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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STATE OF CALIFORNIA, by and through Attorney General Xavier Becerra; COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; CITY OF FREMONT; CITY OF LONG BEACH; CITY OF OAKLAND; CITY OF STOCKTON, Plaintiffs, **v.** **WILBUR L. ROSS, JR., in his official capacity as Secretary of the U.S. Department of Commerce; U.S. DEPARTMENT OF COMMERCE; RON JARMIN, in his official capacity as Acting Director of the U.S. Census Bureau; U.S. CENSUS BUREAU; DOES 1-100,** Defendants.	3:18-cv-01865 **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Date: December 7, 2018 Time: 10:00 a.m. Dept: 3 Judge: The Honorable Richard G. Seeborg Trial Date: January 7, 2019 Action Filed: March 26, 2018

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INTRODUCTION

The last six decennial census questionnaires sent to every household in the country have not asked about citizenship. And for good reason. The Census Bureau (Bureau) has long opposed adding a citizenship question because its own studies show that doing so would deter participation in and undermine the accuracy of the decennial census.

Ignoring this precedent, Secretary of Commerce Wilbur Ross announced this March his eleventh-hour decision to add a citizenship question to the 2020 Census. His decision was made despite (1) the Bureau's recommendation that he *not* include the citizenship question, (2) quantitative and qualitative evidence that the question will significantly depress census response rates and yield inaccurate citizenship data, and (3) the Bureau's failure to pretest the question in violation of governing regulations and established Bureau policies. Plaintiffs[1]—all which have a disproportionate share of the nation's non-citizen residents—are already expending substantial funds to mitigate the harm caused by the citizenship question, face considerable losses in federal funding, and are likely to lose their fair share of representation in Congress.

Each of Defendants' three arguments for summary judgment is unavailing. First, Defendants argue that Plaintiffs lack standing because their injuries are purportedly too speculative and not fairly traceable to Secretary Ross's decision. Defendants' standing argument—based on nothing more than factual disputes—disregards the harm Plaintiffs have suffered and will suffer. Second, Defendants argue that Plaintiffs cannot prevail on their Enumeration Clause claim because the Secretary intends to conduct a person-by-person enumeration. But the Court has rejected this argument and should do so again, particularly because Defendants' motion fails to address evidence that the citizenship question will impact congressional apportionment. Third, Defendants argue that the Secretary's decision to add a citizenship question did not violate the Administrative Procedure Act (APA) because it was reasonable. Not so. The record shows that Secretary Ross's decision was, in every respect, arbitrary and capricious and contrary to law.

[1] Plaintiffs are the State of California, County of Los Angeles, and Cities of Los Angeles, Fremont, Long Beach, Oakland and Stockton, as well as intervenor Los Angeles Unified School District (LAUSD).

Defendants' motion should be denied in its entirety, and this action should proceed to trial.

BACKGROUND

I. LEGAL AND HISTORICAL BACKGROUND OF THE CENSUS

The U.S. Constitution requires an "actual Enumeration" of the population every ten years by counting "the whole number of persons in each State," without regard to citizenship status. U.S. Const. art. I, § 2, cl. 3 & amend. XIV. There has been no citizenship question on the decennial census since 1950. AR 1314; Decl. Handley 7; *see also* Abowd Dep. (Aug. 29, 2018), Ex. 3 [1950 Census Questionnaire]. The sole constitutional purpose of the census is congressional apportionment. Pub. L. No. 105-119, § 209(a)(2); U.S. Const. art. I, § 2, cl. 3. In addition to this purpose, the federal government relies on census data to distribute hundreds of billions of dollars of funding each year. Decl. Reamer 4.

Under the Census Act, Congress delegated its constitutional duty to conduct the census to the Secretary of Commerce and the Bureau, a federal statistical agency within the Department of Commerce. 13 U.S.C. §§ 2, 4, 141(a). Congress has placed fundamental limits on the Secretary's discretion, declaring it "essential" to obtain a population count that is "as accurate as possible, consistent with the Constitution and laws of the United States," and subordinating the Secretary's authority to collect other information to this paramount goal. Pub. L. No. 105-119 (codified at 13 U.S.C. § 141 note).

Although Congress has delegated to the Secretary its constitutional duty to conduct the census, the Secretary does not have unfettered discretion in carrying out that duty. *Wisconsin v. City of New York*, 517 U.S. 1 (1996). The Secretary's actions must bear "a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census," which is "to determine the apportionment of the Representatives among the states." *Id*. at 19-20.

II. SECRETARY ROSS'S DECISION TO ADD THE CITIZENSHIP QUESTION TO THE 2020 CENSUS

In March 2017, the Bureau submitted to Congress a report listing five subjects for the 2020 Census: age, gender, race/ethnicity, relationship, and homeowner status. AR 204–213; *see* 13

U.S.C. § 141(f)(1) (requiring the Secretary to submit a report identifying the "subjects proposed to be included, and the types of information to be compiled" in the 2020 Census by March 2017). The report informed Congress that citizenship would be among the topics included on the American Community Survey (ACS), but not on the decennial census. AR 214–267.

The Secretary began considering whether to add a citizenship question to the decennial questionnaire "[s]oon after [his] appointment as Secretary of Commerce." AR 1321; Comstock Dep. 54:16-55:4. On April 5, 2017, Chief White House Strategist Steve Bannon asked to speak with the Secretary about the census. AR 2561. Around the same time, "at the direction of Steve Bannon," the Secretary spoke with Kris Kobach, vice chair of the Presidential Advisory Commission on Election Integrity, about the citizenship question—and, specifically, Kobach's view (contrary to law, *see Evenwel v. Abbott*, 136 S. Ct. 1120, 1129, 1132 (2016)) that it was a "problem" that undocumented persons were included in the census count for apportionment purposes.[2] AR 763–764. Rather than seek the advice of Bureau staff, the Secretary enlisted Earl Comstock, director of the Commerce Department's Office of Policy and Strategic Planning, along with Commerce Department legal counsel, to determine whether non-citizens are included in the census count and how to add a citizenship question to the 2020 Census questionnaire. AR 2521, 3705, 3710; Comstock Dep. 63:18-21.

