IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBYN KRAVITZ, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF COMMERCE, *et al.*, Defendants.	No. 8:18-cv-01041-GJH

REPLY IN FURTHER SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Secretary of Commerce is afforded virtually unlimited discretion in conducting the decennial census and exercised that discretion to reinstate a citizenship question on the 2020 census. Plaintiffs oppose the government's motion for summary judgment on their unfounded challenges to the Secretary's decision, yet Plaintiffs fail to meet their burden at this late stage of the proceedings to establish Article III standing and cannot identify any dispute of material fact that would preclude this Court from entering summary judgment for the government as a matter of law.

Plaintiffs have now had the benefit of extensive discovery into the issues central to their claims of standing—namely, that they are subject to a certainly impending harm from a loss of federal funds or congressional representation resulting from a differential undercount that is fairly traceable to the inclusion of a citizenship question on the 2020 census and redressable through an order setting aside the Secretary's decision to reinstate the question. Plaintiffs have failed to adduce evidence, on the eve of trial, that any putative net differential undercount has crossed the line from the speculative to the sufficiently imminent, nor have Plaintiffs set forth evidence to show that any net differential net undercount would be fairly traceable to the inclusion of a citizenship question. Plaintiffs also have no answer to the uncontroverted evidence that the Census Bureau has made preparations to address any decline in self-response rates. In any event, Plaintiffs can point to no dispute of material fact as to the government's evidence that Plaintiffs would not be harmed from a putative undercount.

Plaintiffs' arguments on the merits fare no better. Plaintiffs' arguments against summary judgment on the Enumeration Clause claim are wholly unsupported because, again, there is no evidence to suggest that the Census Bureau is not prepared to conduct a complete enumeration, regardless of any estimated decline in self-response rates. Plaintiffs' arguments against summary judgment on claims under the Administrative Procedure Act (APA)—which can and should be resolved exclusively at summary judgment—rest on a willful misunderstanding of the nature of the Secretary's decisionmaking process and mischaracterizations of the back-and-forth consultation

process among federal agencies. Lastly, Plaintiffs' other claims that the Secretary acted contrary law are a baseless attempt to find some unrelated statutory hook to challenge the Secretary's vast discretion in conducting the census, but the law simply does not support their claims. The Secretary complied with congressional reporting requirements and all relevant statistical standards. The Court should grant Defendants' motion for summary judgment.

ARGUMENT

I. Defendants Are Entitled to Summary Judgment Because Plaintiffs' Claims of Injury and Causation are, in 2018, Too Speculative to Establish Standing to Challenge the 2020 Census.

In Defendants' opening memorandum, they argued that Plaintiffs lack standing because their purported future injuries are too speculative and also because, in light of the current macro-environment, Plaintiffs cannot establish that any such injuries would be attributable to a citizenship question. In response, Plaintiffs discuss evidence they have developed during discovery concerning the likelihood of a decrease in self-response, predictions regarding the effectiveness of non-response follow-up efforts, and predictions of the behavior of individuals already concerned regarding the current administration's immigration policies. Pls.' Opp'n at 20-24, ECF No. 69.

As Defendants explained in their motion to dismiss, ECF No. 24-1 at 13-14, Plaintiffs have the burden of establishing standing. To satisfy the Article III case or controversy requirement, a Plaintiff must demonstrate an "injury in fact," which requires a plaintiff to establish that he or she "'has sustained or is immediately in danger of sustaining a direct injury'" as a result of the defendant's action. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1552 (2016) (quoting *Ex Parte Levitt*, 302 U.S. 633, 634 (1937) (per curiam)). This injury in fact must be "concrete and particularized," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); an injury that is "merely 'conjectural' or 'hypothetical' or otherwise speculative" will not suffice, *Summers v. Earth Island Inst.*, 555 U.S. 488, 505 (2009) (quoting *Lujan*, 504 U.S. at 560). Any alleged future injury in fact must be "certainly impending"; "'[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (emphasis

added) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). Moreover, "an 'objectively reasonable likelihood' of harm is not enough to create standing, even if it is enough to engender some anxiety." *Chambliss v. Carefirst, Inc.*, 189 F. Supp. 3d 564, 570 (D. Md. 2016) (quoting *Clapper*, 568 U.S. at 410).

While Plaintiffs argue in their opposition that they have established an issue of material fact as to whether there is a "certainly impending" "concrete and particularized" injury in fact as a result of the Secretary's decision to include a citizenship question on the 2020 Decennial Census, Plaintiffs' discussion just underlines the reasons why Defendants are entitled to summary judgment on the ground of standing. Namely, even if the Court were to hold trial on the issue of standing, the evidence presented would still consist of nothing more than speculation and uncertain predictions as to the results of the census that will not occur until almost two years from now. Regardless of the number of studies conducted beforehand, therefore, it is inherently too uncertain at this stage for the Court to make any definitive conclusions regarding the possibility of future injury attributable solely to the citizenship question and, more specifically, to conclude that there is a "substantial risk" of future injury caused by the question. Even viewed in the light most favorable to Plaintiffs, their evidence is simply not (and will not be at trial) sufficient "to push the threatened injury . . . beyond the speculative to the sufficiently imminent." *Beck v. McDonald*, 848 F.3d 262, 274 (4th Cir. 2017), *cert. denied*, *Beck v. Shulkin*, 137 S. Ct. 2307 (2017); *see id.* at 275-76 (discussing statistics from up to 33% as "fall[ing] far short of establishing a 'substantial risk' of harm"); *Chambliss*, 189 F. Supp. 3d at 569 ("Where the alleged injury requires a lengthy chain of assumptions, including 'guesswork as to how independent decisionmakers will exercise their judgment,' the injury is too speculative to be 'certainly impending.'" (quoting *Clapper*, 568 U.S. at 413)).

