administrative record, without consideration of extra-record evidence produced in discovery or at
9 trial, because the APA provides the waiver of sovereign immunity for this claim and the APA’s
10 strictures on judicial review accordingly apply with equal force to the Enumeration Clause claims.
11 *See, e.g., Jarita Mesa Livestock Grazing Ass’n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1237 (D.N.M.
12 2014) (explaining that the case “alleges constitutional violations as well as statutory ones does not
13 take it outside of the APA”); *Bellion Spirits, LLC v. United States*, 335 F. Supp. 3d 32, 43 (D.D.C.
14 2018) (“[W]hen a constitutional challenge to agency action requires evaluating the substance of an
15 agency’s decision made on an administrative record, that challenge must be judged on the record
16 before the agency”); *Chiayu Chang v. U.S. Citizenship & Immigration Servs.*, 254 F. Supp. 3d 160, 161
17 (D.D.C. 2017) (summarizing cases holding that the assertion of constitutional claims does not
18 remove a matter from the APA’s procedural strictures).

19 63. Plaintiffs have not shown that the inclusion of a citizenship question will prevent
20 the accomplishment of an actual enumeration of the population, keeping in mind the constitutional
21 purpose of the census. *Wisconsin*, 517 U.S. at 20 (1996). Nor have Plaintiffs shown that the
22 inclusion of a citizenship question undermines the strong constitutional interest in the accuracy of
23 the census. *Utah*, 536 U.S. at 478 (2002).

24 64. To the extent that the Court’s standard, see *supra* ¶¶ 4-5, which Defendants accept
25 for the purposes of this filing as law of the case, extends beyond that developed by the Supreme
26 Court in *Wisconsin* and *Utah*, Plaintiffs have not shown that this standard has been violated.

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1 65. The Supreme Court has explained that historical practice is a critical factor in
2 examining an alleged violation of the Enumeration Clause. *See Wisconsin*, 517 U.S. at 21; *State of New*
3 *York*, 315 F. Supp.3d at 800 (recognizing that in interpreting the Enumeration Clause, significant
4 weight is placed on historical practice.) It is undisputed that a citizenship question has a lengthy
5 historical pedigree, appearing on the census for most of the last two hundred years. *See* ECF No.
6 75, at 26 (“The history of the census reflects that demographic questions have long been a part of
7 the enumeration process since its inception. The first census in 1790 asked about age, race, and sex.
8 Every census since then has collected demographic information beyond the number and location of
9 inhabitants.”); *State of New York v. Dep’t of Commerce*, 315 F. Supp.3d 766, 804-806 (S.D.N.Y 2018).
10 Thus, it is “clear that the mere asking of a question about citizenship on the census form is
11 consistent with the historical conduct of the census.” ECF No.75 at 26, (“The long history of
12 demographic questions appearing on the census questionnaire, including questions regarding place
13 of birth and immigration status, confirms that the specific act of including a citizenship question on
14 the census is not, by and of itself, beyond the Secretary’s authority under the Enumeration
15 Clause.”) *See* Undisputed Facts, ECF Nos. 119 and 125 at 67-81.

16 66. Defendants have demonstrated that obtaining citizenship data serves a “reasonable
17 governmental purpose,” ECF No. 75, at 29, because the collection of citizenship data “has been a
18 long-standing historical practice” in the United States, PTX-091 at 2; *see* PFFOF ¶¶ 145, 157; PTX-
19 091, at 7 (“[O]ther democracies inquire about citizenship on their census, including Australia,
20 Canada, France, Germany, Indonesia, Ireland, Mexico, Spain, and the United Kingdom, to name a
21 few.”). Furthermore, it is undisputed that DOJ and the courts need citizenship data “for
22 determining violations of Section 2 of the Voting Rights Act.” PTX-091 at 1.

23 67. Even assuming Secretary Ross failed to reasonably explain his decision to reinstate a
24 citizenship question on the census for purposes of the Administrative Procedure Act, Plaintiffs
25 have not shown that the collection of citizenship data does not fulfill a reasonable governmental
26 purpose for Enumeration Clause purposes. *See Dalton v. Specter*, 511 US 462, 472 (1994) (“Our
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1 cases do not support the proposition that every action by the President, or by another executive
2 official, in excess of his statutory authority is ipso facto in violation of the Constitution.”).

3 68. There is no violation of the Enumeration clause because during the 2020 census,
4 the Census Bureau intends “to seek to reach each individual household” and to count each such
5 household, and will deploy a variety of methods to reach and count everyone. *Utah v. Evans*, 536
6 U.S. 452, 478 (2002). The record demonstrates that the Census Bureau has put in place procedures
7 to achieve an actual enumeration of all persons in the United States. *See* PFFOF ¶¶ 28-39; 49-56.

8 69. The possibility of an undercount exists in every census and the Constitution does
9 not require perfection, *Utah*, 536 U.S. at 504 (Thomas, J., concurring in part and dissenting in part);
10 *Wisconsin*, 517 U.S. at 6 (recognizing that no census has been wholly successful in achieving goal of
11 complete enumeration). Some of the more-recent censuses incorporated a long-form questionnaire
12 that included a citizenship question, yet the incremental impact on accuracy created by these
13 instruments was never determined to implicate constitutional accuracy. The facts establish that the
14 2020 census will achieve both absolute and distributive accuracy within this historical context that
15 does not rise to the level of a “uniquely impactful” inaccuracy of constitutional magnitude.