The Secretary grew impatient with the lack of progress, urging Comstock in early April 2017 that "we must get our [Census] issue resolved" by month's end, AR 3694 (emphasis in original), and complaining on May 2, 2017, that "nothing have [*sic*] been done in response to my months['] old request that we include the citizenship question." AR 3710. Comstock responded that, to move forward, "we need to work with [the Department of] Justice to get them to request that citizenship be added" and "to illustrate that DoJ has a legitimate need for the question." *Id.* Both Secretary Ross and Comstock acknowledged that they would need to be "very careful" to prepare an administrative record that presented the decision in a defensible light. AR 12476.

[2] On July 14, 2017, Kobach followed up with an email to the Secretary containing proposed language for a citizenship question to be added to the Census. AR 764.

Comstock contacted the White House, which referred him to a DOJ aide. AR 12756, 2462, 3701. The aide directed Comstock to another member of DOJ's staff, who suggested that Comstock engage the Department of Homeland Security (DHS) instead.[3] AR 12756. DHS also declined to pursue the citizenship question. After Comstock came up short, the Secretary determined that he would "call the AG" directly. AR 12476, 2652.

Six months after he began contemplating a citizenship question, and four months after Comstock set out to find a sponsoring agency, Secretary Ross finally found his audience in Attorney General Jeff Sessions. One of Attorney General Sessions's senior advisors quickly confirmed that "it sounds like we can do whatever you all need us to do" and "[t]he AG is eager to assist." AR 2651. Indeed, several months later, in an undated letter received by the Bureau on December 12, 2017, DOJ issued a "formal[] request[]" for the addition of a citizenship question on the 2020 Census questionnaire. AR 663–665. The letter—signed not by an attorney from the Voting Section of the Civil Rights Division, but by Arthur Gary, General Counsel of the Justice Management Division—stated that block-level citizenship data "is critical to the Department's enforcement of Section 2 of the Voting Rights Act" and that "the decennial census questionnaire is the most appropriate vehicle for collecting that data."[4] AR 663.

Following receipt of Gary's letter, Karen Dunn Kelley, Under Secretary of Economic Affairs at the Department of Commerce, contacted senior data scientists at the Bureau, led by John Abowd, the Bureau's Chief Scientist and Defendants' expert in this action, to conduct a technical review of whether to add a citizenship question. Kelley Dep. 99:11–101:22. Dr. Abowd was not aware of the potential citizenship question before the Gary letter. AR 3354; Abowd Dep. (Aug. 15, 2018) 12:19–13:1. Abowd's team performed a technical review of three options to address DOJ's stated need for block-level citizenship data: Alternative A, which would make no changes in the Bureau's data collection practices (*i.e.*, requiring DOJ to rely on existing sources of citizenship data, such as the ACS, for Voting Rights Act (VRA) enforcement

[3] DOJ had already reported the potential changes it would like to see on the ACS Questionnaire for the 2020 Census; the changes did not involve a citizenship question. AR 311.

[4] In his deposition, Acting Assistant Attorney General John Gore disagreed with this conclusion and admitted not knowing whether census-based citizenship data would be more accurate than ACS data. Gore Dep. 226:1–228:20; 422:11–17.

purposes); Alternative B, which would add a citizenship question to the decennial questionnaire; and Alternative C, which would obtain citizenship data for as much of the 2020 Census population as possible by using data from administrative records. AR 1277.

On December 22, 2017, Ron Jarmin, the Bureau's acting director, relayed to Gary the Bureau's preliminary findings that Alternative C (using administrative records) "would result in higher quality data produced at lower cost" and proposed "a meeting of Census and DOJ technical experts to discuss the details of this proposal." AR 5491. Gary shared the Bureau's suggestion of an alternative proposal with Gore, who did not inquire further about the proposal. Gore Dep. 267:10-268:11. Ultimately, at the direction of the Attorney General, DOJ refused to meet or otherwise engage with the Bureau about alternatives, explaining that Gary's "letter requesting citizenship be added to the 2020 Census fully describes their request." AR 3460; Gore Dep. 271:21-272:16.

In a memorandum dated January 19, 2018, Abowd and his team detailed their review. The memorandum, circulated in draft form, concluded that Alternative B "is very costly, harms the quality of the census count, and would use substantially less accurate citizenship status data than are available from administrative sources," and recommended either Alternatives A or C instead. AR 1312. These conclusions were supported by a comprehensive analysis, including the anticipated impact of each alternative on response rates, data quality, and cost, and by responses to a set of 35 written questions from Commerce officials. AR 1279–1297.

Undeterred by the Bureau's findings, Secretary Ross asked Abowd's team to consider a new proposal, Alternative D—a hybrid of Alternatives B and C intended to use the citizenship question to supplement gaps in administrative record data. AR 1308. In a memorandum dated March 1, 2018, most of which is spent analyzing "the weaknesses in Alternative C," Abowd ultimately concluded that "Alternative D would result in poorer quality citizenship data than Alternative C" because "[i]t would still have all the negative cost and quality implications of Alternative B outlined in the draft January 19, 2018 memorandum to the Department of Commerce." AR 1312. Alternative D "would raise questions about why 100 percent of respondents are being burdened by a citizenship question to obtain information for the two

percent of respondents where it is missing." *Id.* And it would not only "lead to more incorrect enumerations," but would likely "increase the number of persons who cannot be linked to the administrative data because the [data obtained through follow-up procedures] is lower quality than the self-response data." AR 1311.

Given the firm opposition of Bureau experts to adding a citizenship question, Secretary Ross and his staff began contacting external stakeholders to solicit support. Yet finding stakeholders who could "give a professional expression of support for the proposal in contrast to the many folks . . . against the proposal" proved challenging. AR 4853. Indeed, six former Bureau directors wrote to Secretary Ross to oppose the citizenship question and warned that adding the question without first subjecting it to the Bureau's well-established pretesting standards and requirements "would put the accuracy of the enumeration and success of the census in all communities at grave risk." AR 1057-58.

On March 26, 2018, Secretary Ross issued a memorandum announcing his decision to add a citizenship question to the 2020 Census and directing Kelley to communicate this decision to Bureau staff and Congress before March 31, 2018. AR 1313-1320. Although the decisional memorandum is written as if in direct response to DOJ's request, AR 1313, Secretary Ross acknowledged in a supplemental memorandum—submitted on June 21, 2018, months after this action was filed—that the citizenship question originated from "senior Administration officials," not DOJ, and that he had deliberated with other "Federal Government components" before soliciting DOJ's involvement. AR 1321.