Plaintiffs seek to avoid the problem with the speculative nature of their claims of injury and causation by arguing that, at the very least, the evidence they cite establishes genuine issues of material fact for trial. But, even taking Plaintiffs' evidence as undisputed, it does not establish that a differential net undercount or less accurate census is "substantially" likely to occur due to the inclusion of a

citizenship question on the 2020 decennial census. Declaration of Dr. John Abowd ¶¶ 13, 24, 53, 56, 78, (ECF No. 67-2) ("Abowd Decl."). Plaintiffs' claims are particularly speculative because the 2020 Decennial Census will feature several features that have not been used in previous decennial censuses: (1) the 2020 Decennial Census will allow all persons living in the United States to respond to the census questionnaire via the Internet, instead of responding via mail; Census Operational Plan at 18, 21, 91, 95; and (2) for respondents who do not self-respond and cannot be enumerated by the in-person enumerators, the Census Bureau will use high-quality administrative records to enumerate that household. Census Operational Plan at 22, 114, 117; Abowd Decl. ¶ 53. Both of these measures are designed to assist the Census Bureau in enumerating the entire population in an accurate and cost-effective manner, and Plaintiffs do not and cannot establish the impact of these measures. Furthermore, the Census Bureau will coordinate aggressive and targeted advertising and outreach campaigns designed to educate the public and increase the accuracy of the final enumeration. However, the plans for these campaigns and outreach efforts have not been finalized or announced yet, so any allegations Plaintiffs may make about them is nothing more than pure speculation.

Moreover, the Census Bureau is readying itself to do everything in its power to forestall an undercount. *Id.* ¶¶ 24, 59-67, 74-78, 82. In denying Defendant's motion to dismiss, this Court held that while at that stage Plaintiffs "sufficiently alleged that [the Census Bureau's NRFU] measures would not be effective," "[d]iscovery, and potential expert testimony, may later make it clear that these efforts will sufficient to eliminate any potential undercount." MTD Op. at 14, ECF No. 48. That is precisely what has happened. While Plaintiffs go to great lengths in their opposition to discuss how they have established an issue of material fact as to whether a citizenship question will cause a differential impact on *self-response* rates, Plaintiffs have been unable to produce any non-speculative evidence that NRFU will not remedy any decline in initial self-response rates due to the inclusion of a citizenship question, and have thus failed to meet their burden of establishing standing. As the undisputed evidence in the record shows, the planned NRFU process is extensive, involving up to six

in-person visits from an enumerator, and, if in-person enumeration is not possible, the Census Bureau will use administrative records, proxies, and, if all else fails, imputation to enumerate a household. *See* Defs.' Mem. at 12-14, ECF No. 67-1 (discussing NRFU procedures in more detail). There will be an additional $1.7 billion appropriated to the Census Bureau in contingency funding for fiscal year 2020 that may be spent on NRFU. Abowd Decl. ¶ 59. Plaintiffs' arguments about the insufficiency of NRFU are based on no empirical evidence and constitute nothing more than speculation. For example, Plaintiffs argue that the Census Bureau's use of proxies and the imputation process will cause a differential undercount. *See, e.g.*, Pls.' Opp'n at 16. Of course, proxies and the imputation process will only be used if a household has (a) declined to self-respond; (b) cannot be enumerated by an in-person enumerator after numerous attempts; and (c) insufficient administrative records exist. Furthermore, however, Plaintiffs' allegations concerning proxies and imputation at most establish an issue of material fact as to whether these measures are *accurate*, but they have not produced any evidence that such measures lead to a systemic undercount. As set forth in Dr. Abowd's declaration, the Census Bureau is not aware of any credible quantitative evidence that the use of proxies or imputation leads to a greater differential net undercount. Abowd Decl. ¶¶ 53, 56. Having a trial so that Plaintiffs can present their speculative opinions and studies concerning one possible, but not inevitable or even likely, outcome of the 2020 census, would be of no benefit to the Court.

Moreover, Plaintiffs have failed to establish the existence of a material fact as to a non-speculative "substantial risk" that there will be a net differential undercount *as a result of the inclusion of a citizenship question*, separate and distinct from other possible factors which may impact the Census Bureau's enumeration efforts. Much of Plaintiffs' evidence, and even arguments, in this case revolve around the general cultural and political environment in which the 2020 census will occur. However, those concerns pre-date, and exist separate and apart from, the Secretary's decision to include a citizenship question. To the extent Plaintiffs' allegations, such as the ones contained in their complaint, SAC ¶¶ 1, 111, ECF No. 55-1 relate to other concerns and reasons respondents may have

for not responding to the census, those allegations show only that Plaintiffs have failed to demonstrate that any net differential undercount will be traceable directly to the Secretary's decision to include a citizenship question on the 2020 census, as opposed to any number of other cultural or political factors.

Plaintiffs have likewise failed to show that they are at imminent risk of a concrete, particularized harm. While Plaintiffs rely upon the expert opinion of Mr. Kimball Brace, Mr. Brace's apportionment calculations are based upon entirely speculative net differential undercount scenarios. Pls.' Opp'n at 25. However, as the Supreme Court in *Clapper* recognized, even an "objectively reasonable likelihood" of harm is not sufficient to create standing. *Clapper*, 568 U.S. at 410. By contrast, Dr. Gurrea's expert opinion shows that if the NRFU efforts in 2020 are of comparable success in enumerating the population as the NRFU efforts in previous decennial censuses, there will be no loss of representation or vote dilution as a result of the inclusion of a citizenship question. Rule 26(a)(2)(B) Expert Report and Declaration of Stuart D. Gurrea, Ph.D., ¶¶ 12, 65-67, ECF No. 67-3 ("Gurrea Decl.").

