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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

STATE OF CALIFORNIA, *et al.*,

Plaintiffs,

v.

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

Defendants.

Civil Action No. 3:18-cv-01865-RS

**DEFENDANTS' NOTICE OF MOTION
AND MOTION FOR SUMMARY
JUDGMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: December 7, 2018
Time: 10:00 a.m.
Judge: Honorable Richard Seeborg
Dept.: 3

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

1 **PLEASE TAKE NOTICE** that on Friday, December 7, 2018, at 10:00 a.m., or as soon
2 thereafter as counsel may be heard, before The Honorable Richard Seeborg, in Courtroom 3, 17th
3 Floor, of the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, the
4 defendants Wilbur L. Ross, Jr., Secretary of Commerce; U.S. Department of Commerce; Ron Jarmin,
5 performing the nonexclusive functions and duties of Director, U.S. Census Bureau; and U.S. Census
6 Bureau will move, and hereby do move, for summary judgment in this action under Rule 56 of the
7 Federal Rules of Civil Procedure. This motion is based on the following Memorandum of Points and
8 Authorities, the other papers and records on file in this action, and any other written or oral evidence
9 or argument that may be presented at or before the time this motion is heard by the Court.

10 Date: November 2, 2018

Respectfully submitted,

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INTRODUCTION

Following a formal request from the Department of Justice, the Secretary of Commerce made an eminently reasonable decision to reinstate a question about citizenship on the decennial census, consistent with historical practice dating back to 1820 and the Secretary's nearly unfettered discretion over the format and content of the census. If included, the citizenship question will be one of several demographic questions (including questions inquiring about race, gender, and relationship status) on the census form sent to every household. Plaintiffs ask this Court to vacate that decision, but lack standing to bring their claims, which in any event are belied by the record.

As a threshold matter, Plaintiffs have suffered no Article III injury traceable to the Secretary's decision. They cannot show that the reinstatement of a citizenship question will result in a differential undercount of the population (and thus putative detrimental effects on apportionment and federal funding), particularly after accounting for the Census Bureau's extensive follow-up operations, massive outreach communications plan, and processes for imputation. Nor can they show that any such potential decline in self-response will result in any material effect on apportionment or federal funding. Plaintiffs' claims of injury are impermissibly speculative and remote, and their claims are not fit for resolution by an Article III court.

But even assuming the Court finds it has jurisdiction, Defendants are entitled to summary judgment on the merits. Plaintiffs' claim under the Enumeration Clause that the inclusion of a citizenship question will interfere with an "actual" Enumeration fails because the Secretary will conduct a person-by-person headcount, and the Enumeration Clause is not implicated by the inclusion of demographic questions, which (including a citizenship question) have appeared uninterrupted since the first census. Plaintiffs' claims under the Administrative Procedure Act (APA) also fail because the Secretary of Commerce articulated a reasonable explanation for his decision to reinstate a citizenship question based on the record before him—that obtaining more precise citizenship data via the decennial census will be useful to the Department of Justice in enforcing the Voting Rights Act. That decision falls well within the Secretary's enormous discretion in overseeing the decennial census and is fully in compliance with the Constitution and applicable laws. The APA

1 requires no more. Even if the Court were to look behind the Secretary’s decision for any additional
 2 motivations, there is no evidence that the Secretary did not believe his stated, reasonable rationale.

3 Defendants are therefore entitled to summary judgment.

4 BACKGROUND

5 I. FACTUAL BACKGROUND

6 The Constitution requires that an “actual Enumeration” of the population be conducted
 7 every ten years in order to allocate representatives in Congress among the States, and vests Congress
 8 with the authority to conduct that census “in such Manner as they shall by Law direct.” U.S. Const.
 9 art. I, § 2, cl. 3. The Census Act, 13 U.S.C. § 1 *et seq.*, delegates to the Secretary of Commerce the
 10 responsibility to conduct the decennial census “in such form and content as he may determine,” and
 11 “authorize[s] [him] to obtain such other census information as necessary.” *Id.* § 141(a). The Census
 12 Bureau assists the Secretary in performing this duty. *See id.* §§ 2, 4. The Act directs that the Secretary
 13 “shall prepare questionnaires, and shall determine the inquiries, and the number, form, and
 14 subdivisions thereof, for the statistics, surveys, and censuses provided for in this title.” 13 U.S.C. § 5.
 15 Nothing in the Act directs the content of the questions included on the decennial census.

16 With the exception of 1840, decennial censuses from 1820 to 1880 asked for citizenship or
 17 birthplace in some form, and decennial censuses from 1890 through 1950 specifically requested
 18 citizenship information.¹ In 1960, the Census Bureau asked 25% of the population for the
 19 respondent’s birthplace and that of his or her parents. *Measuring America* at 72-73. Between 1970
 20 and 2000, the Bureau distributed a more detailed “long-form questionnaire” to a sample of the
 21 population in lieu of the “short-form questionnaire” sent to the majority of households. U.S. Census

22
 23
 24 ¹ Beginning in 1820, the census was used to tabulate citizenship by inquiring of each
 25 household the number of “foreigners not naturalized.” *See* U.S. Census Bureau, *Measuring America:
 26 The Decennial Censuses From 1790 to 2000*, at 6-7, [https://www2.census.gov/library/publications/
 27 2002/dec/pol_02-ma.pdf](https://www2.census.gov/library/publications/2002/dec/pol_02-ma.pdf) (“*Measuring America*”). No question regarding birthplace or citizenship
 28 status was included in the 1840 Census. *Id.* at 8. In the 1850, 1860, and 1880 enumerations, the
 questionnaires asked for place of birth. *Id.* at 9, 11, 13. The census included an express question
 regarding citizenship in 1870. *Id.* at 13, 15. Decennial censuses from 1890 through 1950 specifically
 requested citizenship information more consistently, including asking for place of birth and (for some
 respondents) naturalization status and birthplace of parents. *Id.* at 22-62.

1 Bureau, Questionnaires, https://www.census.gov/history/www/through_the_decades/questionnaires/.
2 The long-form questionnaire, which was generally sent to 1 in 6 households, included questions about
3 the respondent's citizenship or birthplace; the short form did not. Measuring America at 78, 91-92.