III. THE ADMINISTRATIVE RECORD AND EXTRA-RECORD DISCOVERY IN THIS ACTION

Defendants filed the initial administrative record in this action on June 8, 2018, and supplemented it on June 21, 2018. ECF Nos. 23, 33. In response to the court's order in the related census case, *State of New York v. U.S. Dept. of Commerce*, Case No. 1:18-cv-02921 (S.D.N.Y.) (New York action), Defendants further supplemented the administrative record by producing documents on July 23 and 27, and August 3, 2018.[5] Defendants have agreed that the

[5] The documents produced on these dates as part of the supplemental record were not filed with this court. Defendants filed a notice in the New York action with a link to a zip file where

administrative record consists of not only the initial record that Defendants filed but also these and other additional documents specified in stipulations reached in the New York action. Decl. Wise ¶ 2 & Exs. 1, 2, 3.

On August 20, 2018, this Court issued an order permitting Plaintiffs to take discovery consistent with the discovery order in the New York action. ECF No. 76. Thereafter, Defendants and the U.S. Department of Justice produced documents, Plaintiffs deposed Defendant-affiliated witnesses, and both sides deposed each other's expert witnesses.

LEGAL STANDARD

A party moving for summary judgment "has both the initial burden of production and the ultimate burden of persuasion" on the motion. *Nissan Fire & Marine Ins. Co. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). "In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Id.* To carry its ultimate burden of persuasion on the motion, the moving party must persuade the court that there is no genuine issue of material fact." This is a "heavy burden." *Ambat v. City and County of S.F.*, 757 F.3d 1017 (9th Cir. 2014).

ARGUMENT

I. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FAILS BASED ON BOTH THE ADMINISTRATIVE RECORD ALONE AND THE FULL EVIDENTIARY RECORD

Extra-record evidence is admissible in this case because every exception to limited record-review applies: the decision-maker acted in bad faith, extra-record evidence is necessary to determine whether agencies considered all factors, the agencies relied on documents not in the record, and the case involves technical and complex subject matter. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1117 (9th Cir. 2007). Defendants suggest that this Court should not consider evidence outside the

the documents were available for download. New York action, ECF No. 67. For the Court's ease of reference, Plaintiffs submit with this opposition all documents they cite from the administrative record.

administrative record, with the exception of evidence related to Plaintiffs' standing. Defs' Mot. Summ. J. 19-20. But the Court need not resolve that issue to decide this motion for summary judgment, because the motion can be denied on either the administrative record alone or the full evidentiary record. Plaintiffs cite both the administrative record and extra-record evidence in this opposition.

II. PLAINTIFFS HAVE STANDING TO BRING THIS ACTION

For standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Each of these elements is present in this case. Plaintiffs will suffer injuries—a decline in federal funding, costs incurred from additional census outreach efforts, and one or more lost congressional seats—because of the differential undercount that is traceable to the inclusion of a citizenship question on the 2020 Census. Removing the citizenship question from the 2020 Census will avert these injuries.

A. The Citizenship Question Will Cause a Differential Undercount in Plaintiffs' Jurisdictions

Adding a citizenship question to the 2020 Census will injure Plaintiffs by causing an undercount of their residents. The Bureau acknowledges that certain populations that the Bureau describes as "hard-to-count," including non-citizens, immigrants, and Hispanics, will be more likely than other populations to refuse to respond to the Census because they do not trust the federal government with their citizenship information. AR 10386DRB-10393DRB, 13026. For this reason, the Bureau's Non-Response Follow-Up (NRFU) efforts—that is, the Bureau's efforts to determine the status and number of residents from households that did not respond to the census questionnaire—will also be largely ineffective at counting these populations. Decl. O'Muircheartaigh 11-12; Decl. Barreto ¶¶ 45-61. Because California has more residents in these subpopulations than any other state, the undercount caused by the citizenship question will be greatest in California—or in other words, "differential." Decl. Barreto ¶¶ 17, 110-112, 125; Decl. Fraga 19.

1. Because of the citizenship question, Plaintiffs' residents will respond to the 2020 Census at a lower rate than other populations

The addition of the citizenship question will cause fewer people to respond to the 2020 Census. AR 1311; COM_DIS00009886; Abowd Dep. (Aug. 29, 2018) 242-243. Plaintiff's expert Dr. Matthew Barreto, Ph.D. estimates based on empirical survey evidence that between 7.1 and 9.7 percent of the nationwide population will not respond to the census as a result of the citizenship question. Decl. Barreto ¶ 19. In California, the drop-off is estimated to be the worst of any state in the nation—between 12.3 and 18 percent of the population. *Id.* at ¶ 20. Extrapolating for household-sizes and state-by-state demographics, 12.51 percent of Californians would not be reported, also the highest in the nation. Decl. Fraga 17, 18.

Defendants do not deny in their motion that the citizenship question will cause fewer people to respond to the 2020 Census. Defs.' Mot. Summ. J. 8-9, 12-13. They cannot do so, because the Bureau's own studies reach the same conclusion. AR 1277, 11639-11640; COM_DIS00009834 ("The evidence in this paper also suggests that adding a citizenship question to the 2020 census would lead to lower self-response rates in households potentially containing non-citizens …."); Abowd Dep. (Oct. 5, 2018) 358:12-17. The Bureau estimates that, just among households with at least one non-citizen, there will be a 5.8 percent decline in self-response relative to all-citizen households. COM_DIS00009871. The Bureau characterizes this most recent estimate as "conservative" because "the level of [census respondents'] concern about using citizenship data for enforcement purposes may be very different in 2020" than in previous census years. *Id.*

In short, the parties agree that the citizenship question will cause a decrease in responses to the 2020 Census, and that effect will be greater in California than in any other state.

2. The differential undercount will remain following the Bureau's "combined enumeration" efforts

The Bureau's follow-up enumeration efforts will be insufficient to prevent a differential undercount of Plaintiffs' residents. Such efforts have a limited track record of success and will be hampered by the initial differential non-response caused by the citizenship question.