16 **V. Any Relief Granted to Plaintiffs Must Comport with the APA and Art. III’s**
17 **Limitations**

18 **A. Remand to the Agency Is the Only Potentially Appropriate Remedy**

19 70. This Court should uphold the Secretary’s decision to include a citizenship question
20 and enter judgment in Defendants’ favor.

21 71. If the Court were to conclude that the Secretary’s decision is not supported by the
22 administrative record or is otherwise unlawful, the appropriate remedy would be to remand to the
23 agency for further consideration. 5 U.S.C. § 706(2); *Allied-Signal, Inc. v. U.S. Nuclear Regulatory*
24 *Comm’n*. 988 F.2d 146, 151 (D.C. Cir. 1993) (holding that remand without vacatur was appropriate
25 when “the consequences of vacating may be quite disruptive” and “the possibility that the [agency]
26 may be able to justify” the decision on remand); *California Communities Against Toxics v. EPA*, 688
27 F.3d 989, 992 -94 (9th Cir. 2012)(recognizing that a flawed rule need not be vacated and can be left
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1 in place while the agency follows the necessary procedures to correct its action); *Idaho Farm Bureau*
2 *Federation v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir.1995) (holding that although “ordinarily”
3 regulations that are not promulgated in compliance with the APA are invalid, “when equity
4 demands, the regulation can be left in place while the agency follows the necessary
5 procedures.”); *Nat. Res. Def. Council v. U.S. Emt'l Prot. Agency*, 676 F. Supp. 2d 307, 312 (S.D.N.Y.
6 2009) (“Where an agency action is remanded for further proceedings, the determination of whether
7 or not also to vacate the agency action is left to the court’s discretion.”) (citing *Sugar Cane Growers*
8 *Co-op. of Fla. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002)).

9 72. A remand to the agency without vacatur is appropriate here because the agency
10 could correct any procedural deficiencies on remand, and vacatur would be extremely disruptive to
11 the agency. *Allied-Signal*, 988 F.2d at 151; *AquAlliance v. Bureau of Reclamation*, 312 F. Supp. 3d 878,
12 881 (E.D. Cal. 2018)(stating that in “determining whether to vacate an agency decision, courts in
13 the Ninth Circuit look to the factors described in *Allied-Signal*”).

14 73. Courts have repeatedly emphasized that remand without vacatur is appropriate even
15 if there is only “‘a non-trivial likelihood’ that the [agency] will be able to state a valid legal basis for
16 its rules,” *In re Core Comm’ns, Inc.*, 531 F.3d 849, 861 (D.C. Cir. 2008) (quotation omitted), or a
17 “significant possibility” that the agency may be able to explain itself on remand. *Williston Basin*
18 *Interstate Pipeline Co v. FERC*, 519 F.3d 497, 504 (D.C. Cir. 2008).

19 74. Should the Court determine that the decision should be remanded, Plaintiffs’
20 request that this Court enjoin Secretary Ross and his staff at the Department of Commerce from
21 participating in the decision on remand must be rejected as beyond the scope of relief contemplated
22 by the APA and unjustified by the record in this case.

23 **B. Any Relief Granted in this Case Should Not Extend Beyond the Plaintiffs That**
24 **Demonstrate an Injury-in-Fact Traceable to Defendants**

25 75. Any request by Plaintiffs for an injunction that would extend beyond the Plaintiffs
26 in this litigation must be rejected. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (to establish
27 Article III standing, a plaintiff “must allege personal injury fairly traceable to the defendant’s
28 allegedly unlawful conduct and likely to be redressed by the requested relief.”); *Town of Chester v.*

1 *Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (“[S]tanding is not dispensed in gross,” and the
2 plaintiff must establish standing “separately for each form of relief sought.”); *see also Warth v. Seldin*,
3 422 U.S. 490, 499 (1975) (“The Art. III judicial power exists only to redress or otherwise to protect
4 against injury to the complaining party, even though the court’s judgment may benefit others
5 collaterally.”).

6 76. Article III requires this Court to reject any relief to Plaintiffs that extends beyond
7 the injuries they have proven they have sustained and that are directly attributable to the
8 Defendants’ conduct. *See Gill v. Whitford*, 138 S. Ct. 1916, 1930-31 (holding in case challenging
9 alleged gerrymandering, that “the remedy that is proper and sufficient lies in the revision of the
10 boundaries of the individual’s own district,” not the broader remedy of “restructuring all of the
11 State’s legislative districts.”) *Id.* at 1934 (cautioning that, on remand, “standing is not dispensed in
12 gross’: A plaintiff’s remedy must be tailored to redress the plaintiff’s particular injury.” *Id.* at 1934
13 (quoting *Cuno*, 547 U.S. at 353).

14 77. Any conclusion of law deemed to be a finding of fact is incorporated into the
15 findings of fact.

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Dated: February 1, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

BRETT A. SHUMATE
Deputy Assistant Attorney General

CARLOTTA P. WELLS
Assistant Branch Director

MARSHA S. EDNEY
Senior Trial Counsel

/s/ Kate Bailey
KATE BAILEY
CAROL FEDERIGHI
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, DC 20530
Phone: (202) 514-9239
Email: kate.bailey@usdoj.gov
Attorneys for Defendants