4 Beginning in 2005, the Census Bureau began collecting the more extensive long-form data—
5 including citizenship—through the American Community Survey (ACS), which is sent yearly to about
6 one in 38 households. See U.S. Census Bureau, Archive of American Community Survey Questions,
7 <https://www.census.gov/programs-surveys/acs/methodology/questionnaire-archive.html> (noting
8 citizenship questions on every ACS questionnaire). The introduction of the yearly ACS enabled the
9 2010 census to be a “short-form-only” census. The 2020 census will also be a “short-form-only”
10 census. The ACS will continue to collect additional data each year, including information on the
11 citizenship status of respondents. Because the ACS collects information from only a small sample
12 of the population, it produces annual estimates only for “census tracts” and “census-block groups.”
13 The decennial census is designed to undertake a full count of the people and produces other, limited
14 information down to the smallest geographic level, known as the “census block.” As in past years,
15 the 2020 census will pose a number of questions beyond the total number of individuals residing at
16 a location, including questions regarding sex, Hispanic origin, race, and relationship status.

17 On March 26, 2018, the Secretary of Commerce issued a memorandum reinstating a
18 citizenship question on the 2020 census questionnaire. Administrative Record (“AR”) 1313-20. The
19 Secretary's reasoning and the procedural background are set out in that memorandum and in a
20 supplemental memorandum issued on June 21, 2018. *Id.* 1321. The Secretary explained that, “[s]oon
21 after [his] appointment,” he “began considering various fundamental issues” regarding the 2020
22 census, including whether to reinstate a citizenship question. *Id.* As part of his deliberative process,
23 he and his staff “consulted with Federal governmental components and inquired whether the
24 Department of Justice (DOJ) would support, and if so would request, inclusion of a citizenship
25 question as consistent with and useful for the enforcement of the Voting Rights Act.” *Id.*

26 In a December 12, 2017 letter, DOJ responded that citizenship data is important to its
27 enforcement of Section 2 of the VRA for several reasons, and that the decennial census would

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1 provide more-granular citizenship voting age population (CVAP) data than that provided by the
2 annual ACS survey. AR 663-665 [hereinafter Gary Letter]. In the letter DOJ “formally request[ed]
3 that the Census Bureau reinstate into the 2020 Census a question regarding citizenship.” *Id.* 665.

4 After receiving DOJ’s formal request, the Secretary “initiated a comprehensive review process
5 led by the Census Bureau,” AR 1313, and asked the Bureau to evaluate the best means of providing
6 the data identified in the letter. The Census Bureau initially presented three alternatives. *Id.* 1277-
7 85. After reviewing those alternatives, the Secretary asked the Census Bureau to consider a fourth
8 option, which would combine two of the options the Bureau had presented. *Id.* 1316. Ultimately, the
9 Secretary concluded that this fourth option—reinstating a citizenship question on the census while
10 simultaneously linking available administrative-record data to Census Bureau files—would “provide
11 DOJ with the most complete and accurate CVAP data in response to its request.” *Id.* at 1317.

12 The Secretary also observed that collecting citizenship data in the decennial census has a long
13 history and that the ACS has included a citizenship question since 2005. AR 1314. The Secretary
14 therefore found, and the Census Bureau confirmed, that “the citizenship question has been well
15 tested.” *Id.* He further confirmed with the Census Bureau that the census-block-level citizenship
16 data requested by DOJ are not available from the ACS. *Id.* The Secretary “carefully considered,”
17 but was unpersuaded by, concerns that reinstating a citizenship question would negatively impact the
18 response rate for non-citizens. AR 1317. While the Secretary agreed that a “significantly lower
19 response rate by non-citizens could reduce the accuracy of the decennial census and increase costs
20 for non-response follow up (“NRFU”) operations,” he concluded that “neither the Census Bureau
21 nor the concerned stakeholders could document that the response rate would in fact decline
22 materially” as a result of a citizenship question. *Id.* 1315. Based on his extensive process of
23 consultation and review, the Secretary determined that, to the best of everyone’s knowledge, there is
24 limited empirical data on how reinstating a citizenship question might affect response rates. *Id.* 1316.

25 The Secretary also emphasized that “[c]ompleting and returning decennial census
26 questionnaires is required by Federal law,” meaning that concerns regarding a decline in response
27 rates were premised on speculation that some will “violat[e] [a] legal duty to respond.” AR 1319.

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1 Despite the hypothesis “that adding a citizenship question could reduce response rates, the Census
2 Bureau’s analysis did not provide definitive, empirical support for that belief.” *Id.* 1316. The
3 Secretary further explained that the Census Bureau intends to take steps to conduct respondent and
4 stakeholder outreach in an effort to mitigate any impact on response rates of including a citizenship
5 question. *Id.* 1318. In light of these considerations, the Secretary concluded that “even if there is
6 some impact on responses, the value of more complete and accurate [citizenship] data derived from
7 surveying the entire population outweighs such concerns.” *Id.* 1319.

8 **II. PROCEDURAL HISTORY**

9 Plaintiffs² filed suit against Defendants on March 26, 2018, and amended their complaint on
10 May 4, 2018. Compl. Decl. & Inj. Relief, ECF No. 1; 1st Am. Compl. Decl. & Inj. Relief (“State of
11 California, FAC”), ECF No. 12. Defendants sought dismissal based on Plaintiffs’ lack of standing,
12 the political question doctrine, lack of justiciability under the APA, and Plaintiffs’ failure to state an
13 Enumeration Clause claim. *See* Defs.’ Mot. Dismiss, ECF No. 37. The Court denied this motion to
14 dismiss. Order Denying Mots. Dismiss, ECF No. 75. Defendants lodged the Administrative Record
15 (“AR”) on June 8, 2018, as supplemented on June 21, 2018. Notice of Filing AR, ECF No. 23;
16 Notice of Filing Supplement to AR, ECF No. 33. This Motion for Summary Judgment is filed
17 pursuant to the schedule entered by the Court on August 30, 2018. Stip. to Case Sched. & Order as
18 Modified by the Court, ECF No. 79.