There has been a differential undercount of hard-to-count subpopulations—in particular, the Hispanic population, the immigrant population, and non-citizens in general—in all recent censuses. AR 1286. All available evidence indicates that this trend will continue, particularly for members of these populations who choose not to respond to the 2020 Census because of the citizenship question. The Bureau admits that, in 2020, the NRFU efforts of census enumerators will likely be less successful for hard-to-count populations than for other populations. Abowd Dep. (Oct. 12, 2018) 263:20-264:5. Given the sensitivity of the citizenship question, those refusing to initially self-respond because of the question are particularly unlikely to respond to follow-up contacts. Abowd Dep. (Oct. 12, 2018) 255:16-256:6; COM_DIS00009874 at 42 n.59 ("If a household declines to self-respond due to the citizenship question, we suspect it would also refuse to cooperate with an enumerator coming to their door, resulting in a need to use a proxy"); Decl. O'Muircheartaigh 5, 13; Decl. Barreto ¶¶ 12-15. As with the initial non-response, the failure of the NRFU efforts of census enumerators reflects the lack of trust among these subpopulations that the federal government will protect the confidentiality of their responses. Decl. O'Muircheartaigh 2; Decl. Barreto ¶¶ 25-26.

Following enumerator NRFU, the Bureau's "final attempt" procedures of imputation through administrative records and proxy enumeration (information provided by a willing respondent, such as a neighbor or landlord) will also fail to fully mitigate the undercount resulting from the citizenship question.[6] The Bureau acknowledges that, for hard-to-count populations, there are gaps in the administrative data used for enumeration. Abowd Dep. (Oct. 12, 2018) 255:2-8. Non-citizens, for example, are among the groups for which administrative records are least likely to exist. Decl. O'Muircheartaigh 14-15 (citing AR 1310-1311). And given the perceived threat from the citizenship question, willing and knowledgeable proxy respondents will

[6] Although Defendants do not identify the statistical method of count imputation as a "combined enumeration" strategy, that approach would also be insufficient to mitigate the non-response because of differences between responding households and non-responding households. Decl. O'Muircheartaigh 16; Decl. Barreto ¶¶ 39-40, 51-52; *see also* Abowd Dep. (Oct. 12, 2018) 109:3-22.

likely be more difficult to find in neighborhoods where a substantial proportion of households contain a non-citizen. Decl. O'Muircheartaigh 16; Abowd Dep. (Oct. 12, 2018) 255:16-256:13.

Because the Bureau's NRFU efforts will not fully remediate the large initial non-response caused by the citizenship question, the differential undercount of Californians will remain.

B. The Differential Undercount Resulting from the Citizenship Question Will Injure Plaintiffs

An undercount resulting from the citizenship question will imminently and concretely injure Plaintiffs, even if the undercount is slight. Defendants have submitted no admissible evidence that addresses the size or effects of an undercount that will result from the citizenship question. Their expert, Dr. Stuart Gurrea, an economist, admits that he has no expertise in NRFU or knowledge of how successful the Bureau's NRFU will be in 2020. Gurrea Dep. 32:15-18, 103:23-104:4. Dr. Gurrea's "opinions" are based entirely on assumptions about NRFU success that Defendants provided to him, and for which Defendants have submitted no basis in fact or expert opinion. Gurrea Report ¶ 54; Gurrea Dep. 121:9-122:1.

Indeed, Plaintiffs will experience at least three types of injury as a result of the citizenship question. First, Plaintiffs will lose federal funds as a result of the undercount. If a differential undercount occurs, no matter the size of the undercount, California will lose funds from numerous federal programs, including: Title I grants to education agencies; Women, Infants, and Children (WIC) grants; and social service block grants. Decl. Reamer 5, 26-28. Defendants appear to concede this point, and dispute only whether such losses are "material." Yet no "materiality" requirement exists for standing based on financial loss. "For standing purposes, a loss of even a small amount of money is ordinarily an injury." *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017); *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017) ("A dollar of economic harm is still an injury-in-fact for standing purposes."). California is likely to lose millions of dollars, but even if California were to experience a decline in federal funding of only .01 percent, as Defendants' expert suggests in one scenario, the State would still lose more than $200,000 in Title I funding, alone. Gurrea Report 28; *see also id.* at 29-30.

Second, in an attempt to mitigate the undercount caused by the citizenship question, California has appropriated and begun spending $90.3 million, largely for community outreach. Request for Judicial Notice (RJN) Exs. B at CAL000147; C at CAL000152-154; D at CAL000162, CAL000230; E at CAL000235-253; F at CAL000269-273, CAL000278-279, CAL000292-294; I at CAL000411; J at CAL000443-444; K at CAL000540; L at CAL000717 (detailing the Legislature's additional appropriations to California's Complete Count efforts because of the citizenship question). California's budget for the 2020 Census swelled because of the addition of the citizenship question. *See, e.g.*, RJN Exs. A at CAL000001-5; G at CAL000322-323; H at CAL000364-369.

Third, California is likely to lose at least one congressional seat as a result of the citizenship question. Decl. Fraga 3-4, 17-18, 21-28; *see also* Decl. Barreto ¶¶ 20, 110-140. The empirical survey evidence estimates that between 12.3 and 18 percent of Californians will refuse to respond to the Census. Decl. Barreto ¶ 20. Based on that data and the national non-response rates, California may lose as many as *three* congressional seats, if the Bureau's NRFU efforts are unsuccessful. Decl. Fraga 10-13, 21-23; *see also id.* at 56-58.

California's county and city co-plaintiffs, as well as LAUSD, will also suffer these harms. Take the County of Los Angeles, which, after receiving additional funds from the State of California, will still need to spend more than $2.6 million of its own funds on community outreach as result of the citizenship question. Decl. Baron ¶¶ 4-9; RJN No 1. Or LAUSD, which stands to lose its fair share of Title I grants distributed by the State. Decl. Reamer 16. Any of these injuries confers standing upon all of the Plaintiffs, because "once the court determines that one of the plaintiffs has standing, it need not decide the standing of the others." *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993) (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 682 (1977)); *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017).

C. Plaintiffs' Injuries Are Traceable to the Citizenship Question and Redressable by Its Removal

As this Court held in its Order denying Defendants' Motion to Dismiss, Plaintiffs' injuries are traceable to the citizenship question and redressable by its removal from the 2020 Census questionnaire. Defendants offer no new arguments nor any evidence on these issues.

