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

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

21 Plaintiffs,

22 vs.

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

27 Defendants.
28

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

**PLAINTIFFS' REPLY MEMORANDUM
IN SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Date: December 7, 2018
Time: 10:00 a.m.
Dept: 3
Judge: The Hon. Richard Seeborg
Trial Date: January 7, 2019

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INTRODUCTION

1
2 Defendants do not dispute the key material facts in this action. They do not dispute that
3 Secretary Ross, soon after taking office, made a “request that we include the citizenship question”
4 on the 2020 Decennial Census (“Census”). (0003710.) They do not dispute that Ross’s deputy at
5 the U.S. Department of Commerce (“Commerce”), Earl Comstock, reached out first to the
6 Department of Justice (“DOJ”) and then to the Department of Homeland Security (“DHS”) to ask
7 them to request that the U.S. Census Bureau (the “Bureau”) add the question. They do not dispute
8 that each agency rebuffed Comstock. They do not dispute that Ross then called Attorney General
9 Sessions, and that DOJ issued its December 12, 2017 letter to the Bureau (the “DOJ Request”)
10 only *after* Ross and Sessions spoke.

11 Further, Defendants proffer no evidence that the purported goal of the DOJ Request—
12 obtaining block-level citizenship voting-age population (“CVAP”) data—is better served by
13 adding the citizenship question than by using administrative records. Every statistical expert,
14 including Defendants’ expert witness, has stated that administrative records would provide better
15 data. Indeed, Defendants have not offered any evidence in support of Ross’s conclusory statement
16 in his March 26, 2018 decisional memorandum (the “Decisional Memo”) that “the citizenship
17 data provided to DOJ will be more accurate with the question than without it.” (001319.)
18 Defendants do not deny that Ross added the topic to the Census nearly a year after the statutory
19 deadline, and provide no evidence of “new circumstances” that “necessitate” doing so, as the
20 statute requires. 13 U.S.C. § 141(f)(3).

21 Instead, Defendants ground their opposition in a number of cases standing for the
22 unremarkable proposition that courts treat agency decisions with deference in APA cases. While
23 that may be so as a general matter, that deference is not absolute or unlimited. Defendants cite to
24 no decision in which any court has upheld an administrative decision in which an agency head:
25 (1) first requested a decision be made without stating a reason; (2) then sought out another agency
26 to request that the decision be made; (3) was rejected by two different agencies; (4) reached out to
27 another cabinet Secretary to order unwilling subordinates to make the request; (5) received a
28 detailed expert opinion—not just differing “views”—that the decision would not achieve the

1 stated goal of the request, and that other available options would; (6) made the decision anyway,
 2 without citing to any evidence in support of the key conclusion; and (7) not only omitted any
 3 reference to the real history behind his decision, but did not testify truthfully about it to Congress.
 4 The foregoing facts are the undisputed facts in this case and are supported by the uncontroverted
 5 evidence in the administrative record. The notion that this Court must blindly defer to such
 6 manifestly arbitrary, capricious, and wrongful agency action finds no support in the law.

7 This is not a case about a “disagreement with the Secretary’s policy choice.” (Defs.’ Opp.
 8 (Doc. 104) at 18.) And it is not a case about Secretary Ross’s “subjective thought process.” (*Id.* at
 9 19.) Rather, Plaintiffs are entitled to summary judgment because the administrative record
 10 confirms beyond dispute that Defendants’ *actions* breached nearly every conceivable norm of
 11 administrative procedure when they decided to add a citizenship question to the Census in
 12 violation of standard processes, procedures, and protocols.

13 Moreover, Defendants fail to rebut evidence of Plaintiffs’ standing. In opposing Plaintiffs’
 14 allegations that they have spent money based on the substantial risk of an undercount, Defendants
 15 put forward a witness who has agreed under oath that those risks are real, and whose report and
 16 trial testimony confirm that local communities *such as the City of San Jose* must increase their
 17 outreach spending *specifically because* of the likelihood of an undercount resulting from the
 18 citizenship question. And Defendants do not even attempt to address, let alone rebut, the evidence
 19 of BAJI’s members’ well-founded fears that their personal data will be misused.

20 For all of the reasons set forth below and in Plaintiffs’ opening memorandum, Plaintiffs’
 21 motion for partial summary judgment should be granted.

22 ARGUMENT

23 I. DEFENDANTS’ OPPOSITION CONFIRMS PLAINTIFFS’ STANDING.

24 A. Defendants Do not Challenge BAJI’s Privacy-Based Standing.

25 Plaintiff Black Alliance for Just Immigration (“BAJI”) alleges that “the inclusion of the
 26 citizenship question will instill fear and intimidation in Black immigrant communities. (Compl.
 27 (Doc. 1) ¶ 60.) BAJI’s members have expressed fears that, if they answer the citizenship question,
 28 their personal information will not be kept confidential. (Declaration of Opal Tometi (Doc. 99-4)

¶¶ 9–11.) Plaintiffs explained that these fears are reasonable because CVAP data are public and census blocks are sometimes as small as a single household. (Pls.’ Mot. (Doc. 99) at 18.) A loss of privacy, like other “noneconomic values,” is sufficient to confer standing. *Ass’n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 154 (1970); *see also Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1114 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 931 (2018).

Defendants have not proffered any evidence or legal argument disputing BAJI’s members’ fears. It is black letter law that, to defeat a motion for summary judgment, a non-moving party “must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Defendants have addressed standing only with regard to a potential undercount and have totally ignored BAJI’s members’ privacy fears.¹

Since BAJI’s standing based on its members’ fears is unopposed, this Court need not even consider Defendants’ reasonable efforts to mitigate the substantial risk of an undercount. *See Carey v. Population Services Int’l*, 431 U.S. 678, 682 (1977). But should the Court consider Defendants’ opposition to Plaintiffs’ other standing arguments, it should reject them.