19 **LEGAL STANDARD**

20 “The court shall grant summary judgment if the movant shows that there is no genuine
21 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
22 Civ. P. 56(a). Where claims call for judicial review under the APA, “summary judgment is an
23 appropriate mechanism for deciding the legal question” presented. *Ctr. for Emvtl. Health v. McCarthy*,
24 192 F. Supp. 3d 1036, 1040 (N.D. Cal. 2016) (citation omitted). The court must uphold an agency
25

26 ² Plaintiffs are the State of California, County of Los Angeles, City of Los Angeles, City of
27 Fremont, City of Long Beach, City of Oakland, and City of Stockton, as well as intervenor-plaintiff
Los Angeles Unified School District. Compl. Intervention, ECF No 47-1

1 decision unless it is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in
2 accordance with law,” “contrary to constitutional right,” or “in excess of statutory jurisdiction,
3 authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2).

4 ARGUMENT

5 I. Defendants Are Entitled to Summary Judgment Because Plaintiffs Have Not 6 Established Their Standing.³

7 Plaintiffs claim that they will be injured because the citizenship question will result in a
8 decrease in self-response rates on the census, which will result in an undercount, which will lead to
9 California being apportioned fewer congressional seats that it should otherwise have, and receiving
10 less federal funding. State of California, FAC ¶ 6; Compl. Intervention ¶ 6.

11 Plaintiffs are unable to meet their burden and demonstrate with sufficient certainty that any
12 of these harms will actually come to pass. Plaintiffs will only be harmed if (1) the citizenship question
13 itself *causes* individuals to neglect their legal duty to respond to the 2020 census, such that a decrease
14 in the initial self-response rate occurs, (2) such a decline is not corrected by the Census Bureau’s
15 repeated efforts to encourage self-response, (3) such a decline is not corrected by the Census Bureau’s
16 extensive Nonresponse Followup (“NRFU”) efforts, (4) such a decline is not corrected by the Census
17 Bureau’s use of imputation for any remaining uncounted households after NRFU, (5) if any net
18 undercount remains after these comprehensive operations, Plaintiffs’ *particular states and localities* will
19 be undercounted more than others (*i.e.*, there will be a differential net undercount), and (6) any such
20 differential net undercount actually changes the apportionment or funding of Plaintiffs’ specific states
21

22
23 ³ In an APA case, “the district judge sits as an appellate tribunal” and all issues—including
24 standing—generally are resolved at summary judgment. *McCrary v. Gutierrez*, No. C-08-015292, 2010
25 WL 520762, at *2 (N.D. Cal. Feb. 8, 2010) (quoting *Am. Bioscience v. Thompson*, 269 F.3d 1077, 1083
26 (D.C. Cir. 2001)). This case should be no different. In the event that the Court concludes an
27 evidentiary hearing on standing is appropriate, that hearing should be limited to standing only (rather
28 than the merits). The question on the merits, of course, is whether the Secretary’s action was
supported by the administrative record and consistent with the APA standard of review, and Plaintiffs
should not be permitted to import their experts’ *post hoc* criticisms of the Secretary’s decision. *See Vt.*
Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 549 (1978) (stating the question
in an APA case as “whether the challenged rule . . . finds sufficient justification in the administrative
proceedings that it should be upheld by the reviewing court”).

1 and localities in light of both the magnitude of the differential net undercount and the national
2 distribution of the differential net undercount. This long chain of necessary events before Plaintiffs
3 are injured demonstrates the speculative nature of their purported injuries and strains credulity, as
4 well as their inability to attribute those hypothetical injuries to the addition of the citizenship question.

5 **A. Plaintiffs Bear the Burden of Establishing Their Article III Standing.**

6 The doctrine of constitutional standing, an essential aspect of an Article III case or
7 controversy, demands that a plaintiff have “a personal stake in the outcome of the controversy [so]
8 as to warrant his invocation of federal-court jurisdiction.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975)
9 (internal citation omitted). At its “irreducible constitutional minimum,” the doctrine requires a
10 plaintiff, as the party invoking the Court’s jurisdiction, to establish three elements: (1) a concrete and
11 particularized injury-in-fact, either actual or imminent; (2) a causal connection between the injury and
12 defendants’ challenged conduct, such that the injury is “fairly . . . trace[able] to the challenged action
13 of the defendant”; and (3) a likelihood that the injury suffered will be redressed by a favorable
14 decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). The standing inquiry is “especially
15 rigorous” where “reaching the merits of the dispute would force [the court] to decide whether an
16 action taken by one of the other two branches of the Federal Government was unconstitutional,”
17 *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013) (quoting *Raines v. Byrd*, 521 U.S. 811, 819-20
18 (1997)).

19 The standing requirement of “injury in fact” requires a plaintiff to establish that it “has
20 sustained or is immediately in danger of sustaining a direct injury” as a result of the challenged action.
21 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1552 (2016) (citations omitted). The injury must be “concrete
22 and particularized,” *Lujan*, 504 U.S. at 560 (citations omitted), and not “merely ‘conjectural’ or
23 ‘hypothetical’ or otherwise speculative.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 505 (2009)
24 (quoting *Lujan*, 504 U.S. at 560). Thus, an alleged future injury must be “*certainly* impending”;
25 “[a]llegations of possible future injury’ are not sufficient.” *Clapper*, 568 U.S. at 409 (quoting *Whitmore*
26 *v. Arkansas*, 495 U.S. 149, 158 (1990), emphasis in *Clapper*).

1 The “fairly traceable” prong of standing requires Plaintiffs to prove that their certainly
2 impending injuries “fairly can be traced to the challenged action of the defendant, and not injury that
3 results from the independent action of some third party not before the court.” *Simon v. E. Ky. Welfare*
4 *Rights Org.*, 426 U.S. 26, 41-42 (1976). In the census context, merely a showing of differential net
5 undercount is not enough as there has never been a perfect census count. *See Carey v. Klutznick*, 653
6 F.2d 732, 735 (2d Cir. 1981). Plaintiffs instead must prove by a preponderance of the evidence that
7 any differential net undercount is specifically attributable to the citizenship question.

8 “[I]here can be no genuine issue as to any material fact” where a party “fails to make a
9 showing sufficient to establish the existence of an element essential to that party’s case, and on which
10 [it] [bears] . . . the burden of proof.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Thus, “[a]t the
11 summary judgment stage,” plaintiffs “[a]re required to come forward with evidence demonstrating
12 concrete injury . . . based on the challenged action,” *Proyecto Pastoral at Dolores Mission v. Cty. of L.A.*,
13 22 Fed. App’x. 743, 744 (9th Cir. 2001), or else “Rule 56(c) mandates the entry of summary judgment”
14 against them. *Celotex*, 477 U.S. at 322 (quoting Fed. R. Civ. P. 56(e)).