Similarly, Plaintiffs have failed to establish anything beyond self-serving speculation that they will be harmed by any change in federal funding that accompanies a differential net undercount caused by the inclusion of a citizenship question. While Plaintiffs rely upon the expert opinion of Dr. Andrew Reamer for the proposition that a differential net undercount would have caused some states to have lost federal funding in 2016 had there been a larger net differential undercount in the 2010 decennial census, Plaintiffs have failed to provide anything other than broad speculation for the proposition that Plaintiffs themselves, as opposed to the states in which they reside, would be injured in the event of a relatively small impact on the funding of a few federally funded programs. In deposition testimony, Dr. Reamer was clear that (a) none of the federally-funded programs he examines provide funding to any individuals or nonprofit organizations and (b) the eligibility for such programs is determined by the states themselves. Reamer Dep. 86:24-87:9 (Medicaid), 94:23-95:23 (CHIP), 110:9-111:3 (WIC),

124:8-125:4 (social services block grants), Federighi Decl., Ex. A. To establish standing on the basis of a change in federal funding to state governments, Plaintiffs would have to demonstrate that there was an imminent risk that states would cut benefits to individual Plaintiffs or individual members of organizational Plaintiffs. They have not even attempted to do so.

II. Defendants Are Entitled to Summary Judgment on the Enumeration Clause Claim.

Defendants' explained that even if Plaintiffs had shown that the citizenship question will cause *any* differential net undercount (giving them Article III standing), they have not shown that the citizenship question will cause such a *significant* differential net undercount as to violate the Enumeration Clause. Defs.' Mem. at 17-19.

Yet in support of their Enumeration Clause claim, Plaintiffs rely solely on the same evidence and argument that they contend gives them Article III standing. Pls.' Opp'n at 44-45. But this Court has explained that the Enumeration Clause imposes a higher standard than Article III: "Plaintiffs' allegation that the citizenship question will affect the accuracy of the census does not automatically render the citizenship question unconstitutional. The Census Bureau is not obligated, nor expected, to conduct a perfectly accurate count of the population." MTD Op. at 23, ECF No. 48.

Instead, the citizenship question does not violate the Enumeration Clause unless it "*unreasonably* compromises the distributive accuracy of the census." *Id.* at 14 (emphasis added). Plaintiffs have adduced no evidence, however, that any effect the citizenship question might have on distributive accuracy rises to the level of unreasonable, especially in light of the value of the information gathered by the question. The government is therefore entitled to summary judgment on the Enumeration Clause claim.

III. Defendants Are Entitled to Summary Judgment on Plaintiffs' APA Claims.

A. Plaintiffs' APA Claims Should Be Decided on Summary Judgment.

In their opposition, Plaintiffs argue that there are disputes of material fact as to their APA claims that the Court must resolve after trial, Pls.' Opp'n at 26, but that argument fundamentally

misconstrues the nature of review under the APA. As the government explained in its motion, "[w]hen a party seeks review of agency action under the APA, . . . the district judge sits as an appellate tribunal." *Doe v. Tenenbaum*, 127 F. Supp. 3d 426, 436 n.2 (D. Md. 2012) (quoting *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009)). That is because "the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Andreas-Myers v. NASA*, No. GJH-16-3410, 2017 WL 1632410, at *5 (D. Md. Apr. 28, 2017) (quoting *Kaiser Found. Hosps. v. Sebelius*, 828 F. Supp. 2d 193, 198 (D.D.C. 2011)). These issues are properly decided through summary judgment, which "serves as a mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Hospira, Inc. v. Burwell*, No. GJH-14-02662, 2014 WL 4406901, at *9 (D. Md. Sept. 5, 2014). Thus, "the Court would appropriately dispose of the case on summary judgment even if, as a general matter, [a] dispute [of fact] were genuine." *Doe*, 127 F. Supp. 3d at 436 n.2. There is no need for a trial to resolve disputes of material fact because APA claims are appropriately resolved as a matter of law on a review of the record at summary judgment.

The presentation of evidence at trial is inappropriate because "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (*per curiam*); *see also, e.g.*, *Fla. Light & Power Co. v. Lorion*, 470 U.S. 729, 743 (1985). This record constitutes the "whole record" contemplated by the statute when setting forth the APA standard of review. 5 U.S.C. § 706; *Minotti v. Whitehead*, 584 F. Supp. 2d 750, 764 (D. Md. 2008) ("It is well-settled that the Court is confined to examining the administrative record to determine whether the agency has articulated a rational basis for its decision."). Yet Plaintiffs would have this Court disregard these basic principles of administrative law and essentially conduct a *de novo* review of the Secretary's judgment in the guise of "buttress[ing] the strong inference raised by the AR" that the Secretary's decision was pretextual or addressing unidentified and unexplained "infirmities" in the administrative record. Pls.' Opp'n at 28. Plaintiffs'

argument seems to be that because the Court authorized limited extra-record discovery, the Court also must ignore limits on APA review and second-guess the substance of the Secretary's policy decision. But this Court has not so held. In authorizing extra-record discovery, the Court did not resolve the question of what materials would be subject to the Court's review in resolving the APA claim, nor did the Court suggest that this discovery order invited *de novo* review of the Secretary's judgment.

Setting aside whether the Court's order authorizing extra-record discovery was correct in the first place, a question on which the Supreme Court has granted the government's petition for a writ of certiorari in the related New York challenges to the Secretary's decision, a bad-faith finding in authorizing discovery does not overcome the clear rule that this Court "may not substitute its policy judgment for that of the agency when the policy is rational." *Johnson v. Dep't of Educ.*, No. 17-cv-2104 (RDB), 2018 WL 3420016, at *3 (D. Md. July 13, 2018); *see also, e.g.*, *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) ("A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives."). Those "limited circumstances" where "district courts are permitted to admit extra-record evidence" do not allow a court to engage in *de novo* review of the agency's decision through fact finding; rather, "[t]hese limited exceptions operate to *identify and plug holes* in the administrative record." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (emphasis added). That is why testimony from experts that seek to contradict the agency's judgment is not permitted in an APA case; otherwise, the Court would be left to "simply substitute the judgment of plaintiff's experts for that of the agency's experts." *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 201 (4th Cir. 2009). Plaintiffs thus cannot point to "disputes" of "material fact" created through materials obtained through discovery because APA review does not contemplate fact finding in the first instance, only review of the record as a matter of law.