"Causation may be found even if there are multiple links in the chain connecting the defendant's unlawful conduct to the plaintiff's injury, and there's no requirement that the defendant's conduct comprise the last link in the chain." *Mendina v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014) (citing *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997)). The key question is whether the "government's unlawful conduct is at least a substantial factor motivating the third parties' actions." *Id.* at 1013 (internal citations and quotations omitted).

Here, the evidence shows that the citizenship question will directly cause some people not to respond at all to the 2020 Census. Decl. Barreto ¶¶ 17-20. The differential undercount that results will harm Plaintiffs. Defendants' act of adding the question to the census is a "substantial factor" in such harm, which would be redressed by removing the question.

III. DEFENDANTS VIOLATED THE ENUMERATION CLAUSE AND ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THAT CLAIM

The Enumeration Clause of the Constitution requires Secretary Ross's actions to bear "a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census," which is "to determine the apportionment of the Representatives among the states." *Wisconsin*, 517 U.S. at 19-20. The addition of the citizenship question was unreasonable under *Wisconsin* because the Secretary's decision "affirmatively interferes with the actual enumeration" by causing an undercount, and that effect is not counterbalanced by a reasonable governmental purpose. ECF No. 75 at 29.

Defendants first contend that the *Wisconsin* standard does not apply here, asserting that the Enumeration Clause only requires Secretary Ross to conduct a "person-by-person headcount" rather than conduct the census through estimate or conjecture. Defs.' Mot. Summ. J. 15. No legal authority supports this argument, and this Court correctly rejected it in its Order Denying

Motion to Dismiss. ECF No. 75 at 28-29. As this Court reasoned, Defendants' interpretation of the clause is overbroad, because it would mean that the Secretary's exercise of discretion related to the census questionnaire would never be subject to judicial scrutiny, despite the "strong constitutional interest in [census] accuracy." *Id*. at 28; *accord Utah v. Evans*, 536 U.S. 452, 478 (2002). Nor would the *Wisconsin* standard effectively prohibit all demographic questions on the census or mean that the citizenship question is unconstitutional in every time period. *See* ECF No. 75 at 28. What matters is that, in the specific context and political climate of the 2020 Census, the citizenship question will, in fact, be "uniquely impactful" on the enumeration. *Id*.

Defendants also argue that Plaintiffs cannot prove that the citizenship question would impact the accuracy of the census because Defendants expect that the Bureau's NRFU efforts will correct the decline in the self-response "and result in a complete enumeration." Defs.' Mot. Summ. J. 17-18. As explained above in relation to standing, all available evidence indicates otherwise, and, at the very least, this argument merely raises a disputed fact for purposes of summary judgment. And while Defendants argue that complete accuracy is not required by the Constitution, they have not even attempted to meet their burden to defend the citizenship question's effect on apportionment. In fact, Plaintiffs' experts will show that malapportionment is likely. Decl. Fraga 3-4, 17-18, 21-28; *see also* Decl. Barreto ¶¶ 20, 110-140.

IV. DEFENDANTS VIOLATED THE ADMINISTRATIVE PROCEDURE ACT AND ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THAT CLAIM

A. Defendants Cannot Establish that Secretary Ross's Decision Was Not Arbitrary and Capricious

The Administrative Procedure Act "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). To ensure that agency actions are reasonable and lawful, a court must conduct a "thorough, probing, in-depth review" of the agency's reasoning and a "searching and careful" inquiry into the factual underpinnings of the agency's decision. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971). After undertaking that review, a court "shall" set aside agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Agency action should be set aside as arbitrary and capricious if the agency (1) fails to disclose and explain the basis of its decision, (2) offers "an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," or (3) fails to "consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). Here, Defendants violated the APA on each of these grounds.

1. The Secretary Failed to Disclose a Plausible, Non-Pretextual Basis for the Agency's Decision

The APA requires an agency decision-maker to "disclose the basis of its" decision. *Burlington Truck Lines*, 371 U.S. at 168 (internal quotation marks omitted). In cases where the purported rationale for agency action is pretextual, the action must be set aside without further inquiry. *See, e.g.*, *N.E. Coal. on Nuclear Pollution v. Nuclear Regulatory Comm'n*, 727 F.2d 1127, 1130-31 (D.C. Cir. 1984); *Squaw Transit Co. v. United States*, 574 F.2d 492, 496 (10th Cir. 1978); *Pub. Citizen v. Heckler*, 653 F. Supp. 1229, 1237 (D.D.C. 1986).

Although Defendants contend that the existence of a memorandum purporting to provide a basis for the Secretary's decision is sufficient to withstand arbitrary-and-capricious review, this argument fails where, as here, the memorandum's function is to "provide a pretext for the ulterior motive" of the decision-maker. *Woods Petroleum Corp. v. U.S. Dep't of Interior*, 18 F.3d 854, 859 (10th Cir. 1994) (invalidating agency decision as arbitrary and capricious where action was pretext for ulterior motive). Because the record establishes that the stated basis for the Secretary's decision is pretextual, summary judgment is inappropriate.

The Secretary's decisional memorandum claims that receiving the letter from Arthur Gary prompted him to take a "hard look" at whether a citizenship question could be helpful to DOJ in providing data for VRA enforcement purposes. But in the eight months before receiving DOJ's letter, the Secretary had considered the impact of including non-citizens in the census count on congressional apportionment, deliberated about taking census-related action with Steve Bannon and Kris Kobach, and placed pressure on his staff to deliver a citizenship question on the census.

AR 763–764, 2561, 3694, 3710, 4004; *see D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1237 (D.C. Cir. 1971) (Bazelon, J.) (overturning an agency decision where "impartial evaluation of the project envisioned by the statute was impermissibly distorted by extraneous pressures").

Indeed, uncontroverted facts demonstrate that the Secretary involved DOJ only after it became apparent that his actual rationale for adding a citizenship question—to serve political interests—would not withstand scrutiny. AR 12476. DOJ not only did not originate the request, AR 1321, but rejected the Secretary's bid that it do so. AR 2458. Defendants even pursued DHS as a potential sponsoring agency, even though DHS does not enforce Section 2 of the VRA. *Id.* DOJ only reconsidered after Secretary Ross personally lobbied the Attorney General. AR 2636, 2653, 4004. The Secretary then collaborated with DOJ to develop a letter giving the false impression that DOJ initiated the request independently, AR 12756—even though just one year earlier, DOJ had determined that it had no such need—and worked with staff to curate a whitewashed administrative record to support this pretext.[7] AR 12476. These efforts to conceal the Secretary's prejudgment of the issue provide further proof of the arbitrary and capricious nature of Defendants' decision. *Cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.").