15 **B. Plaintiffs Cannot Show That the Citizenship Question Will Result in an**
16 **Undercount.**

17 As an initial matter, Plaintiffs cannot show that the months-long census process will result in
18 an undercount, even assuming, *arguendo*, that the citizenship question resulted in any additional
19 hesitancy to respond among certain individuals. First, those who choose not to respond to the
20 citizenship question alone, or who cease completing questions on the census after they reach the
21 citizenship question, will still be enumerated and thus would not contribute to any undercount.
22 Second, the Census Bureau has extensive techniques to encourage individuals who did not initially
23 respond to respond through one of five additional opportunities. Third, for those who still have not
24 responded, the Census Bureau will employ its NRFU process, one of the largest peacetime
25 mobilizations in our Nation’s history in which includes sending enumerators out to collect
26 information from non-responders in person. Fourth, where enumeration efforts still fail, the Census
27 Bureau uses high-quality administrative records from other federal agencies to enumerate

1 individuals. As the Census Bureau’s Chief Scientist and Associate Director for Research and
 2 Methodology therefore concluded in his expert report, “there is no credible quantitative evidence
 3 that the addition of the citizenship question would affect the accuracy of the count.” Declaration of
 4 John M. Abowd, Ph.D. ¶ 13 (Abowd Declaration), Ex. A; *see also id.* at 4 (“It is important to stress
 5 that the estimated decrease in self-response rates does not translate into an increase in net
 6 undercount, and the use of our estimates as if they did is wholly inappropriate.”). As discussed
 7 below, these extensive procedures will ameliorate any risk of injury to Plaintiffs. Plaintiffs’
 8 speculative claimed injuries are far from “certainly impending” because they will come to pass only if
 9 every step described below fails. *Clapper*, 568 U.S. at 409.

10 ***1. Individuals Are Prompted Multiple Times to Respond to the Census,***
 11 ***and Their Responses Are Counted Even If They Are Incomplete or Do***
 12 ***Not Respond to the Citizenship Question.***

13 Even before beginning its NRFU efforts, the Census Bureau has comprehensive plans in
 14 place to maximize self-response. Instructions to complete the census online or by telephone will
 15 initially be sent to most households, with the remaining households (those deemed less likely to have
 16 internet access) receiving a paper questionnaire in the first mailing. 2020 Census Operational Plan:
 17 A New Design for the 21st Century, at 18, 21, 91, 95 (Sept. 2017, v.3.0),
 18 [https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-](https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan3.pdf)
 19 [docs/2020-oper-plan3.pdf](https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan3.pdf) (“2020 Census Operational Plan”); Abowd Declaration ¶¶ 25-29. All
 20 households will receive a letter reminding them to respond as a second contact. Abowd Declaration
 21 ¶ 29. If households do not initially self-respond, they will receive a postcard as the third contact, a
 22 letter and the paper version of the questionnaire as the fourth contact, and another postcard as the
 23 fifth contact. Abowd Declaration ¶ 30; 2020 Census Operational Plan at 99. Each household can
 24 thus receive up to six mailings. 2020 Census Operational Plan at 99; *see also* Abowd Declaration ¶ 30.
 25 In addition to online instructions, all mailings also include a toll-free number that provides assistance
 26 in self-responding. Abowd Declaration ¶ 30. In addition, the 2020 census will be the first to rely
 27 extensively on digital methods and automation, and it will be the first census where individuals are

1 encouraged to respond online. 2020 Census Operational Plan at 15, 18-19, 26, 88. The Census
2 Bureau also engages in advertising and outreach efforts to inform people about the census and
3 encourage them to self-respond. 2020 Census Operational Plan at 21, 92-94; Abowd Declaration
4 ¶ 61 & n.52.

5 Furthermore, the actual enumeration could only be affected by households that completely
6 choose not to respond—if a household simply skips the citizenship question (i.e., so-called “item
7 nonresponse,” where a person does not respond to a particular item on the questionnaire) or stops
8 filling out the census questionnaire once they reach the citizenship question (i.e., “breakoff”) they
9 will nonetheless be fully counted. *See* Abowd Declaration ¶ 35-38.

10 ***2. Any Households that Do Not Self-Respond Will Be Enumerated by***
11 ***NRFU Efforts.***

12 If a household does not self-respond during the steps described above, which span six weeks,
13 it does not mean that that household will not be enumerated. Instead, the Census Bureau’s extensive
14 NRFU operations will kick in, starting with the assignment of an enumerator to each nonresponding
15 household address. Abowd Declaration ¶¶ 38-39; 2020 Census Operational Plan at 114.
16 Enumerators physically visit housing unit addresses in order to enumerate households through an in-
17 person interview. Abowd Declaration ¶ 39. Enumerators are dispatched utilizing a state-of-the-art
18 optimizer that efficiently assigns cases and provides routes for field work.⁴ 2020 Census Operational
19 Plan at 114; *see also* Abowd Declaration ¶ 45-51. The Census Bureau “considers the demographic
20 characteristics of each unique geographic area” in selecting enumerators, and works to retain local
21 enumerators, as well as enumerators with the language skills required to communicate with residents
22 in each area. Abowd Declaration ¶¶ 49-50. Enumerators also have access to remote translation
23 services for 59 non-English languages. Abowd Declaration ¶ 50. If an enumerator is not able to
24 connect with a resident during an in-person visit, the enumerator will leave a Notice of Visit form

25
26
27 ⁴ The increased efficiency from these technological advances will enable the Census Bureau
to target advertising and NRFU resources toward areas with low response rates.

1 providing information about how the household can complete the 2020 census. Abowd Declaration
2 ¶ 51. A household may be visited by an enumerator up to 6 times. Abowd Declaration ¶ 53 & n.43.