Lastly, Plaintiffs argue that the Court should hold a trial on their APA claims if the Court concludes there are disputes of material fact with respect to Plaintiffs' standing to sue and their claim under the Enumeration Clause. Pls.' Opp'n at 27-29. Plaintiffs suggest the "most efficient course"

would be to have a trial on all issues if the Court must engage in fact finding to resolve questions of standing. *Id.* at 29. But Plaintiffs have no authority for that proposition. Indeed, the cases Plaintiffs cite suggest an alternative method: resolving disputes of material fact as to standing "through a pretrial evidentiary proceeding." *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 425 (1st Cir. 1983); *see also, e.g.*, *Tech-Sonic, Inc. v. Sonics & Materials, Inc.*, No. 3:12-cv-01376 (MPS), 2015 WL 4715329, at *7 (D. Conn. Aug. 7, 2015) (explaining that the jurisdictional issue could be resolved "either at trial or at a separate evidentiary hearing"). In other words, disputes of fact as to standing do not necessitate a trial on merits claims that may be resolved through dispositive motions, particularly where a dispositive ruling on standing would obviate the need for the Court to expend resources on resolving merits questions. Thus, even assuming the Court were to conclude that standing may not be resolved at summary judgment, there is no reason to hold a trial on an APA claim—which should be resolved as a matter of law at summary judgment—simply because there may be disputes of fact on some other issue.

B. The Secretary's Decision Was Not Arbitrary and Capricious.

As the administrative record shows, the Secretary's decision was not arbitrary and capricious because he set out to understand the costs and benefits of reinstating a citizenship question before making his decision and explained his reasoning based on the record before him. Plaintiffs' arguments to the contrary essentially amount to explanations for why Plaintiffs would have made a different decision or baseless allegations that the Secretary's stated reasons for his decisions were somehow improper or pretextual. But disagreement with the Secretary's decision is not a basis to set aside his judgment under the APA, nor are unsubstantiated allegations of misconduct. The Secretary, not Plaintiffs, is charged by statute with conducting the decennial census, and he has "virtually unlimited discretion" in his discharge of that duty. *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996). To set aside the Secretary's considered judgment under the APA, Plaintiffs must explain why, given the evidence before him at the time of his decision, the Secretary did not engage in reasoned decisionmaking such that his ultimate decision can only be deemed arbitrary and capricious. 5 U.S.C.

§ 706(2); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (explaining that the question for the Court is whether the agency's decision "was the product of reasoned decisionmaking"). Thus, the Court determines only whether the agency "articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 105 (1983).

Plaintiffs appear to agree that the bar they must clear is a high one, and that the Court properly affords the Secretary substantial deference in fulfilling the duties that Congress has delegated to him. *See* Pls.' Opp'n at 30 (noting that a court "should not venture into the area of agency expertise" (quoting *United States v. F/V Alice Amanda*, 987 F.2d 1078, 1085 (4th Cir. 1993))). Yet Plaintiffs nonetheless contend that the Secretary's decision should be set aside for two reasons. First, Plaintiffs suggest that the Secretary's explanation for his decision was contrary to the evidence before him. *Id.* at 31. Second, Plaintiffs contend that the Secretary's decision was "impermissibly pretextual, predetermined, and politically influenced." *Id.* Both arguments must fail.[1]

1. The Secretary reasonably decided to include a citizenship question based on the record before him.

Plaintiffs begin with the argument that the Secretary's decision to include a citizenship question was arbitrary and capricious because the Secretary did not appropriately weigh the evidence before him. Pls.' Opp'n at 31. Plaintiffs' evident disagreement with how the Secretary weighed the evidence is, of course, legally irrelevant to the merits of an arbitrary-and-capricious claim under the APA. *Sierra Club v. State Water Control Bd.*, 898 F.3d 383, 403 (4th Cir. 2018) ("The court is not empowered to substitute its judgment for that of the agency." (quoting *Ohio Valley Envtl. Coal.*, 556 F.3d at 192)); *Darden v. Peters*, 488 F.3d 277, 284 (4th Cir. 2007) (rejecting an argument that the agency

[1] Notably, Plaintiffs do not expressly point to any disputes of material fact in making either argument. That is because the parties' disputes are purely legal—as they must be in an APA case—and amenable to resolution at summary judgment.

"simply reached the wrong result"). Plaintiffs' argument boils down to an assertion that the Secretary's decision "was the worst option available to him," Pls.' Opp'n at 31, but it is not the province of the federal courts to determine whether an agency's decision "is the best one possible or even whether it is better than the alternatives." *Elec. Power Supply Ass'n*, 136 S. Ct. at 782. "Deference is due where the agency has examined the relevant data and provided an explanation of its decision that includes 'a rational connection between the facts found and the choice made.'" *Ohio Valley Envtl. Coal.*, 556 F.3d at 192 (quoting *State Farm*, 463 U.S. at 43); *see also, e.g.*, *Md. Dep't of Health & Mental Hygiene v. Ctrs. for Medicare & Medicaid Servs.*, 542 F.3d 424, 427-28 (4th Cir. 2008) ("We will overrule the agency's decision only if we find that it has failed to consider relevant factors and committed 'a clear error of judgment.'" (quoting *West Virginia v. Thompson*, 475 F.3d 204, 212 (4th Cir. 2007))).