The rationale supplied by the Gary letter—to enhance DOJ's enforcement of Section 2 of the VRA by providing statistics of the citizen voting-age population (CVAP) at the census block level—is similarly pretextual. DOJ has enforced the VRA since its enactment in 1965, even though block-level citizenship data from the decennial census has never been available over this period. Decl. Karlan 6. No Section 2 case has ever failed on account of an absence of survey-based citizenship data, such as from a census questionnaire. *Id.* at 7-11; Decl. Handley 4 ("[C]urrently available census data, including [ACS data], has proven to be perfectly sufficient to ascertain whether an electoral system or redistricting plan dilutes minority votes[.]"). While the Gary letter concludes that the decennial census questionnaire is the "most appropriate vehicle

[7] The administrative record was compiled by Sahra Park-Su, who received no training in how to prepare an administrative record, and who simply "ke[pt] the record of all documents that were handed to [her]." Park-Su Dep. 127:21-24; 188:20-25; 190:23-191:4.

for collecting" block-level citizenship data, the letter offers no explanation about why the questionnaire itself would be superior to other methods of data collection, such as the use of administrative records. AR 663-665; *California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1065 (N.D. Cal. 2018) (suspension of agency rule was arbitrary and capricious where record evidence cited in support of agency's stated concern "provides no citation or factual basis for that claim"). Tellingly, the administrative record contains no evidence that shows that DOJ needs block-level CVAP data. When internal Bureau experts questioned DOJ's request and sought clarifying information, DOJ declined to engage with the Bureau about workable alternatives, and instead claimed that the Gary letter "fully describes their request." AR 3460.

Defendants contend that the Secretary "reasonably accepted DOJ's determination" that the decennial questionnaire is the most appropriate means to obtain block-level citizenship data. Defs.' Mot. for Summ. J. 21; Comstock Dep. 176:5-9 ("[DOJ] were the people that needed it for ACS, and our understanding was . . . you'd need to put it on the decennial census to do that."). The APA, however, "does not permit such a dodge." *Del. Dep't of Nat. Res. & Envtl. Control*, 785 F.3d 1, 16 (D.C. Cir. 2015) (reversing challenged rulemaking in which "EPA seeks to excuse its inadequate responses by passing the entire issue off onto a different agency"). Gore himself admitted that it is unnecessary to use the decennial questionnaire to obtain the requested data, and he admitted not knowing whether census-based citizenship data would have greater accuracy or smaller error margins than the existing citizenship data on which DOJ currently relies. Gore Dep. 226:1-228:20; 422:11-17.

Defendants also assert that whether the Secretary's decision was pretextual is of no moment because the reviewing court must limit its consideration to the agency's stated rationale, irrespective of any policy preferences or additional reasons the decision-maker may have had. Defs' Mot. for Summ. J. 23–24. But the clear requirement that the agency "disclose the basis" of its decision establishes otherwise. *Burlington Truck Lines*, 371 U.S. at 168. Permitting an agency to paper the record so as to conceal the actual basis for its decision would render this requirement meaningless. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 248-49 (1972).

Because Defendants have not established and cannot establish that they disclosed a plausible, non-pretextual basis for the Secretary's decision, summary adjudication of the APA claim would be inappropriate.

2. The Secretary's Decision Runs Counter to Evidence Before the Agency

Agency action is arbitrary and capricious if the agency offers "an explanation for its decision that runs counter to the evidence before the agency…." *State Farm*, 463 U.S. at 43; *see also, e.g.*, *City of Kansas City, Mo. v. Dep't of Hous. & Urban Dev.*, 923 F.2d 188, 194 (D.C. Cir. 1991) ("Agency action based on a factual premise that is flatly contradicted by the agency's own record does not constitute reasoned administrative decision-making and cannot survive review under the arbitrary and capricious standard."). Defendants' decision should also be set aside because it runs counter to substantial evidence before the agency in two critical respects.

First, the decision is contrary to the evidence that a citizenship question will depress census response rates. Secretary Ross's decisional memorandum indicated that the impact of the question on the response rate was an "important consideration" in his decision-making. AR 1317. But he dismissed this concern as unsupported, claiming that "neither the Census Bureau nor the concerned stakeholders could document that the response rate would in fact decline materially." AR 1315. In fact, the Bureau had done just that. In his January 19, 2018 memorandum to Ross, Dr. Abowd compared the response rate between citizen and non-citizen households to the 2010 Census and 2010 ACS questionnaires in an effort to determine whether the ACS citizenship question deterred responses. Abowd's team calculated a net decline in self-responses to the ACS by non-citizens in excess of five percent, and concluded that this would be a reasonable estimate of the lower bounds of the decline in self-response rates that would occur if a citizenship question is added to the 2020 Census questionnaire. AR 1280-1282.

Second, the decision is contrary to the evidence that asking a citizenship question in conjunction with using administrative records (Alternative D) would yield *less* accurate citizenship data than using administrative records alone (Alternative C). Accuracy was another concern emphasized in the decisional memorandum. AR 1313, 1316, 1317. But the Bureau had

advised Ross in its March 1 memorandum that a "key difference" between Alternatives C and D was that "Alternative D would result in poorer quality citizenship data than Alternative C." AR 1312, 1314. The Bureau had determined that, based on historical census and ACS data, non-citizens misreport themselves as citizens "for no less than 23.8% of the cases, and often more than 30%." AR 1283, 1284, 1312. The self-reported citizenship data of non-citizens is thus largely inaccurate.

Because Secretary Ross's central assertions in the decisional memorandum about response rates and citizenship data accuracy are directly contradicted by evidence proffered by the Bureau's own internal experts, those assertions cannot be accorded any weight. *See McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (courts will "not defer to the agency's conclusory or unsupported suppositions"); *see also, e.g., Islander E. Pipeline Co., LLC v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 99 (2d Cir. 2006) (reversing where agency offered "no explanation for dismissing record evidence that runs counter to its findings"). Accordingly, Defendants cannot establish that the decision to add a citizenship question was not arbitrary and capricious for failure to account for the evidence before the agency.