3 If the enumerator is unable to make contact with a household, and the household does not
4 complete the 2020 census questionnaire as per the Notice of Visit, the Census Bureau will still
5 enumerate that household. Using its “final attempt” procedures, the Census Bureau will impute data
6 for a non-responding household if reliable administrative records are available. 2020 Census
7 Operational Plan at 22, 114, 117; Abowd Declaration ¶ 53. If such reliable data is not available, then
8 the enumerator will attempt to contact a nearby proxy (such as a neighbor or building manager), and
9 will enumerate the non-responding household through data provided by that proxy. Abowd
10 Declaration ¶ 53 & n.41. As necessary, the most experienced and effective enumerators will be tasked
11 to identify proxies. 2020 Census Operational Plan at 22, 114, 117; Abowd Declaration ¶ 53.
12 Although imputation and proxy efforts may result in lower quality data for demographic questions
13 relative to data from self-responses, they should not cause an *undercount*. See Abowd Declaration ¶ 53
14 (“The Census Bureau is not aware of any credible quantitative evidence suggesting that proxies in the
15 census provide a greater net undercount or differential net undercount in comparison to self-response
16 or in-person interviews.”); Abowd Declaration ¶ 56 (“The Census Bureau is not aware of any credible
17 quantitative data suggesting that imputation in the census leads to a greater net undercount or
18 differential net undercount in comparison to self-response or in-person interviews.”).

19 The Census Bureau’s NRFU operations are dynamic, and will be adjusted in real-time based
20 on self-response rates to ramp up media efforts and hire additional enumerators in areas of
21 demonstrated need. Abowd Declaration ¶¶ 64-67. If necessary, the Census Bureau can also assign
22 enumerators to work overtime, shift enumerators between geographic regions, and even extend the
23 NRFU period to obtain a full enumeration. Abowd Declaration ¶¶ 66-67.

1 3. *The Census Bureau’s Combined Enumeration Efforts (Encouraging*
2 *Self-Response, NRFU, Imputation and Proxy Data) Will Correct Any*
3 *Possible Decline in Initial Self-Response and Completely Enumerate*
4 *the Population.*

5 The Census Bureau expects that the completion of the exhaustive NRFU efforts described
6 above “will result in a complete enumeration,” Abowd Declaration ¶ 24—in other words, there will
7 be no undercount, differential or not. And, the Census Bureau has more than sufficient resources
8 available to complete these steps, even in a worst-case scenario for self-response. *See* Abowd
9 Declaration ¶ 78 (“The Census Bureau is prepared to conduct the 2020 Census NRFU operation and
10 believes that those efforts will result in a complete enumeration.”).

11 The 2020 Census Life Cycle Cost Estimate (“LCCE”) includes an estimated fiscal year 2020
12 cost for NRFU of approximately \$1.5 billion. Abowd Declaration ¶ 58. This estimate is based on
13 numerous factors, including the self-response rate at the start of the operation; self-responses
14 received after the start of the operation; occupied, vacant and non-existent cases in the workload that
15 are removed using administrative information; late additions to the workload; the number of days
16 worked by enumerators; the average hours the enumerators work per day; the number of contact
17 attempts to conduct the interview; training hours for enumerators; mileage travelled by enumerators;
18 and other miscellaneous expenses. Abowd Declaration ¶ 58. In fiscal year 2020, there will also be an
19 additional \$1.7 billion in contingency funding that may be spent on NRFU. Abowd Declaration ¶ 59.

20 The self-response rate built into the LCCE is in the range of 55.5% to 65.5%. And although
21 the Census Bureau expects a self-response rate of 60.5%, all NRFU planning—including hiring of
22 field staff and enumerators—is based on the lower bound of this estimate, 55.5%. For each
23 percentage point increase or decrease in the overall self-response rate, the LCCE estimates \$55
24 million will be saved or spent. Abowd Declaration ¶ 60. This estimate includes, for example, the
25 cost of additional or lowered field supervisors and enumerators, hours in the field, mileage, training
26 costs, provisioning and usage of handheld devices, and impacts on printing, postage, and paper data
27

1 capture operations.⁵

2 Under any conceivable scenario in which self-response rates decline due to the citizenship
3 question, the Census Bureau is fully equipped and funded to enumerate all those who would be
4 enumerated absent a citizenship question. For example, even if there is a 10% decline in self-response
5 among potential noncitizen households in 2020, and if 28.6% of households in the country match
6 that description (a high estimate), Abowd Declaration ¶ 69, then the predicted increase in the NRFU
7 workload would be approximately 3.6 million addresses, which would increase NRFU costs by \$137.5
8 million, far below the \$1.7 billion in fiscal year 2020 contingency funding.

9 **C. Even if an Undercount Occurred, Plaintiffs Cannot Show that It Would Affect**
10 **Them Through Any Material Impact on Apportionment or Federal Funding.**

11 As discussed in detail above, the Census Bureau's plans to encourage self-response, and to
12 use NRFU efforts—including personal visits by enumerators and, eventually, imputation—to
13 supplement that self-response will result in a complete enumeration, and thus Plaintiffs will not be
14 injured. Even if, however, there was some undercount, Plaintiffs cannot show that it would be
15 differential such that their specific states and localities would see a negative effect in apportionment
16 or funding.

17 Plaintiffs raise two theories as to how they would be harmed by a differential undercount:
18 (1) a differential undercount will cause Plaintiffs to cause a dilution of their legislative representation,
19 and (2) a differential undercount will cause harm in the form of a loss of federal funding under certain
20 federal programs that use census data in part to determine funding amounts. *See, e.g.,* State of
21 California, FAC ¶ 6; Compl. Intervention ¶ 6, ECF No 47-1. However, Plaintiffs cannot prove, as
22 they must, that there is an imminent, concrete risk of either harm.

23 Indeed, to the contrary, Defendants' expert Dr. Stuart Gurra has shown that there would
24 likely be no effect on apportionment, and only a negligible effect on funding. Dr. Gurra concluded

25
26 _____
27 ⁵ The estimate assumes that the increased or decreased percentage of housing unit addresses
28 self-responding is not easier or harder to count than a representative percentage of those not
responding to the census.