B. Plaintiffs’ Expenditures Are Warranted, and Defendants’ Witnesses Agree.

Defendants concede that plaintiffs who face a “substantial risk” of harm and “reasonably incur costs to mitigate or avoid that harm” have standing to challenge the conduct that created the risk. (Defs.’ Opp. at 4.) *See Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 414 n.5 (2013). To establish the “substantial risk” that adding the citizenship question may result in an undercount, Plaintiffs cited the Bureau’s own *documented* finding that adding the question will depress self-response rates, along with Defendants’ public statements that local governments should conduct more outreach because of the addition of the question. (Pls.’ Mot. at 10–11.) To demonstrate that they have reasonably incurred costs to mitigate this substantial risk, Plaintiffs have offered uncontroverted evidence regarding money and time that both San Jose and BAJI have expended on additional outreach to encourage participation in the Census—exactly the sort of expenditure encouraged by the Bureau to supplement its own efforts. (*Id.* at 12–14.)

¹ Defendants likewise ignore BAJI’s argument that the burden of filling out the questionnaire itself provides it standing through its members. (Pls’ Mot. at 18 n.2.)

1 Defendants discuss the “Census Bureau’s efforts to obtain a complete enumeration,” but
 2 do not and cannot question that there is a substantial risk of an undercount. (Def’s. Opp. at 5.)
 3 Indeed, their own evidence shows that much of the efforts they are undertaking—as well as the
 4 efforts they have directed San Jose to take—are aimed at mitigating that risk. Because “the record
 5 taken as a whole could not lead a rational trier of fact to find for the non-moving party” with
 6 regard to standing, Plaintiffs have standing and this Court can proceed to the merits. *See*
 7 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

8 **1. Dr. Abowd Has Confirmed the Existence of a Substantial Risk of a**
 9 **Differential Undercount and Has Testified that Localities Should**
 10 **Divert Resources to Mitigate that Risk.**

11 Defendants may have produced evidence suggesting that the Bureau has plans in place to
 12 mitigate the net undercount, or even that it is hard to predict the scale of the undercount. But their
 13 burden on this motion is to present evidence sufficient to create a genuine dispute as to the
 14 *substantial risk* of an undercount. And they have failed to meet that burden.

15 Defendants rely on the opinion of Dr. John Abowd, the Bureau’s chief scientist, to try to
 16 dispute the fact that the citizenship question creates a substantial risk of a differential undercount.
 17 But Abowd’s report and testimony actually *confirm* the existence of that risk. As the Bureau
 18 itself has concluded, the 2010 decennial census resulted in a differential undercount of both the
 19 Black and non-white Hispanic populations.² As recently as 2016, the Bureau’s directors argued
 20 that adding a citizenship question would “exacerbate[e] the undercount.”³ Defendants’ claim that
 21 there will be no differential undercount this time, despite this recent history, is implausible and
 22 requires them to “come forward with more persuasive evidence than otherwise would be
 23 necessary.” *Wong v. Regents of Univ. of Cal.*, 379 F.3d 1097 (9th Cir. 2004), *as amended by* 410
 24 F.3d 1052, 1055 (9th Cir. 2005) (citing *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147
 25 (9th Cir. 1998)). Defendants have failed to meet that burden.

26 ² *See* 2010 Census Coverage Measurement Memorandum Series #2010-G-01 (“Census Coverage
 27 Memo”), available at https://www.census.gov/coverage_measurement/pdfs/g01.pdf.

28 ³ Defendants’ Reply Memorandum and Opposition to Plaintiffs’ Motion for Summary Judgment, *Federation for American Immigration Reform (FAIR), et al., v. Philip M. Klutznick, et al.*, 79-3269 (D.D.C. Jan 3, 1980) 1980 WL 683642 at 22.

1 Recognizing that large groups of residents will not respond to the Census because of the
2 addition of the citizenship question, Abowd himself concluded that because of the question, the
3 “2020 Census could be expected to lower the self-response rate in an identifiable and large sub-
4 population-households that may contain non-citizens.” (Declaration of John M. Abowd, Ph.D.
5 (“Abowd Decl.”), Doc. 100-1 ¶ 12.) Abowd’s claim that the Bureau did not develop “credible
6 quantitative evidence that the addition of a citizenship question to the 2020 Census would
7 increase the net undercount or increase differential net undercounts for identifiable sub-
8 populations” speaks only to the precision with which one can predict an undercount—not to the
9 **substantial risk** that the question will cause one. Abowd testified that the “credible quantitative
10 evidence of the harmful effects of the citizenship question” include “degradation of the quality of
11 the census data in terms of the coverage measurement,” and that those “coverage measurement
12 components enter into the computation of a net undercount in a very complicated way.” (Expert
13 Deposition of John M. Abowd, (“Abowd Exp. Dep.”), Exhibit 1 to the Reply Declaration of
14 Andrew Case (“Case Reply Decl.”) at 39:14-40:2)

15 Moreover, Abowd agrees that the risk of an undercount is substantial. He testified that he
16 had not sought “credible quantitative evidence” that adding the question would lead to a net
17 undercount. But that is a specialized term, meaning a “measure of uncertainty associated with that
18 estimate that is a direct estimate or a modeled estimate of the effect that you’re trying to
19 quantify.” (Abowd Exp. Dep. at 244:13-21). He testified that “credible quantitative evidence” is
20 used “in the social sciences” when “we produced estimates of an effect that can be modeled
21 appropriately, done appropriate diagnostic checks on it and presented it, along with its associated
22 standard error.” (*Id.* at 245:20-246:1). After all, he testified that the Bureau has produced no
23 “credible quantitative evidence” to support the conclusions in his report either. *See* Trial
24 Transcript, *New York et al. v. Commerce et al.*, 18-cv-2921, November 14, 2018, (“N.Y. Trial
25 Transcript”), Case Reply Decl. Ex. 2 at 1295:13-18.⁴ (Q: [T]he Census Bureau has not produced
26 credible quantitative evidence indicating whether or not NRFU will be sufficient to address the
27

28 ⁴ Abowd’s trial testimony in the New York matter is admissible as a statement by a party
opponent. Fed. R. Evid. 801(d)(2)(A).