Plaintiffs thus seek to establish that the Secretary's decision was totally contrary to the evidence before him, but fail to show anything more than a disagreement with his evaluation. *First*, Plaintiffs contest the Secretary's conclusion that, although the Census Bureau and some stakeholders raised concerns that a citizenship question would have a negative effect on the response rate for non-citizens, no one had produced definitive evidence that the response rate would decline "materially" as a result. AR 1315. According to Plaintiffs, this conclusion is "inaccurate and contradicted by the record," citing a technical review of the DOJ request prepared by the Census Bureau. Pls.' Opp'n at 31. In that January 19, 2017, memorandum, the Census Bureau analyzed self-response rates in previous surveys—namely, the American Community Survey (ACS) and the "long-form" census that previously went to only a portion of households—that included a question about citizenship status. AR 1280-81. Reviewing the data, the Bureau wrote that there was "a reasonable inference" that inclusion of a citizenship question "would lead to some decline in overall self-response." AR 1281. The Bureau similarly analyzed breakoff rates—the rate at which a respondent starts an online survey but changed his or her mind about responding during the survey—for the ACS. AR 1281.

Plaintiffs argue that the technical review thus presented an "empirical analysis" that the Secretary did not account for, making the Secretary's decision unreasonable. Pls.' Opp'n at 31. That assertion is remarkable, given that the Secretary took the time to expressly address this analysis in his decision memorandum. The Secretary explained that comparisons to the ACS were unpersuasive and did not yield definitive, empirical support because "response rates generally vary between decennial censuses and other census sample surveys." AR 1315. And comparisons to the long-form census failed because those surveys "differed significantly in nature" as they were, *inter alia*, significantly longer and more time-consuming. AR 1315. The Secretary thus acknowledged the exact data on which Plaintiffs rely and concluded that "the Census Bureau's analysis did not provide definitive, empirical support." AR 1316. Plaintiffs may disagree with that conclusion, but "the mere fact that the Secretary's decision overruled the views of some of his subordinates is by itself of no moment in any judicial review of his decision," *Wisconsin*, 517 U.S. at 23, and a court is not permitted to set aside an agency decision merely because the court disagrees with the agency's analysis. *Elec. Power Supply Ass'n*, 136 S. Ct. at 782. The Secretary considered the issue of a decline in self-response rates and provided a cogent, rational explanation for his decision. Nothing more is required.

Second, Plaintiffs argue that the Secretary's decision to pursue "Option D," a combination of reinstating the citizenship question and linking administrative records, was contrary to the evidence before him. Pls.' Opp'n at 32. But the Secretary drew a rational connection between the evidence before him and Option D. The Secretary concluded that that using administrative records alone (Option C) would be inadequate for a significant portion of the population, and that Option D would allow the Census Bureau to "compare the decennial census responses with administrative records" in order to establish the most accurate data. AR 1317. Option D would also "give[] each respondent the opportunity to provide an answer" to the citizenship question, potentially reducing the burden of imputation on the Bureau relative to an option using only administrative data. AR 1317. The Secretary recognized that some of those answers might be inaccurate, which is why he stated that the Bureau

would compare the responses with administrative records, where available. Plaintiffs do not dispute that solely relying on administrative records runs its own risks, including that "the Bureau does not yet have a complete administrative records data set for the entire population" and about 25 million voting age people lacked credible administrative data. AR 1316. Plaintiffs at best make an argument that the Secretary made the wrong choice, but again, that argument is no basis to set aside the Secretary's decision. And regardless what Plaintiffs think of the nuances of the Secretary's explanation, "the Supreme Court has instructed that '[e]ven when an agency explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that account if the agency's path may reasonably be discerned.'" *Nat'l Elec. Mfrs. Ass'n v. U.S. Dep't of Energy*, 654 F.3d 496, 514-15 (4th Cir. 2011) (quoting *Ala. Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004)).

Third, Plaintiffs contend that the Secretary improperly relied on DOJ's request. Pls.' Opp'n at 32-33. Essentially, Plaintiffs suggest that the Secretary was required to second-guess the "validity" of DOJ's request for block-level CVAP data to aid in the enforcement of the Voting Rights Act (VRA). *Id.* As an initial matter, DOJ is not a defendant in this lawsuit, and the "validity" of DOJ's actions is not before the Court. When reviewing an agency's decision to rely on the views of another agency, "the critical question is whether the action agency's *reliance* was arbitrary and capricious," not whether the underlying request was itself arbitrary and capricious. *Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv.*, 637 F.3d 259, 267 (4th Cir. 2011) (emphasis added) (quoting *City of Tacoma v. FERC*, 460 F.3d 53, 75 (D.C. Cir. 2006)). And in that regard, "an action agency need not undertake a separate, independent analysis in the absence of new information not considered by the [other] agency." *Aluminum Co. of Am. v. Adm'r, Bonneville Power Admin.*, 175 F.3d 1156, 1161 (9th Cir. 1999). Plaintiffs cannot rely on putative flaws in DOJ's reasoning to impeach the Secretary's decision because the Secretary reasonably relied on the opinion of the very agency charged with enforcing the VRA. Plaintiffs also argue that block-level CVAP data is not "necessary" to enforce the VRA, but as their

own papers explain, DOJ never said otherwise. Pls.' Opp'n at 33.[2] In any event, the Secretary reasonably took DOJ's request at face value, and his decision not to second-guess DOJ about questions of VRA enforcement was not arbitrary and capricious.

Lastly, Plaintiffs assert in a conclusory fashion that there are additional arguments they would otherwise make that present questions of material fact necessitating trial. Plaintiffs nowhere explain what these disputes of material fact might be, nor do they explain how the Court could go about making findings of fact without engaging in an impermissible *de novo* review of the Secretary's decision, given that APA claims are resolved as a matter of law based on the record before the agency. This mere gesture toward the necessity of trial cannot suffice to defeat summary judgment.