1 that if the 2020 NRFU efforts were as successful as the 2010 NRFU efforts, “congressional
2 apportionment in any state (including California) does not change due to reinstatement of a
3 citizenship question,” even without considering additional mitigation efforts, such as imputation.
4 Rule 26(A)(2)(B) Expert Report and Declaration of Stuart D. Gurrea, Ph.D. ¶¶ 11, 66-70 (Gurrea
5 Declaration), Ex. B. Similarly, assuming the 2010 NRFU success rate and no additional imputation,
6 “the distribution of federal funds to the State of California is estimated to decline by 0.01 percent”
7 for Title I LEA Grants, WIC Supplemental Foods Grants, and Social Services Block Grants. Gurrea
8 Declaration ¶ 11. This would hardly represent a material change. In light of this evidence, Plaintiffs
9 cannot meet their burden to show an imminent, nonspeculative injury by a preponderance of the
10 evidence based on either apportionment or funding. The purported injuries of the state and locality
11 plaintiffs, as well as the Los Angeles Unified School District, are of course entirely based on changes
12 to apportionment and loss of federal funding. State of California, FAC, Compl. ¶ 41-46; Compl.
13 Intervention ¶ 32-36.

14 **D. If Any Potential Injuries Existed, Plaintiffs Cannot Show that They Are**
15 **Traceable to the Citizenship Question or Redressable by That Question’s**
16 **Removal.**

17 Finally, Plaintiffs cannot show that any injury—if one existed—is traceable to the addition of
18 the citizenship question, or would be redressed if the question were removed. First, Plaintiffs’
19 supposition that the citizenship question will cause an undercount relies on individuals violating their
20 legal duty to respond to the census. As the Secretary emphasized in his decision memo, “[c]ompleting
21 and returning decennial census questionnaires is required by Federal law.” AR 1319; 13 U.S.C. § 221.
22 Defendants should not be held to blame such hypothetical illegal acts. *See Salmon Spanning & Recovery*
23 *All. v. Gutierrez*, 545 F.3d 1220, 1228 (9th Cir. 2008) (finding that plaintiffs lacked causation for their
24 claims against the United States when the United States merely continued to participate in a treaty,
25 while plaintiffs were allegedly harmed by illegal overfishing outside the treaty). Second, Plaintiffs
26 must show that their claimed concerns will lead households who would currently respond to the
27 census if it did not include a citizenship question to not respond to *any part* of the census due to the

1 inclusion of a citizenship question at the end of the form. In other words, if households exist that
2 have confidentiality concerns in the current political climate such that they will decide not to respond
3 to the census with or without a citizenship question, any resulting undercount is not attributable to
4 the Secretary's decision to add a citizenship question. And, as discussed above, households that leave
5 the citizenship question blank but otherwise respond or breakoff at the citizenship question will still
6 be enumerated, avoiding Plaintiffs' purported harms. Plaintiffs cannot show, absent "speculation or
7 guesswork," that the addition of a citizenship question is a "substantial factor" motivating any
8 decrease in initial non-response. *Mendina v. Garcia*, 768 F.3d 1009, 1012-13 (9th Cir. 2014), citing
9 *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997)). Indeed, Plaintiffs refer to "new concerns about topics
10 like the "Muslim ban," discomfort "registering" other household members by reporting their
11 demographic characteristics, the dissolution of the "DACA" (Deferred Action for Childhood Arrival)
12 program, repeated references to Immigration and Customs Enforcement (ICE), etc." State of
13 California, FAC ¶ 37 (internal citations omitted). Of course, concerns driven by the so-called
14 "Muslim ban," dissolution of DACA, and events other than the presence of a citizenship question
15 on the census are not traceable to Secretary Ross's actions and would not be redressed by the outcome
16 of this lawsuit.

17 **II. Defendants Are Entitled to Summary Judgment on the Enumeration Clause Claim**
18 **Because the Secretary Will Conduct a Person-by-Person Enumeration.**

19 The Court should grant judgment in favor of Defendants on the Enumeration Clause claim.
20 Plaintiffs allege that Defendants violate the Enumeration clause by including the citizenship question
21 on the 2020 census because the question will diminish the response rates of non-citizens and their
22 citizen relatives. State of California, FAC ¶ 49. This argument is fatally flawed because the
23 Constitution neither requires nor prohibits the census from asking whether a person is a U.S. citizen.
24 Rather, the Constitution's reference to "actual Enumeration" requires only that the population be
25 determined by a person-by-person headcount, rather than through estimate or conjecture. U.S.
26 Const. art. I, § 2, cl. 3. There is no dispute that the 2020 census seeks to do a person-by-person
27 headcount. *See* State of California, FAC ¶ 35. Therefore, the Enumeration Clause is satisfied.

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1 Rather than challenging the 2020 census for failing to do a person-by-person headcount, the
 2 only requirement under the Enumeration Clause, Plaintiffs make the novel argument that the “effect”
 3 of the citizenship question is so sensitive in the current political climate that it interferes with the
 4 actual enumeration. State of California, FAC ¶ 37; *see also* ECF No. 75 at 27. This theory, taken to
 5 its logical conclusion, would mean that the Enumeration Clause prohibits any demographic questions
 6 that may theoretically reduce response rates and cause some differential undercount.⁶ But, from the
 7 beginning, the census has asked demographic questions that may disproportionately deter
 8 respondents in certain areas of the country.⁷ *See* Census Act of 1790, § 1, 1 Stat. 101 (1790) (specifying
 9 six questions, including the number of slaves). This includes citizenship-related questions—as early
 10 as 1820—that may have had a disproportionately deterrent effect similar to what Plaintiffs allege will
 11 result from the 2020 census citizenship question. For example, the census has previously asked
 12 questions relating to the “[n]umber of foreigners not naturalized,” even though such people would
 13 not be equally distributed across the United States. *See, e.g.*, Census Act of 1820, 3 Stat. 548 (1820)
 14 (question on the “[n]umber of foreigners not naturalized”); Census Act of 1830, 4 Stat. 383 (1830)

15
 16 ⁶ To the extent Plaintiffs rely on the *Wisconsin* standard for this proposition, it is inapposite
 here. As Judge Furman recognized:

17 To read *Wisconsin* as Plaintiffs suggest would, therefore, lead ineluctably to the
 18 conclusion that each and every census—from the Founding through the
 19 present—has been conducted in violation of the Enumeration Clause. That
 20 would, of course, be absurd, and leads the Court to conclude instead that the
 21 *Wisconsin* standard applies only to decisions that bear directly on the actual
 population count. Notably, the Supreme Court’s own language supports that
 22 limitation, as it held only that “the Secretary’s decision not to adjust” the
 census count “need bear only a reasonable relationship to the accomplishment
 of an actual enumeration of the population.” [*Wisconsin v. New York*] 517 U.S.
 at 20 (emphasis added). That is, the Court did not purport to announce a
 standard that would apply to a case such as this one.