1 marginal increase in nonresponse caused by the citizenship question, correct? A: . . . [T]hat’s
2 correct, yes.”)

3 When asked if there was any evidence—regardless of whether it included the appropriate
4 standard error or met other scientific standards—that including the question would produce a net
5 undercount, Abowd testified as follows:

6 I am aware of considerable evidence that the addition of the
7 citizenship question *might affect the net undercount* because
8 analysts, *including myself*, have produced *credible evidence* that
9 *self-response is directly related to the quality of components of*
10 *that net undercount measurement* and directly related to the
11 quality of the dual system estimate that you are going to have to
12 have to independently estimate the population you’re trying to see
13 whether you over or underestimated in the census.

11 (Abowd Exp. Dep. at 193:4-14 (emphasis added).) Abowd’s only dispute was whether there is
12 “credible qualitative evidence” that adding the question “will” affect the undercount. He stated
13 that, “our statement should be it might affect the net undercount. *And I agree.*” (*Id.* at 194:9-10
14 (emphasis added).) But even if true, that does not affect the standing inquiry. Defendants continue
15 to act as though Plaintiffs must prove an undercount with certainty to establish standing even
16 though that is plainly not the law. And Defendants do not even acknowledge that their own
17 expert, Abowd, testified as to the substantial risk of an undercount.⁵

18 And while Abowd stated, with regard to NRFU, that the Bureau “believes that those
19 efforts will result in a complete enumeration,” part of that belief is based on the notion that
20 increased spending now will mitigate the decline in self-response. (Abowd Decl. ¶ 78.) An entire
21 section of Abowd’s expert report is devoted to an analysis of *local efforts* to increase self-
22 response through outreach. In his report, using El Paso as an example, Abowd writes that efforts
23 to lessen the decrease in self-response associated with the citizenship question will take the form
24 of “targeted messaging for population sub-groups, *local messaging* and engagements *through the*
25

26 ⁵ To the extent that any question remains in the Court’s mind, Plaintiffs’ experts have shown that
27 not only is there a risk of an undercount, but the risk is overwhelmingly likely to materialize. (*See*
28 *Declarations of Matthew Barreto* (Doc. 103-3) and *Colm O’Muircheartaigh* (Doc. 103-4).) This
Court may consider all evidence submitted by both parties in cross-motions for summary
judgment to determine whether there is a genuine dispute of material fact. *Fair Hous. Council of*
Riverside County, Inc. v. Riverside Two, 249 F.3d 1132, 1137 (9th Cir. 2001).

1 *community-based partnership efforts.*” (Abowd Decl. ¶ 75 (emphasis added).) These are the very
 2 efforts that San Jose is currently undertaking, and which establish its standing in this action.

3 Plaintiffs need not prove that an undercount is certain or measure its magnitude. There is
 4 no “‘highly attenuated’ chain of possibilities” required for Plaintiffs to suffer injury here, as the
 5 Supreme Court found in *Clapper*. See *In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197,
 6 1213 (N.D. Cal. 2014) (a data breach confers standing absent evidence that plaintiffs’ data was
 7 misused based on the *risk* that it may be misused); see also *Monsanto Co. v. Geertson Seed*
 8 *Farms*, 561 U.S. 139 (2010) (holding that a “reasonable probability” that an engineered gene
 9 would enter the crop pool created a “substantial risk of gene flow” and established standing).

10 **2. Defendants’ Expert, Dr. Stuart Gurrea, Fails to Create a Dispute that**
 11 **Adding the Citizenship Question Creates a Substantial Risk of Harm.**

12 Once again misstating the relevant standard, Defendants contend that Plaintiffs cannot
 13 establish standing unless they “establish that they would actually be harmed by such an
 14 undercount.” (Defs.’ Opp. at 7.) But Plaintiffs need show only that they face a “substantial risk”
 15 of such harm, and they have demonstrated that any differential undercount of non-citizens will
 16 create such a risk. To the extent there is any question as to whether San Jose has a higher non-
 17 citizen population “relative to other areas,” the Bureau’s own data confirms that the San Jose-
 18 Sunnyvale-Santa Clara metropolitan area has among the highest such populations in the country.⁶

19 Defendants’ own expert Dr. Gurrea fails to raise any dispute of fact as to the risk of harm
 20 to Plaintiffs. Although he performed calculations regarding how funding would be affected under
 21 certain conditions, when asked, Gurrea confirmed that he simply “took the number that was
 22 provided with [] and just applied it to the data that you were working with.” (Expert Deposition of

23 ⁶ After Plaintiffs filed their original motion, the Bureau deleted citizenship percentages from the
 24 publicly available ACS website that Plaintiffs cited in their opening brief. See
 25 <https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml>. The Court can draw its own
 26 conclusions as to why Defendants did so. But because the website still reports the percentage of
 27 “foreign born” residents and the percentage of those foreign-born residents that are citizens, the
 28 citizenship rates remain available. Report DP02 from the ACS, which provides these data,
 confirms that San Jose’s non-citizen population is 17.3% (38.9% foreign born, with 44.5% of
 those foreign born non-citizens) and trails only Miami, Santa Ana, and Los Angeles among major
 metropolitan areas with large foreign-born populations. See Case Reply Decl. Ex. 4. San Jose’s
 Hispanic population is not merely “larger” than the national average, but nearly double the
 national average. See Case Reply Decl. Ex. 5.