2. The Secretary's explanation for his decision was not a pretext for an improper purpose.

Next, Plaintiffs argue that the Secretary's decision was nothing more than a "pretext for a predetermined action improperly infected by extraneous political influence," part of a broader "sinister narrative," but utterly fail to support their sensational claims. Pls. Opp'n at 34. Plaintiffs cannot demonstrate that the Secretary did not believe the rationale set forth in his memorandum or that any initial policy preferences render his decision arbitrary and capricious. *See Jagers v. Fed. Crop Ins. Corp.*, 758 F.3d 1179, 1186 (10th Cir. 2014). So long as the Secretary sincerely believed that reinstating a citizenship question on the census would aid DOJ in enforcing the VRA, the Secretary's subjective deliberative process in reaching that conclusion is irrelevant to APA review.

Plaintiffs suggest that courts "regularly" set aside agency actions after concluding that an agency articulated a pretextual justification, but the two cases Plaintiffs cite are inapposite here. First,

[2] Plaintiffs also seem to suggest that the *Secretary* asserted that including a citizenship question on the census was "necessary" to enforce the VRA. Pls.' Opp'n at 33 (quoting AR 1320). But the Secretary wrote merely that he had determined that Option D—reinstating a citizenship question and also linking administrative records—was, in his considered view, necessary to provide DOJ with the data that it had requested. *See* AR 1320. He offered no view on VRA enforcement.

in *Latecoere Int'l Inc. v. U.S. Dep't of the Navy*, 19 F.3d 1342 (11th Cir. 1994), the plaintiffs relied on evidence of bias showing that the decisionmaker did not actually believe the justification provided for a procurement decision, which flatly contradicted required criteria. *Id.* at 1365. Here, Plaintiffs offer no evidence that the Secretary did not believe that DOJ's VRA enforcement efforts would benefit from block-level CVAP data; rather, they suggest that the Secretary may have thought about the issue before DOJ requested that data. In *Tummino v. Torti*, 603 F. Supp. 2d 519 (E.D.N.Y. 2009), the district court concluded that the stated reasons for the agency's action were unsupported by the record. *Id.* at 546, *amended*, *Tummino v. Hamburg*, 2013 WL 865851 (E.D.N.Y. Mar. 6, 2013). Here, in contrast, there can be little dispute that block-level CVAP data would benefit DOJ in enforcing the VRA. Plaintiffs' only argument to the contrary is that a decennial census question is not *necessary* for DOJ to enforce the VRA—but the APA does not require *necessity* to uphold an agency decision, only a rational connection between the facts found and the decision made.

In any event, Plaintiffs have not substantiated a claim of pretext. Plaintiffs make much of the fact that the Secretary considered the issue of reinstating a citizenship question before DOJ issued its formal request, Pls.' Opp'n at 35-36, but the Secretary has made his process clear. After the Secretary was confirmed, he "began considering various fundamental issues" regarding the 2020 Census, "including funding and content," as well as schedule, contracting issues, systems readiness, and the upcoming 2018 End-to-End Test. AR 1321; *see also* AR 317-22, 1416-70. These issues examined by the Secretary early in his tenure "included whether to reinstate a citizenship question," which he and his staff "thought . . . could be warranted." AR 1321. The Secretary questioned why a citizenship question was not on the census questionnaire and sought other general background "factual information." AR 2521-22; *see also* AR 3699. Plaintiffs suggest that the Secretary prejudged the issue and instructed his staff to execute his decision however possible, Pls.' Opp'n at 36, but the record establishes only that the Secretary urged his staff to move the process along. Similarly, Plaintiffs

suggest it was improper for the Secretary to consult with a White House official and a state elected official, yet provide no explanation why consultation with other government officials is improper.

Plaintiffs also imply that the Secretary's consideration of the DOJ letter was a sham because the request "originated" with the Commerce Department. *Id.* But as the Secretary explained, the Commerce Department sought only to understand "whether the Department of Justice (DOJ) would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act." AR 1321. And there is nothing improper about the Secretary exploring whether DOJ would support inclusion of a citizenship question. As Justice Gorsuch explained, "there's nothing unusual about a new cabinet secretary coming to office inclined to favor a different policy direction, soliciting support from other agencies to bolster his views, disagreeing with staff, or cutting through red tape." *In re Dep't of Commerce*, 139 S. Ct. 16, 17 (2018) (opinion of Gorsuch, J.). The consultation process does not somehow invalidate DOJ's request.

Remarkably, after engaging in extensive discovery, all of the materials Plaintiffs cite in support of their claim of pretext comes from the administrative record. Plaintiffs cite to no evidence adduced through discovery that the Secretary in fact had any ulterior motive—and nothing to suggest that this claim must be decided at trial, not summary judgment. Instead, Plaintiffs seek to insinuate that the Secretary reinstated a citizenship question on account of "improper political influence" for some unstated reason, yet barely even mention—much less support—that alarming claim. Pls.' Opp'n at 35. Plaintiffs simply ask the Court to take their word that there is evidence "too voluminous to recite in detail here." *Id.* at 36. Surely Plaintiffs cannot rely on a wink and a nod to abdicate their responsibility, on the eve of trial, to set forth disputes of material fact that preclude summary judgment.