23 *New York, et al. v. Dep’t of Commerce, et al.*, 18-cv-2921 (S.D.N.Y. July 26, 2018), ECF No. 215 at 58;
 24 *NYIC, et al. v. Dep’t of Commerce, et al.*, 18-cv-5025 (S.D.N.Y. July 26, 2018), ECF No. 70 at 58. This
 Court should likewise reject *Wisconsin* for this proposition.

25 ⁷ As Judge Furman noted, “the longstanding practice of asking questions about the populace
 of the United States without a direct relationship to the constitutional goal of an ‘actual Enumeration’
 26 has been blessed by all three branches of the federal government.” *New York, et al. v. Dep’t of Commerce,*
et al., 18-cv-2921 (S.D.N.Y. July 26, 2018), ECF No. 215 at 51; *NYIC, et al. v. Dep’t of Commerce, et al.*,
 18-cv-5025 (S.D.N.Y. July 26, 2018), ECF No. 70 at 51.

1 (question on “[t]he number of White persons who were foreigners not naturalized”); Census Act of
 2 1850, 9 Stat. 428 (1850) (governing the censuses of 1850–1870 and asking place of birth); Act
 3 Providing for the Fourteenth Census, 40 Stat. 1291 (1919) (questions on place of birth and parents’
 4 places of birth; if foreign-born, what year the person immigrated and the person’s naturalization
 5 status).

6 The “current political climate” does not alter this analysis, nor have Plaintiffs put forth
 7 evidence that the citizenship question in fact will preclude an actual enumeration in the current
 8 political climate. There is no support for the proposition that an otherwise constitutional census
 9 question becomes unconstitutional due to the political climate at a particular time. Quite the
 10 opposite, citizenship-related questions have been asked to some or all of the population, in varying
 11 political climates, for nearly two hundred years. And no one contends that citizenship questions—
 12 asked since 1820—and race-related questions—asked in every census since 1790—were
 13 unconstitutional prior to the Civil War,⁸ during World War II,⁹ or during the Cold War,¹⁰ all turbulent
 14 political times when census demographic questions allegedly would diminish response rates.

15 To the extent the Court is concerned about the accuracy of the enumeration, the Census
 16 Bureau’s comprehensive NRFU procedures, set forth above, will attempt to contact nearly every
 17 person in the country, utilizing up to six mailings and multiple in-person visits by an enumerator.
 18 2020 Census Operational Plan, at 88-92, 112-21. The operations in place for 2020 are more wide-
 19 ranging and more advanced than the operations performed in any previous census. Moreover, the
 20 Census Bureau is fully prepared and budgeted to conduct its extensive NRFU operations. As
 21 discussed above, Plaintiffs cannot sufficiently establish that—even if the citizenship question caused

23 ⁸ Census Act of 1850, 9 Stat. 428 (1850) (1850 census questions); *see also* James Oliver Horton
 24 & Lois E. Horton, *A Federal Assault: African Americans and the Impact of the Fugitive Slave Law of 1850*,
 25 68 Chi.-Kent L. Rev. 1179, 1183 (1993) (“Blacks who grew to maturity under the shadow of the
 eighteenth-century law, even if they themselves had not been threatened with capture, were aware
 that both fugitive slaves and free blacks were in danger.”).

26 ⁹ U.S. Census Bureau, *Measuring America: The Decennial Censuses From 1790 to 2000*, at 62,
https://www2.census.gov/library/publications/2002/dec/pol_02-ma.pdf (“Measuring America”)
 (1940 census questions).

27 ¹⁰ *Measuring America* at 66-69 (1950 census questions), 72-73 (1960 census questions).

1 a decline in initial self-response—the Census Bureau’s NRFU efforts, including imputation and proxy
2 data, would not correct the decline and result in a complete enumeration.

3 While the possibility of an undercount exists in every census, the Constitution does not
4 require perfection. See *Utah v. Evans*, 536 U.S. 452, 504 (2002) (Thomas, J., concurring in part and
5 dissenting in part) (canvassing the history of census undercounts, including the first census in 1790);
6 *Wisconsin v. City of New York*, 517 U.S. 1, 6 (1996) (“Although each [of the 20 past censuses] was
7 designed with the goal of accomplishing an ‘actual Enumeration’ of the population, no census is
8 recognized as having been wholly successful in achieving that goal.”); *Gaffney v. Cummings*, 412 U.S.
9 735, 745 (1973) (census data “are inherently less than absolutely accurate”); *Senate of the State of Cal. v.*
10 *Mosbacher*, 968 F.2d 974, 979 (1992) (describing the 1990 census as “one of the best ever taken in this
11 country” despite counting “approximately 98 percent of the population”); *City of L.A. v. Evans*, No.
12 01-cv-1671, 2001 WL 34125617, at *2 (C.D. Cal. Apr. 25, 2001) (“Like all of its predecessors, Census
13 2000 produced less than perfect results.”). As long as the Secretary has established procedures for
14 counting every resident of the United States—and there is no dispute of material fact that he has
15 not—any undercount is a constitutionally permissible result of attempting to enumerate upwards of
16 325 million people across 3.8 million square miles. See U.S. & World Population Clock,
17 <https://www.census.gov/popclock/>. Accordingly, the Court should grant judgment in favor of
18 Defendants on Plaintiffs’ Enumeration Clause claim.

19 **III. The Court Should Grant Judgment to Defendants on the APA Claims Because the**
20 **Secretary’s Decision Was Eminently Reasonable and within His Lawful Discretion.**

21 The Court should grant judgment in favor of Defendants on the Plaintiffs’ claims under the
22 APA. The complaint alleges that the Secretary’s decision to reinstate a citizenship question was
23 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “contrary to
24 constitutional right,” and “in excess of statutory jurisdiction, authority, or limitations, or short of
25 statutory right.” 5 U.S.C. § 706(2); see, e.g., *State of California*, FAC ¶ 54. But Plaintiffs’ claims fail
26 because the Secretary’s decision was eminently reasonable and fully in accord with the Constitution
27 and relevant statutes.