1 Stuart Gurrea (“Gurrea Dep.”), Case Reply Decl. Ex. 3 at 122:2-5.) Gurrea was provided
 2 assumptions including “a NRFU success rate in 2020 equal to the 2010 Census NRFU success
 3 rate.”⁷ (Gurrea Decl. ¶ 11.) Gurrea provides no evidence regarding the risk that San Jose or BAJI
 4 will be harmed, only to the outcome *if Defendants’ unproven assumptions* as to the effectiveness
 5 of NRFU come true. And he is not qualified to speak to those assumptions: he admits that he has
 6 no experience or expertise with respect to the census, apportionment or any of the issues relevant
 7 to this case. (Gurrea Dep. 32:15-33:18.) Further, Gurrea admits that he has no expertise in NRFU
 8 and doesn’t even have “an independent opinion about what are the components of NRFU.” (*Id.* at
 9 103:23-104:4, 116:5-8.)

10 Even if there were evidence for the assumptions that were provided to Dr. Gurrea, his
 11 conclusions would nevertheless support Plaintiffs’ allegations. Gurrea opines that—operating
 12 under the most optimistic assumptions possible, provided entirely by Defendants—there will be a
 13 net undercount that would translate to a loss of federal funding of 0.01%. (Gurrea Decl. ¶ 55.)
 14 Given the millions of dollars of funding at issue, *any* percentage loss, even a relatively small one,
 15 supports Plaintiffs’ standing to challenge Ross’s decision. Gurrea states that this estimate is made
 16 “before accounting for imputation” but Defendants provide no evidence regarding whether or
 17 how imputation will implicate this loss. (*Id.*)

18 C. **Plaintiffs’ Harm Is Directly Traceable to Ross’s Decision to Add the**
 19 **Citizenship Question to the 2020 Census.**

20 Because adding the citizenship question will depress self-response rates, which creates a
 21 risk of an undercount and lost funds, adding the question is traceable to Plaintiffs’ harm. (Pls.’
 22 Mot. at 16-17.) *See Mendina v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014) (citing *Bennett v.*
 23 *Spear*, 520 U.S. 154, 168-69 (1997)) (“[T]here’s no requirement that the defendant’s conduct
 24 comprise the last link in the chain”). In addition, San Jose has provided estimates of the dollar
 25 amounts spent and diverted on new outreach, and BAJI has provided descriptions of the programs
 26 from which funds have been diverted. (*See* Docs. 99-3 through 99-5.) This uncontroverted
 27

28 ⁷ In 2010, as the Bureau has found, there was a differential undercount of both the Black
 population and the non-white Hispanic population. *See* Census Coverage Memo pp. 1–2.

1 evidence distinguishes this case from *Serv. Women’s Action Network (“SWAN”) v. Mattis*, where
 2 the court found that allegations of fielding complaints could not establish standing because “the
 3 complaint does not clearly allege whether SWAN typically takes any action or provides services
 4 beyond fielding complaints.” 320 F. Supp. 3d 1082, 1100 (N.D. Cal 2018).

5 Indeed, this case is much more analogous to *Fair Housing. Council of San Fernando*
 6 *Valley v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012). There, the court found the plaintiff
 7 had offered sufficient evidence of harm to establish organizational standing where the defendants’
 8 conduct had caused plaintiff to investigate defendants’ alleged violations and to start new
 9 education and outreach campaigns. *Id.* at 1219. The court did not require the plaintiff to identify
 10 “the volume of diverted funds and the specific plans” that the plaintiff planned to undertake.
 11 (Defs.’ Opp. at 9.) It is sufficient for a plaintiff organization to testify that the defendant’s actions
 12 have caused it to expend additional resources, and that “but for” the defendant’s actions, the
 13 plaintiff would have directed those resources to accomplish other aspects of its organizational
 14 mission. *See Nat’l Council of La Raza v. Gegavske*, 800 F.3d 1032, 1040-41 (9th Cir. 2015).⁸

15 Indeed, Ross’s own admissions expressly trace Plaintiffs’ mitigation efforts to his decision
 16 to add the citizenship question. In his public statements, Ross specifically responded to “troubling
 17 reactions” to his decision to add the citizenship question to the Census. (Case Reply Decl. Ex. 6.)
 18 Ross was doing more than “reiterating the standard position” when he wrote to the United States
 19 Commission on Civil Rights (“USCCR”). (Defs.’ Mot. at 12.) After all, the USCCR’s letter
 20 addressed the citizenship question and only the citizenship question, and Ross responded with a
 21 letter about the decision to add “a citizenship question to the 2020 decennial census.” (Case Reply
 22 Decl., Exs. 6, 7.) In its letter USCCR wrote that there was a “valid basis for concern with
 23 participating in a Census that includes such a question.” (Case Reply Decl. Ex. 7.) In response,
 24 Ross replied that he was “asking Federal, state, and local leaders” to reassure the public that “[n]o
 25

26 ⁸ Defendants’ hearsay objections to Plaintiffs’ declarations on this point should be rejected. The
 27 Tometi and Ruster declarations do not contain hearsay because they are being offered not for the
 28 truth of the matters asserted, but rather to show the effect on the listeners and to explain why San
 Jose and BAJI reasonably incurred costs to mitigate the substantial risk of an undercount. *See*
United States v. Payne, 944 F.2d 1458, 1472 (9th Cir. 1991) (a statement introduced to show the
 effect on the listener and not for the truth of the matter asserted is not hearsay).

1 one should be afraid” of the participation in the Census. (Case Reply Decl. Ex. 6.) Defendants’
 2 contention that Ross was speaking in general terms and not about the citizenship question ignores
 3 the context of the exchange.

4 Equally unavailing is Defendants’ contention that “Plaintiffs chose to take up the Census
 5 Bureau’s invitation to perform outreach, there is no reason they needed to do so.” (Defs.’ Opp. at
 6 12.) Their star witness disagrees. In his trial testimony on November 14—*before* Defendants filed
 7 their opposition—Dr. Abowd testified under oath that the addition of the citizenship question has
 8 made increased outreach conducted by local officials “necessary”:

9 I believe that an important part of the mitigation of the decline in
 10 the self-response rate will be to modify components of the
 11 ***partnership and integrated partnership and communication***
 12 ***program*** so that the message that the census data are confidential,
 13 that they are only used to produce statistical tabulations, that they
 14 are not given to any other government agency for the purposes of
 enforcing any law, will be an important message, and *we*
acknowledge that the addition of the citizenship question has
made it necessary to augment that part of the integrated
communication and partnership program.