C. The Secretary Did Not Violate Congressional Reporting Requirements.

Plaintiffs also contend that the Secretary's decision must be set aside because he violated 13 U.S.C. § 141(f)(3) by "failing to list citizenship as a subject for the 2020 Census questionnaire in

the statutorily-required report delivered to Congress in March 2017," and failing to find "new circumstances" that "necessitate" a modification. Pls.' Opp'n at 36-38. But, citing no case law,[3] Plaintiffs entirely bypass Defendants' well-supported argument that congressional reporting requirements—such as § 141(f)—are not judicially reviewable. *See, e.g.*, *Guerrero v. Clinton*, 157 F.3d 1190, 1196 (9th Cir. 1998) ("[T]his issue seems to us quintessentially within the province of the political branches to resolve as part of their ongoing relationships." (quoting *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 318-19 (D.C. Cir. 1988)); *Renee v. Duncan*, 686 F.3d 1002, 1016-17 (9th Cir. 2012) (explaining that the courts could not redress an injury based on an alleged violation of a requirement "to file an annual report to Congress"); *Wilderness Soc'y v. Norton*, 434 F.3d 584, 591 (D.C. Cir. 2006) (declining to review agency's required submission of recommendations to the President, because "[t]here is no good reason to believe that such an order will redress [plaintiffs'] injuries. No legal consequences flow from the recommendations"); *Taylor Bay Protective Ass'n v. Adm'r, EPA*, 884 F.2d 1073, 1080-81 (8th Cir. 1989) (declining to review agency compliance with a congressional reporting provision because "nothing in the scheme indicat[es] that judicial review . . . is necessary or advisable. . . . Additionally, the nature of the agency action here is distinct from the type of agency action normally reviewable"); *United States v. White*, 869 F.2d 822, 829 (5th Cir. 1989) (declining to review an agency's compliance with a congressional reporting requirement because "[t]his court will not scrutinize the merits or timeliness of reports intended solely for the benefit of Congress"); *Nat. Res. Def. Council*, 865 F.2d at 318-19 (declining to review an agency's allegedly insufficient report under a congressional reporting provision because managing the reports should be left to Congress, and the

[3] Plaintiffs' invocation of the APA's "presumption of reviewability", Pls.' Mem. at 37 n.27, is unavailing, as this presumption does not apply to congressional reporting requirements. *Nat. Res. Def. Council*, 865 F.2d at 318.

Court "despair[ed] at formulating judicially manageable standards" to evaluate the reports on Congress's behalf). Plaintiffs' argument should be straightforwardly rejected on that basis.

Even assuming that § 141(f)(3) is a substantive constraint rather than a reporting requirement, Plaintiffs' contention fails for two additional reasons. First, the Secretary's substantive determination under § 141(f)(3) would also barred from review under the APA, 5 U.S.C. § 701(a)(1). Second, even if it were judicially reviewable, § 141(f) has been fully satisfied.

The APA precludes judicial review where "Congress expressed an intent to prohibit judicial review." *Webster v. Doe*, 486 U.S. 592, 599 (1988) (citing 5 U.S.C. § 701(a)(1)). Congress has expressed its intent to prohibit judicial review of the Secretary's compliance with § 141(f)(3) in two ways. First, § 141(f)(3) explicitly delegates the determination of "new circumstances" to the Secretary alone. *See* § 141(f)(3) (calling for a report "if *the Secretary finds* new circumstances exist" (emphasis added)). Second, § 141(f)(3) requires only that the Secretary inform Congress of his *modifications* to subjects, types of information, or questions, not the "new circumstances" forming the basis thereof. *See* § 141(f)(3) (requiring the Secretary to submit "a report containing the Secretary's determination of the subjects, types of information, or questions as proposed to be modified"). Congress, let alone the courts, would therefore have little basis to review the Secretary's exclusive determination of "new circumstances."

Even if the Court were to review the Secretary's compliance with § 141(f), it should conclude that the Secretary has fully satisfied his duty to inform Congress. Pursuant to 13 U.S.C. § 141(f)(2), the intended questions for the 2020 decennial census have been submitted to Congress. Questions Planned for the 2020 Census and American Community Survey (Mar. 29, 2018), https://www2.census.gov/library/publications/decennial/2020/operations/planned-questions-2020-acs.pdf. Even if a § 141(f)(3) report was required, the Secretary has informed Congress of both the subjects (as modified) and questions for the 2020 decennial census—including citizenship, *id.* at 7—

through his § 141(f)(2) report, thus satisfying the requirements of § 141(f)(3).[4] Consequently, Congress is fully informed. Indeed, the House Committee on Oversight and Government Reform has already held several hearings addressing the reinstatement of the citizenship question.

Moreover, DOJ's request to the Census Bureau—and the Secretary's recent understanding of the use of block-level CVAP data to enforce the Voting Rights Act—constitutes "new circumstances" justifying inclusion of an additional topic. The Secretary had not previously been aware of DOJ's desire for citizenship data from the decennial census prior to receipt of the Gary Letter, at which time the Secretary's initial § 141(f)(1) report had been submitted. Because the Census Bureau relies on other agencies to present census data needs, "newness" is appropriately measured by information available to the Secretary. And, as the Gary Letter explained, DOJ itself was still in the process of understanding the challenges of working with data from the 2010 decennial census (the first recent census not to include a long-form questionnaire with a citizenship question). AR 664. Accordingly, if a §141(f)(3) report is required, the Secretary has fully satisfied the Census Act, or could do so any time before April 1, 2020.[5]

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[4] As noted above, there is no requirement that the Secretary inform Congress of the new circumstances triggering modifications to subjects submitted under (f)(1). *See* 13 U.S.C. § 141(f)(3). And despite Plaintiffs' contention that § 141(f) "imposes a rigorous timeline for making content decisions," Pls.' Opp'n at 37, § 141(f)(3) allows the Secretary to modify subjects, types of information, or questions any time "before the appropriate census date" (*i.e.*, April 1, 2020).