3. The Secretary Failed to Consider Important Aspects of Adding the Citizenship Question to the 2020 Census

An agency's decision is also arbitrary and capricious where it fails to consider an "important aspect of the problem." *State Farm*, 463 U.S. at 43. In that regard, an agency must engage in a meaningful examination of the potential costs of a decision along with the potential benefits. *Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 923 (9th Cir. 2018); *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017). Thus, an agency acts arbitrarily and capriciously where it does not "adequately analyze the . . . consequences" of its decision. *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017).

Defendants failed to meaningfully examine important aspects of adding the citizenship question in at least two respects: (1) they did not analyze whether an undercount would remain

after follow-up enumeration efforts, and (2) they did not adequately pretest the question in accordance with well-established Bureau standards and policies.

a. Defendants Never Considered Whether Follow-Up Enumeration Efforts Would Prevent an Undercount

Before Secretary Ross issued the decisional memorandum, none of the Defendants examined whether the initial non-response resulting from the citizenship question would cause an undercount, even after follow-up enumeration efforts. Conducting such an analysis is not only "important," *see State Farm*, 463 U.S. at 43, but fundamental to the census. Yet Defendants looked only at the effects of initial non-response on data accuracy and NRFU costs. *See, e.g.*, AR 1278, 1317. The failure to consider this important issue renders the decision to add the question arbitrary and capricious.

b. Defendants Disregarded the Fact that the Citizenship Question Had Not Been Adequately Tested

The development of the 2020 Census is governed in part by the Paperwork Reduction Act of 1995, which directs the Office of Management and Budget (OMB) to issue "[g]overnmentwide policies, principles, standards, and guidelines" governing "statistical collection procedures and methods" that agencies are required to follow. 44 U.S.C. §§ 3504(e)(3)(A), 3506(e); 5 C.F.R. § 1320.18(c). Under Congress's direction, the OMB has issued Statistical Policy Directives defining the standards that agencies, including the Bureau, must follow in developing and pretesting survey content.[8] The Bureau has also imposed rigorous standards by which data collection instruments and supporting materials must be "pretested with respondents to identify problems . . . and then be refined, prior to implementation." Habermann Dep., Ex. 3 [U.S. Census Bureau, Statistical Quality Standards], at i, ii, 8, 10 (reissued Jul. 2013); *see also* AR 3890, 4773, 9865; Decl. Habermann 12-15; Decl. O'Muircheartaigh 4-7. These standards and procedures are

[8] *See* Office of Mgmt. and Budget, Statistical Policy Directive No. 1, Fundamental Responsibilities of Fed. Statistical Agencies and Recognized Statistical Units, 79 Fed. Reg. 71,610, 71,615 (Dec. 2, 2014), *available at* https://www.bls.gov/bls/statistical-policy-directive-1.pdf; Office of Mgmt. and Budget, Statistical Policy Directive No. 2, Standards and Guidelines for Statistical Surveys §§ 1.3, 1.4, 2.3 (2006), 71 Fed. Reg. 55,522 (Sept. 22, 2006), *available at* https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/statpolicy/standards_stat_surveys.pdf.

mandatory: all Bureau employees "must comply" with them, and they "apply to all information products released by the Bureau and the activities that generate those products," including the decennial census. Habermann Dep., Ex. 3, at ii, 2, 6.

When new questions are added to an existing survey, pretesting "must be performed" to evaluate whether additions "cause potential context effects." Habermann Dep., Ex. 3, at 8, 12-23. Pretesting not only concerns the wording or placement of a question on a questionnaire, but also tests for respondents' cognitive perception of a question, response rates, and data quality and accuracy. Habermann Dep., Ex. 3, at 7-8; Decl. Habermann 12-13. It is vital that questions are tested for the particular questionnaire on which they will appear and under similar circumstances that will govern the survey. O'Muircheartaigh Dep. 78-81. This is especially salient for questions like the citizenship question that are deemed "sensitive" given the social and political context in which they are to be administered. Habermann Dep. Ex. 3, at 8-9; O'Muircheartaigh Dep. 81-82.

As Secretary Ross concedes in his decisional memorandum, the citizenship question has not been pretested for placement on the 2020 Census; this failure violates the Bureau's mandatory standards and procedures. AR 1318-1319. Past and present Bureau officials—including six former Bureau Directors—warned of the dangers of adding a question without following those pretesting procedures. AR 1057-1058, 10386DRB. Although the Secretary concluded that no testing for the citizenship question was required for the 2020 Census because a similar question already appears on the ACS, AR 1319, that conclusion ignores the vast contextual differences between the ACS and the decennial census. For example, the 2020 Census questionnaire is much shorter than the ACS; a single question like the citizenship question could have a much greater impact on the questionnaire as whole. O'Muircheartaigh Dep. 71-73. The 2020 Census is also conducted under far greater scrutiny and publicity than the ACS, which could heighten the sensitivity of the citizenship question and impact response rates. Habermann Dep. 32-34; O'Muircheartaigh Dep. 69-70. And the 2020 Census will be administered under a starkly

different social and political climate from when the ACS questions were tested.[9] O'Muircheartaigh Dep. 68–71. According to Dr. Abowd, the best way to test the question's effect on the census count and data collection would have been through a randomized controlled trial, yet no such test was performed before the Secretary issued his decisional memorandum. Abowd Decl. 4-5; Abowd Dep. (Aug. 15, 2018) 59-60, 83-84; Abowd Dep. (Aug. 29, 2018) 104-105; Abowd Dep. (Oct. 5, 2018) 426-430.

Although pretesting may not be required for questions that "performed adequately in another survey," Habermann Dep., Ex. 3, at 8, the Secretary did not demonstrate—and Defendants have not presented evidence—that the citizenship question "performed adequately" on the ACS. To the contrary, the Bureau's own analysis indicates that the question performs poorly on that questionnaire, lowering response rates, and compromising data accuracy. AR 1284; O'Muircheartaigh Dep. 79–82. In light of those problems, the Bureau is presently considering removing the citizenship question from the ACS. Abowd Dep. (Oct. 12, 2018) 178-182. Thus, what pretesting data the Secretary may have had for the citizenship question on the ACS, he set aside in favor of the unsupported conclusion that testing for the decennial census was adequate.