15 (N.Y. Trial Transcript at 1077:22-78:7 (emphasis added).)⁹ Defendants’ legal arguments are at
 16 odds with the sworn testimony of their own key witnesses.

17 **II. DEFENDANTS HAVE FAILED TO REBUT THE EVIDENCE THAT ROSS’S**
 18 **DECISION WAS ARBITRARY AND CAPRICIOUS.**

19 To establish Defendants’ violation of the APA, Plaintiffs need not discern the “subjective
 20 thought process” that led Ross to add the citizenship question to the 2020 Census. (*See* Defs.’
 21 Opp. at 19). Rather, it is readily apparent from Defendants’ *actions* that Ross’s decision was
 22 arbitrary and capricious because he (1) failed to disclose and explain the true bases of his
 23 decision; (2) failed to consider all relevant factors and to articulate a “rational connection between
 24 the facts found and the choice made,” and (3) offered “an explanation for [his] decision that runs
 25 counter to the evidence before the agency, or is so implausible that it could not be ascribed to a
 26 difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm*

27 _____
 28 ⁹ And while Abowd thinks that this outreach “can help reduce the net undercounts,” he believes it
 is “highly unlikely” to eliminate the net undercount or a differential undercount. (Abowd Exp.
 Dep. 296:13-297:1.)

1 *Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Ross’s purported rationale for the decision was
2 pretextual, so the decision must be set aside without further inquiry. *See e.g. Pub. Citizen v.*
3 *Heckler*, 653 F. Supp. 1229, 1237 (D.D.C. 1986) (when agencies “say one thing” and “do
4 another” it is “the essence of arbitrary action”). But even aside from pretext, the uncontroverted
5 evidence establishes that Defendants violated the APA on each of the *State Farm* grounds.

6 Defendants cite cases in support of the unremarkable principle that APA review is
7 deferential. But those cases only emphasize the departure from ordinary processes here. Two of
8 Defendants’ cited cases involved the Fish and Wildlife Service’s weighing of the “relevant
9 factors” in a four-factor test to determine whether a species is endangered. *Nw. Ecosystem All. v.*
10 *U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007); *see also In Ctr. for Biological*
11 *Diversity v. Zinke*, 868 F.3d 1054, 1058 (9th Cir. 2017). In another case cited by Defendants,
12 *FERC v. Electric Power Supply Association*, 136 S. Ct. 760 (2016), *as revised* (Jan. 28, 2016), the
13 Supreme Court deferred to the agency’s endorsement of the views of “an eminent regulatory
14 economist” over other technical opinions. *Id.* at 782. And Defendants cite *Pacific Dawn LLC v.*
15 *Pritzker*, 831 F.3d 1166 (9th Cir. 2016), but that was a challenge to agency rulemaking after a
16 notice-and-comment process in which the Ninth Circuit deferred to the agency’s determination of
17 end dates for fishing quotas, a fact of which “participants were on notice.” *Id.* at 1179.

18 Inexplicably, Defendants cite *Encino Motorcars, LLC v Navarro*, 136 S. Ct. 2117 (2016),
19 for the proposition that “the agency’s explanation is clear enough that its ‘path may reasonably be
20 discerned,’” without noting that in *Encino Motorcars*, the Supreme Court vacated a Department
21 of Labor decision revoking past practice because “a lack of reasoned explication for a regulation
22 that is ***inconsistent with the Department’s longstanding earlier position*** results in a rule that
23 cannot carry the force of law.” *Id.* at 2127 (emphasis added). None of these cases suggests that
24 courts defer to an agency’s secretive efforts to browbeat other agencies into making requests for
25 agency action, and *Encino Motorcars* in particular mandates a finding in Plaintiffs’ favor.

26 **A. Ross Failed to Disclose a Plausible, Non-Pretextual Basis for His Decision.**

27 The APA requires an agency decision-maker to “disclose the basis of its” decision.
28 *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (internal quotation marks

1 omitted). The purported basis of an agency decision must be rejected where, as here, the function
2 of that statement is to “provide a pretext for the ulterior motive” of the decision-maker. *Woods*
3 *Petroleum Corp. v. U.S. Dep’t of Interior*, 18 F.3d 854, 859 (10th Cir. 1994) (invalidating agency
4 decision as arbitrary and capricious where action was pretext for ulterior motive). Because the
5 record establishes that the stated basis for the Ross’s decision is pretextual, Plaintiffs are entitled
6 to partial summary judgment on their APA claim.

7 *Pub. Citizen v. Heckler*, 653 F. Supp. 1229, in particular, confirms that even when an
8 agency decision does not rise to the level of misconduct shown here, the decision may be set
9 aside as pretextual. *Id.* at 1237. There, the Food and Drug Administration (“FDA”) had found that
10 raw milk was linked to the outbreak of serious disease. *Id.* at 1232. The FDA requested that the
11 Health and Human Services (“HHS”) Secretary ban the interstate sale of all raw milk products.
12 *Id.* Despite overwhelming evidence in support of the ban, the HHS Secretary denied the FDA’s
13 request on the basis that raw milk is most appropriately dealt with at the state and local level. *Id.*
14 at 1235. The court found that “for an agency to say one thing—that all raw milk is a known
15 public health risk, and do another—refuse to ban all types of raw milk, is the essence of arbitrary
16 action” and “indicates that the Secretary’s stated reason may very be pretextual.” *Id.* at 1237.