[5] For the reasons discussed above, *supra* at 13-14, the Secretary has not violated 13 U.S.C. § 6(c), which states: "To the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available from any source referred to in subsection (a) or (b) of this section instead of conducting direct inquiries." Because the Secretary made an explicit determination that using administrative records alone would be inadequate for a significant portion of the population, the information that could be gained from administrative records alone was not of "the kind, timeliness, quality and scope of the statistics required" for DOJ's Voting Rights Act enforcement efforts. *Id.* Additionally, there is no apparent distinction between the citizenship question and a number of other questions on the decennial census—like sex, race, and ethnicity—for purposes of 13 U.S.C. § 6(c). Administrative records could likely be used in the enumeration for some or all of the characteristics, yet no one suggests that the

D. The Secretary Complied with All Relevant Statistical Standards.

Plaintiffs contend that Secretary Ross's decision to reinstate a citizenship question violated statistical standards. Pls.' Opp'n at 38-44. Plaintiffs first contend that Secretary Ross's decision violated the Office of Management and Budget's (OMB) statistical guidelines. Pls.' Opp'n at 39, 40-41. But OMB guidelines do not impose specific rules. Instead, they lay out "policies, principles, standards, and guidelines" for statistical agencies to use when implementing their own statistical collection methods. 44 U.S.C. § 3504(e)(3). Courts have therefore concluded that "OMB guidelines do not provide judicially manageable standards" for APA review because they "'vest agencies with unfettered discretion.'" *Styrene Info. & Research Ctr., Inc. v. Sebelius*, 944 F. Supp. 2d 71, 82 (D.D.C. 2013) (citation omitted); *accord Ams. for Safe Access v. U.S. Dep't of Health & Human Servs.*, No. 07-cv-1049, 2007 WL 4168511, at *4 (N.D. Cal. Nov. 20, 2007) ("OMB guidelines do not create a duty to perform legally required actions that are judicially reviewable."), *aff'd*, 399 F. App'x 314 (9th Cir. 2010).[6]

Plaintiffs also contend that Secretary Ross violated the Census Bureau's own statistical quality standards on pretesting of survey questions. Pls.' Opp'n at 39-40. As a threshold matter, the Census Bureau's policies do not constrain its parent agency, the Commerce Department. "'[T]here is no authority for the proposition that a lower component of a government agency may bind the decision making of the highest level.'" *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008) (alteration in original) (quoting *Cmty. Care Found. v. Thompson*, 318 F.3d 219, 227 (D.C. Cir. 2003)).

In any event, Secretary Ross reasonably concluded that Census Bureau standards did not require further testing of the citizenship question based on advice from the Census Bureau itself. *See*

Census Act prohibits the Census Bureau from including those questions on the decennial census questionnaire.

[6] Plaintiffs contend that these cases did not address the particular OMB guidelines at issue here. Pls.' Opp'n at 40 n.34, ECF No. 69. But Plaintiffs identify no substantive differences between the OMB guidelines at issue in these cases and the OMB guidelines here that might compel a different result.

AR 1319. That advice was based on the explicit statement in the Census Bureau's standards that pretesting is not required for questions previously used on another survey—an accepted practice within the survey field that allows the Census Bureau to avoid duplicative costs. Abowd Decl. ¶ 90 (discussing note to Standard Sub-Requirement A2-3.3.1), ECF No. 67-2. Here, it is undisputed that the citizenship question on the 2020 decennial census was fully tested before it was included on the ACS. Abowd Decl. ¶¶ 91–92. It is also undisputed that the wording of the citizenship question on the 2020 census is identical to the wording of the citizenship question on the ACS. Abowd Decl. ¶ 94. The Census Bureau therefore concluded that, "[a]s a consequence of the 2006 testing and 10 years of production success, the ACS citizenship question was deemed 'adequately tested' and in compliance with the Census Bureau's 2014 Quality Standards for use on the 2020 Census by virtue of the exception for previously tested questions in Standard A2 3.3.1 (note)." Abowd Decl. ¶ 92.

Plaintiffs contend that the ACS pretesting was not sufficient because of contextual differences between the ACS and the decennial census. Pls.' Opp'n at 41-43. But there are *always* contextual differences when a question is borrowed from another survey. Abowd Decl. ¶ 93, ECF No. 67-2. Borrowed questions are nevertheless exempt from pretesting under the Census Bureau's standards. Abowd Decl. ¶ 90. Contextual differences between the two surveys thus do not establish a violation of the Census Bureau's standards.

Finally, Plaintiffs contend that the Census Bureau did not meet with DOJ, the Census Scientific Advisory Committee, or the National Advisory Committee to discuss the citizenship question. Pls.' Opp'n at 43. But Plaintiffs have not identified any statute, rule, or regulation requiring such meetings. The lack of meetings therefore cannot establish that Secretary Ross's decision was "not in accordance with law" under the APA. *See* 5 U.S.C. § 706(2)(A).

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion for summary judgment.[7]

Dated: December 4, 2018

Respectfully submitted,

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[7] APA cases can and should be decided at summary judgment. *See, e.g.*, *Audubon Naturalist Soc'y of the Cent. Atl. States, Inc. v. U.S. Dep't of Transp.*, 524 F. Supp. 2d 642, 660 (D. Md. 2007) ("Because claims brought under the APA are adjudicated without a trial or discovery, on the basis of an existing administrative record, such claims are properly decided on summary judgment."). If the Court concludes that Plaintiffs have satisfied their burden as to standing and that Plaintiffs have the better argument on the merits, the correct means of the resolving the case is through a grant of summary judgment, not trial. *Cf. Allstate Ins. Co. v. Fritz*, 452 F.3d 316, 323 (4th Cir. 2006) ("District courts have an inherent power to grant summary judgment *sua sponte* so long as the party against whom summary judgment is entered has notice sufficient to provide [it] with an adequate opportunity to demonstrate a genuine issue of material fact." (internal quotation marks and citation omitted)).

CERTIFICATE OF SERVICE

I certify that on this fourth day of December, 2018, I caused a copy of the foregoing *Reply in Further Support of Defendants' Motion for Summary Judgment* to be sent to all parties receiving CM/ECF notices in this case.

/s/ Carol Federighi
CAROL FEDERIGHI