These factors show that the decision to add the citizenship question without abiding by the mandatory pretesting requirements was arbitrary and capricious. The decision evinces a failure to consider an "important aspect of the problem"—that the question had not been adequately tested for placement specifically on the 2020 Census in violation of the Bureau's well-established mandatory standards and procedures. *See State Farm*, 463 U.S. at 43. It is also an "irrational departure" from agency policy and procedure "that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion[.]'" *I.N.S. v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996) (quoting 5 U.S.C. § 706(2)(A)). The well-established, mandatory pretesting policies and procedures—which the Secretary failed to meaningfully consider—constitute "regulations, established agency

[9] In fact, a national study commission by the Census Bureau concluded that the presence of the citizenship question could be a "major barrier" to participation in the 2020 Census due in part to those factors. *2020 Census Barriers, Attitudes, and Motivators Study (CBAMS) Survey and Focus Groups: Key Findings for Creative Strategy* (Oct. 31, 2018), *available at* https://www2.census.gov/cac/nac/meetings/2018-11/mcgeeney-evans-cbams.pdf.

policies, or judicial decisions," that inform the Court of meaningful standards by which it may review the Secretary's decision. *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 868 (9th Cir. 2003); *see also Salazar v. King*, 822 F.3d 61, 76 (2d Cir. 2016) ("To determine whether there is 'law to apply' that provides 'judicially manageable standards' for judging an agency's exercise of discretion, the courts look to the statutory text, the agency's regulations, and informal agency guidance that govern the agency's challenged action."). Even though the Census Act authorizes the Secretary to conduct the census "in such a form and content as he may determine," 13 U.S.C. § 141(a), that authorization is not unlimited, and agency decisions are subject to judicial review. *See Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 720 (9th Cir. 2011); *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 688 (9th Cir. 2003).

For these reasons, Defendants' failed to consider an important aspect of the citizenship question—that it had not been adequately tested for placement on the 2020 Census questionnaire.

B. Defendants Cannot Establish that Secretary Ross's Decision Was Not Contrary to Law

1. The Decision Violated the Census Act's Reporting Requirement, 13 U.S.C. § 141(f)

Courts must set aside agency actions and decisions that are made "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). The Census Act sets forth an unambiguous process for selecting and amending questions to the decennial census. 13 U.S.C. § 141(f). The Act requires the Secretary to, at least three years before "the appropriate census date," submit a report to Congress identifying the "subjects proposed to be included, and the types of information to be compiled" in that census. *Id.* § 141(f)(1). If the Secretary wants to amend or add to the proposed "subjects [or] types of information," he must submit a new report to Congress explaining that "*new circumstances* exist which *necessitate*" modifications. *Id.* § 141(f)(3) (emphasis added).

The process by which the citizenship question was added to the 2020 Census violated section 141(f)(3). In March of 2017, the Secretary submitted a report listing the subjects planned for the 2020 Census; citizenship or immigration status was not on that list. AR 194-270; Langdon Dep. 121-23. The Secretary did not, however, submit another report explaining what

"new circumstances" arose since March 2017 that necessitated the addition of a citizenship question. The Secretary's decisional memorandum contends that collecting citizenship data would assist in VRA enforcement, but it does not explain how data gathered specifically via the decennial census is *necessary* for that goal. AR 1313-1314. Nor does the memorandum explain what circumstances changed since March 2017 that suddenly require the use of census-gathered citizenship data for VRA enforcement. *Id.* Even DOJ did not consider citizenship data collected through the decennial census questionnaire to be "necessary" for VRA enforcement, only that it would be of assistance. Gore Dep. 298-300 & Ex. 25.

Defendants do not dispute that the Secretary failed to submit the report required under 13 U.S.C. § 141(f)(3) to modify the list of census topics. They do not identify what "new circumstances" had arisen or argue that data gathered via the decennial census is necessary for VRA enforcement. Defendants instead contend that the Secretary's addition of the citizenship question without submitting the report required under section 141(f)(3) is not subject to judicial review. Defs.' Mot. Summ. J. 24–25 (citing 5 U.S.C. § 551). That argument, however, ignores the APA's requirement for courts to set aside an agency decision—like the decision to add the citizenship question—made in a manner that exceeds statutory authority. 5 U.S.C. § 706(2)(C); *see also District of Columbia v. U.S. Dep't of Commerce*, 789 F. Supp. 1179, 1188 n.16 (D.D.C. 1992) ("[A]lmost every court that has considered the issue has held that 13 U.S.C. § 141 does not preclude judicial review."). By violating the unambiguous process set forth in section 141(f), the Secretary's decision to add the citizenship question was unlawful under the APA.[10]

2. The Decision Violated the Census Act's Requirement of Using Administrative Records Where Appropriate, 13 U.S.C. § 6(c)

The Secretary's decision to add a citizenship question to the 2020 Census also violates the APA by exceeding statutory authority and limitations under section 6, subdivision (c) of the

[10] Contrary to what Defendants suggest, Plaintiffs do not assert a separate cause of action under the Information Quality Act. *See* Defs.' Mot. Summ. J. 24-25.) Rather, the addition of the citizenship question, without abiding by the mandatory agency standards and procedures, demonstrates the arbitrary and capricious nature of the decision, in violation of the APA. *See* Section IV.A.3.b, *supra*; *see also Lowry v. Barnhart*, 329 F.3d 1019, 1022 (9th Cir. 2003) ("An agency's regulations may create judicially enforceable duties.").

Census Act. That statute requires the Secretary of Commerce to perform census-related duties by using information from other government agencies "instead of conducting direct inquiries." 13 U.S.C. 6(c). The Secretary "*shall*" adhere to these terms "[t]o the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required." *Id.* (emphasis added). Subdivision (c) of section 6 serves "the dual interests of economizing and reducing respondent burden." H.R. CONF. REP. No. 94-1719, at 10 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5476, 5478.

Given the Bureau's analysis of Alternatives A through D, section 6 required Secretary Ross to address DOJ's request for citizenship data using administrative records alone (Alternative C). As discussed above, using administrative records alone is both less costly and more accurate than using them in conjunction with a citizenship question on the census. *See e.g.* AR 1277, 1312. Alternative C also poses less of a burden on census respondents. AR 1281. By selecting Alternative D over Alternative C, Secretary Ross exceeded section 6's statutory limitation on his authority, thereby violating the APA.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Court deny Defendants' motion for summary judgment.

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