17 **B. Ross Decided to Add the Citizenship Question Long Before the DOJ**
18 **“Requested” Citizenship Data from the Decennial Census.**

19 Defendants claim that the facts set forth by Plaintiffs present a “fanciful narrative” that is
20 “unsupported.” (Defs.’ Opp. at 19.) But the evidence supporting Plaintiffs’ position is all in the
21 administrative record, and Defendants have failed to dispute that evidence in any way. The
22 uncontroverted evidentiary record demonstrates that Ross asked for the citizenship question long
23 before the December 12, 2017 DOJ Request, and no contemporary evidence before that date
24 suggests any reference to the Voting Rights Act (“VRA”). The Decisional Memo references past
25 events for which there is no record evidence, and the post-hoc explanation set forth in the
26 “Supplemental Memorandum” (001321) creates more questions than it answers.

27 It is undisputed that DOJ only submitted the DOJ Request after multiple demands and
28 interventions by Commerce:

- 1 • Ross began considering whether to add a citizenship question “[s]oon after [his]
2 appointment as Secretary of Commerce.” (0001321.)
- 3 • Ross asked Comstock to determine whether non-citizens are included in the census count
4 and how to add a citizenship question to the 2020 Census questionnaire. (0002521,
5 0003705, 0003710.)
- 6 • In early April 2017, Ross demanded of Comstock that “we must get our [Census] issue
7 resolved” by month’s end. (0003694 (emphasis in original).)
- 8 • Ross complained in May 2017, that he was “mystified why nothing [has] been done in
9 response to my months[?] old request that *we include the citizenship question.*” (0003710
10 (emphasis added).) Comstock responded that “we need to work with Justice to get them to
11 request that citizenship be added.” *Id.*
- 12 • Both Ross and Comstock acknowledged that they would need to be “very careful” to
13 create a defensible administrative record for future litigation. (0012476.)
- 14 • In May 2017, Commerce asked DOJ to support its request for a citizenship question.
15 (0003710, 0003701, 0002462, 0012756.)
- 16 • Before September 2017, DOJ refused to become involved with the citizenship question.
17 (0012756.) Commerce then turned to DHS, which also refused to participate in
18 Commerce’s effort to add the citizenship question. (0012756.)
- 19 • Ross reached out directly to a fellow political appointee, then-Attorney General Jeff
20 Sessions, whose staff agreed to “do whatever you need us to do.” (0002651.)
- 21 • In November 2017, Ross feared that “[w]e are out of time” because the Bureau was
22 scheduled to proceed with Census preparations as planned. (0011193.)
- 23 • The DOJ Request was issued in December, months after it had refused to send it but
24 shortly after Ross contacted Sessions. (000663–000665.)
- 25 • DOJ provided no empirical data to support its claim that “a question on citizenship will
26 best enable the [DOJ] to protect all American citizens’ voting rights.” (000663.)
- 27 All of this evidence comes solely from the administrative record. Nevertheless,
28 Defendants continue to mischaracterize Ross’s decision to add the citizenship question as having

1 been made “in response” to the DOJ’s request for block-level CVAP data. But the charade is
2 over. The undisputed facts speak for themselves, and they establish as a matter of law that
3 Defendants violated the APA.

4 In arguing that Ross’s decision did not “emerge[] from a vacuum,” Defendants contend
5 that “the inclusion of a citizenship question has been common both historically and in
6 comparative international perspective.” (Defs.’ Opp. at 19.) In support of this proposition,
7 Defendants cite only the Decisional Memo itself. They present no evidence that Ross had even
8 seen the “historically and in comparative international perspective” use of citizenship questions
9 when he wrote, in May 2017, that he had issued a months-old “request that we include the
10 citizenship question.” (0003710.) The only pre-May 2017 evidence in the administrative record
11 that suggests *any* reason for adding the question are Ross’s conversations with Kris Kobach and
12 Steve Bannon. (000763–000764.)

13 C. **Ross Entirely Ignored the Bureau’s Requirements That All Questions**
14 **Undergo Field Testing and Cognitive Testing.**

15 Defendants acknowledge that Ross mentioned testing in the Decisional Memo, but do not
16 address the fact that he failed to “adhere to voluntarily adopted, binding policies that limit [his]
17 discretion.” *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987). They fail totally to address the
18 fact that rejecting the testing protocols was “inconsistent with the Department’s longstanding
19 earlier position.” *Encino Motorcars*, 136 S. Ct. at 2127. While Ross acknowledged that the
20 Bureau conducts cognitive and field testing of a new question, he analyzed only the Bureau’s
21 recommendations for *cognitive* testing. (001296.) Ross omitted any consideration of whether
22 prior *field* testing had been performed, and whether such testing was adequate. (001297.)

23 Moreover, the undisputed facts demonstrate that the Bureau advised Ross of the cognitive
24 and field testing requirements. Ross asked the Bureau, “What was the process that was used in the
25 past to get questions added to the decennial Census or do we have something similar where a
26 precedent was established?” (0009832.) The Bureau, through Abowd, provided a detailed
27
28

1 response setting for the Bureau’s “well-established process” for changing content “on the census
2 or ACS.”¹⁰ (0009832–0009833.)

3 Defendants argue that Commerce’s revisions to the Bureau’s answers were “approved for
4 inclusion by Census Bureau leadership.” (Defs.’ Opp. at 23.) But that statement is not supported
5 anywhere in the record. Christa Jones, Deputy Chief of the Bureau, wrote on February 24, 2018,
6 that she was “fine with” one revision to the answer, authored by Sahra Park-Su. (013023.) But the
7 Bureau did not include Park-Su’s proposed answer when it sent its final response to Ross on
8 March 1, 2018, which continues to reference the “well-established process.” (0009812; 0009832.)

9 And in any event, the version that Jones saw was revised *yet again* before the
10 administrative record was produced in this matter, specifically to replace the phrase “Consistent
11 with longstanding practice for adding new questions” with “Because no new questions have been
12 added to the Decennial Census (for nearly 20 years), the Census Bureau did not fee[l] bound by
13 past precedent.” (001296.) Nothing in the record suggests that anyone from the Bureau saw this
14 answer or confirmed that the Bureau did not in fact “feel bound by past precedent.” Defendants
15 simply ignore the record evidence and, therefore, fail to dispute that Commerce “so distort[ed] the
16 record that an agency decisionmaking body can no longer rely on [it] in meeting its obligations
17 under the law.” *Nat’l Small Shipments Traffic Conference, Inc. v. I.C.C.*, 725 F.2d 1442, 1450-51
18 (D.C. Cir. 1984).

19 **D. Ross’s Decision-Making Was Not Reasoned Where He Discounted Agency**
20 **Expertise and Deferred to Facially Invalid Rationale.**

21 The voluminous evidence contained in the administrative record runs counter to the
22 explanation Ross offered for his decision. This is fatal to Defendants’ defense that Ross’s
23 decision was objectively reasonable. While Ross paid lip-service to the Bureau’s expertise by
24 acknowledging “concerns” that adding a citizenship question “would negatively affect the
25 response rate for non-citizens,” he irrationally deferred to the facially invalid rationale set forth in

26 _____
27 ¹⁰ Defendants’ made-for-litigation position that the process applies only to the ACS because no
28 one had suggested a move so radical as changing the short-form census questionnaire is not
supported by the record. They offer no explanation why the ACS, sent to a sample of households,
would have a more robust process for adding content than the short form census sent to every
household. And the process refers to changes in “the census or ACS.” (0009832–0009833.)

1 the DOJ Request over the scientific expertise of the Bureau. (001313–001320.) In so doing, he
 2 ignored important consequences of adding a citizenship question identified by his own agency
 3 experts. *See, e.g., United States v. F/V Alice Amanda*, 987 F.2d 1078, 1085 (4th Cir. 1993)
 4 (agency action is arbitrary and capricious when the agency “had actual knowledge of the
 5 problems” associated with its decision).

6 The administrative record contains ample scientific evidence to support a finding that
 7 adding the citizenship question would conflict with Ross’s stated goal of “obtaining *complete and*
 8 *accurate data*” (001313 (emphasis in original)), including the following findings from the
 9 Bureau’s own January 19, 2018 memorandum:

- 10 • The question will provide “substantially less accurate citizenship status data than are
 11 available from administrative sources.” (001277.)
- 12 • The breakoff rate for Hispanics is nine times higher than for non-Hispanic Whites for the
 13 citizenship question. (001281.)
- 14 • Every respondent would be burdened by the question, and it would lead to a larger decline
 15 in self-response for noncitizen households. (001281.)
- 16 • Responses to the citizenship question on the ACS results in a high amount of false self-
 17 reporting. (001317.)

18 By contrast, the only evidence Ross relied upon was the DOJ Request itself. (001313–
 19 001320.) The DOJ Request states that (1) the DOJ needs CVAP data on the census block level to
 20 enforce the VRA; and (2) asking a citizenship question on the Census is the best way to get that
 21 data. The record does not support the first statement and affirmatively disproves the second.¹¹
 22 Reliance on a facially deficient recommendation renders a decision arbitrary and capricious. *See*
 23 *Ergon-W. Virginia, Inc. v. U.S. Env. Prot. Agency*, 896 F.3d 600, 613 (4th Cir. 2018).

24 None of the cases cited in the DOJ Request actually support the DOJ’s request for such
 25 data to enforce the VRA. *See Reyes v. City of Farmers Branch*, 586 F.3d 1019, 1023–24 (5th Cir.

26
 27 ¹¹ Defendants erroneously state that it is “undisputed” that DOJ needs block-level CVAP data to
 28 enforce the VRA. Plaintiffs absolutely dispute this claim, and specifically did so in their opening
 brief. (Pls.’ Mot. at 29, n.31.) Indeed Plaintiffs have stated since the commencement of this
 litigation that the purported rationale was pretextual. (*See* Compl. ¶¶ 67–70.)

1 2009) (while CVAP data is appropriate evidence to prove minority-majority district, no mention
2 of need for block-level CVAP data and Plaintiffs did not rely on ACS citizenship data); *Barnett v.*
3 *City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998) (affirms use of CVAP data for determining
4 proportional equality of voting power, but rejects use of decennial census to obtain such data: “To
5 verify the age and citizenship of the population would enormously complicate the decennial
6 census and open the census-taker to charges of manipulation.”); *Negron v. City of Miami Beach*,
7 113 F.3d 1563, 15 67–69 (11th Cir. 1997) (plaintiffs relied unsuccessfully on voting-age
8 population to draw illustrative districts and never attempted to proffer districts based on CVAP
9 data); *Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989), *overruled in part on other*
10 *grounds by Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1141 (9th Cir. 1990) (affirms
11 that “eligible minority voter population, rather than total minority population, is the appropriate
12 measure of geographical compactness”); *LULAC v. Perry*, 548 U.S. 399, 423-442 (2006) (no
13 discussion of block-level CVAP data).

14 Ross relied on the DOJ Request for his finding that “having [citizenship] data at the
15 census block level will permit more effective enforcement of the Act.” (001313.) While Ross was
16 not required “to undertake an independent analysis” of another agency’s conclusions, he also
17 could not “blindly adopt [those] conclusions.” *City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C.
18 Cir. 2006). Finally, Defendants have proffered no evidence whatsoever to support Ross’s
19 conclusory statement that “the citizenship data provided to DOJ will be more accurate with the
20 question than without it.” (001319.) This central conclusion of the Decisional Memo is “counter
21 to the evidence before the agency.” *State Farm*, 463 U.S. at 43.

22 **III. DEFENDANTS HAVE FAILED TO REBUT THE EVIDENCE THAT ROSS’S**
23 **DECISION WAS BEYOND HIS STATUTORY AUTHORITY.**

24 **A. This Court May Review Ross’s Decision.**

25 Plaintiffs rely on a single case decided on standing grounds to assert that “congressional
26 reporting requirements” are beyond the jurisdiction of a court. (Defs.’ Mot. at 13). But the issue
27 in *Guerrero v. Clinton* was whether a “better report” regarding the Compact of Free Associations
28 Act of 1985 would have provided any relief to Guam. 157 F.3d 1190, 1195 (9th Cir. 1998). By

1 contrast, the Census Act governs the process by which the Secretary must disclose the content of
 2 the ACS and the Decennial Census to prevent exactly the type of abuse that took place here. The
 3 “agency action” at issue is Ross’s decision to add the question nearly a year after the deadline for
 4 changing census content had passed, without stating that any new circumstances made that
 5 change necessary. *See, e.g., NRDC v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95, 113 (2d
 6 Cir. 2018) (vacating agency decision because agency improperly delayed implementation of a
 7 rule beyond a statutorily-mandated deadline).

8 Defendants claim that the only remedy for violating the Census Act is for Congress “to
 9 respond to the missing report in the manner of Congress’s choosing.” (Defs.’ Opp. at 16.) It is not
 10 clear what Defendants mean. Members of Congress have previously tried to mandate census
 11 content by denying the Bureau funding if it fails to ask certain questions, but this tactic requires
 12 successfully amending appropriations legislation.¹² If courts could not enforce acts of Congress,
 13 there would be no need for Section 706(2)(C). Public reports that codify agency decision-making
 14 are subject to ultra vires review, whether sent to Congress or anyone else. *See, e.g., Motion*
 15 *Picture Ass’n of Am., Inc. v. F.C.C.*, 309 F.3d 796, 799–800 (D.C. Cir. 2002).

16 **B. Defendants “New Circumstances” Do not “Necessitate” Adding the Question.**

17 Defendants do not claim that their interpretation of the Census Act is entitled to *Chevron*
 18 deference, and because the Decisional Memo does not constitute rulemaking, deference is only
 19 due based upon the “thoroughness evident in its consideration, the validity of its reasoning, its
 20 consistency with earlier and later pronouncements, and all those factors which give it power to
 21 persuade.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) And under *Skidmore* deference,
 22 Defendant’s construction of the Census Act—which allows them to add, remove, or modify
 23 topics at any time without any explanation, “fails to address the particular interplay among”
 24 relevant provisions of the Act. *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533
 25 (2013) (refusing to apply *Skidmore* deference to EEOC manual). The law that added Section
 26 141(f) also added 13 U.S.C. § 6(c), requiring the Secretary to use other data sources “to the

27 ¹² Such efforts have not typically been successful. *See* Vitter-Bennet Amendment No. 2644 to
 28 Commerce, Justice Science and Related Agencies Appropriations Act of 2010, *available at*
<https://www.congress.gov/congressional-record/2009/10/13/senate-section/article/S10339-2>.

1 maximum extent possible” instead of “conducting direct inquires.” PL 94–521 (HR 11337)
2 October 17, 1976.¹³

3 Defendants contend that the DOJ Request consists of “new circumstances,” but ignore the
4 fact that it was issued only after Ross met with Sessions. Defendants do not and cannot explain
5 how the DOJ Request “necessitates” adding the question. (Defs.’ Opp. at 16.) And bizarrely,
6 Defendants argue that they should not be held accountable for failing to follow the Census Act
7 now, because they could theoretically submit a compliant report before 2020, even as they admit
8 they have not done so now and cannot explain how a new report would comply with the law.

9 And should this Court find that Defendants’ failure under 13 U.S.C. § 141(f)(1)-(3) cannot
10 be reviewed under § 706(2)(C) of the APA, Defendants’ failure to meet required deadlines further
11 show that the decision to add the question was arbitrary and capricious. *See Reed v. Salazar*, 744
12 F. Supp. 2d 98, 115-18 (D.D.C. 2010) (holding a decision arbitrary and capricious, in part,
13 because of the failure to issue an Environmental Impact Statement).

14 **IV. THE BUREAU SHOULD MAKE ANY DECISION ON REMAND.**

15 Defendants suggest that if Plaintiffs prevail Ross should be allowed to “remed[y] any
16 procedural errors” even though those “errors”—consisting of an obvious cover-up, false
17 statements under oath, and blown deadlines—are neither errors nor remediable. (Defs.’ Opp. at
18 29.) Should this Court find that remand is necessary, Defendants incorrectly state that Plaintiffs
19 do not “present an alternative” to remanding this decision to Ross himself. (Defs.’ Opp. at 30.)
20 Plaintiffs’ alternative is to bar Ross and Commerce from considering any agency action so that
21 any further consideration “be undertaken by the Bureau alone.” (Pls.’ Mot. at 30.) Defendants do
22 not address this alternative and thereby concede that it is an appropriate remedy should this Court
23 decline vacatur without remand. *See Samica Enters. LLC v. Mail Boxes Etc., Inc.*, 460 F. App’x
24 664, 666 (9th Cir. 2011) (“Arguments not raised in opposition to summary judgment or in the
25 opening brief before this court are waived.”)

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27
28 ¹³ The final conference report on the law confirmed its purpose was “reducing respondent
burden” and providing reports to Congressional committees “for their review *and*
recommendations.” HR Conf. Rep. 94-1719, Case Reply Decl. Ex. 8 (emphasis added).

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CONCLUSION

Plaintiffs respectfully request that the Court set aside Ross’s decision to add the citizenship question and enjoin Defendants from taking steps to add the question to the Census.

Respectfully submitted,

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Dated: November 26, 2018

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FILER’S ATTESTATION

Pursuant to Civil Local Rule 5-1(i)(3), regarding signatures, Ana G. Guardado hereby attests that concurrence in the filing of this document has been obtained from all the signatories above.

Dated: November 26, 2018

s/ Ana G. Guardado
Ana G. Guardado

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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2018, I served the foregoing with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

/s/ Ana G. Guardado
Ana G. Guardado