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1 **A. The Secretary’s decision was eminently reasonable and easily survives arbitrary-and-**
 2 **capricious review under the APA.**

3 **1. Agency actions are reviewed only for reasonableness.**

4 In deciding an arbitrary-and-capricious claim, the question for the Court is whether the
 5 agency’s decision “was the product of reasoned decisionmaking.” *Motor Vehicle Mfrs. Ass’n of U.S.,*
 6 *Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). “This standard of review is highly
 7 deferential, presuming the agency action to be valid and affirming the agency action if a reasonable
 8 basis exists for its decision.” *Pacific Dawn LLC v. Pritzker*, 831 F.3d 1166, 1173 (9th Cir. 2016) (citation
 9 omitted).¹¹ Put simply, the Court “cannot substitute its judgment for that of the agency.” *Ctr. for Bio.*
 10 *Diversity v. Zinke*, 868 F.3d 1054, 1057 (9th Cir. 2017); *see also FERC v. Elec. Power Supply Ass’n*, 136 S.
 11 Ct. 760, 782 (2016) (“A court is not to ask whether a regulatory decision is the best one possible or
 12 even whether it is better than the alternatives.”). “The only question before [the Court] is whether
 13 the [agency], in reaching its ultimate finding, ‘considered the relevant factors and articulated a rational
 14 connection between the facts found and the choices made.’” *Nw. Ecosys. All. v. U.S. Fish & Wildlife*
 15 *Serv.*, 475 F.3d 1136, 1145 (9th Cir. 2007) (quoting *Nat’l Ass’n of Home Builders v. Norton*, 340 F.3d 835,
 16 841 (9th Cir. 2003)). And “[t]hat requirement is satisfied when the agency’s explanation is clear
 17 enough that its ‘path may reasonably be discerned.’” *Encino Motorcars, LLC v. Navarro*, 136 S. Ct.
 18 2117, 2125 (2016) (quoting *Bowman Transp., Inc. v. Ark-Best Freight Sys, Inc.*, 419 U.S. 281, 286 (1974)).

19 The Court’s review of Plaintiffs’ APA claim should be confined to the record before the
 20 Secretary. “[W]hen a party seeks review of agency action under the APA, the district judge sits as an
 21 appellate tribunal.” *Herguan Univ. v. ICE*, 258 F. Supp. 3d 1050, 1063 (N.D. Cal. 2017) (quoting
 22 *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009)). Thus, the Court’s review “is based on the
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 25 ¹¹ Moreover, the Court’s review must be particularly deferential here because Plaintiffs
 26 challenge the Secretary’s broad discretion over the census. “The text of the Constitution vests
 27 Congress with *virtually unlimited discretion* in conducting the decennial ‘actual Enumeration,’” and
 “there is no basis for thinking that Congress’ discretion is more limited than the text of the
 Constitution provides.” *Wisconsin v. City of New York*, 517 at 19 (quoting U.S. Const. art. 1, § 2, cl. 3)
 (emphasis added). Congress, in turn, “has delegated its broad authority over the census to the
 Secretary.” *Wisconsin*, 517 U.S. at 19 (citing 13 U.S.C. § 141(a)).

1 agency record and limited to determining whether the agency acted arbitrarily or capriciously.” *Id.*
2 (quoting *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993)); *see also, e.g.*
3 *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (*per curiam*). To the extent Plaintiffs seek to introduce expert
4 testimony going to the merits, that testimony is not a proper subject of APA review because it was
5 not before the Secretary and irrelevant to his decision. *See, e.g., San Luis & Delta-Mendota Water Auth.*
6 *v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014); *Love v. Thomas*, 858 F.2d 1347, 1356 (9th Cir. 1988).
7 Materials produced in discovery (which Defendants contend was improper here) likewise are not a
8 proper subject of APA review unless those materials were part of the record before the agency, 5
9 U.S.C. § 706, because the bad-faith exception to record review simply “operate[s] to identify and plug
10 holes in the administrative record.” *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005).

11 **2. The Secretary reasonably explained his decision to reinstate a**
12 **citizenship question on the decennial census.**

13 Here, the record establishes that the Secretary articulated a satisfactory explanation for his
14 eminently reasonable decision, including a “rational connection between the facts found and the
15 choice made.” *State Farm*, 463 U.S. at 43. The Secretary explained in his decision memorandum that
16 the census is an accepted means of collecting citizenship data. AR 1313-20. The Commerce
17 Department’s review of the issue showed “that collection of citizenship data by the census has been
18 a long-standing historical practice,” including through regular inclusion in the decennial census
19 through 1950, in the long-form census through 2000, and in the ACS since 2005. *Id.* at 1314. As the
20 Secretary observed, “the decision to collect citizenship information from Americans through the
21 decennial census was first made centuries ago.” *Id.* at 1319. Further, the inclusion of a citizenship
22 question is far from unusual in comparative perspective; the United Nations recommends that
23 nations inquire about citizenship and other countries include a citizenship question on their censuses.
24 *Id.* Given the ubiquity of citizenship questions, the reinstatement of a question on the 2020 census
25 was a subject under consideration by various government officials. *Id.*

26 Against this backdrop, the Secretary solicited DOJ’s views on the subject and, in December
27 2017, received DOJ’s formal request “that the Census Bureau reinstate on the 2020 Census

1 questionnaire a question regarding citizenship.” AR 663. The Gary Letter explains that citizenship
2 data is “critical” to DOJ’s Voting Rights Act enforcement because DOJ “needs a reliable calculation
3 of the citizen voting-age population in localities where voting rights violations are alleged or
4 suspected.” According to the Gary Letter, collecting such data through the decennial census, which
5 would provide block-level CVAP data, is preferable to currently available ACS data for several
6 reasons. *Id.* at 664-65. The Gary Letter therefore concluded that “the decennial census questionnaire
7 is the most appropriate vehicle for collecting [citizenship] data, and reinstating a question on
8 citizenship will best enable the Department to protect all American citizens’ voting rights under
9 Section 2.” *Id.* at 663.

10 The Secretary “set out to take a hard look at the request” and ensure that he “considered all
11 facts and data relevant to the question.” AR 1313. The Commerce Department and the Census
12 Bureau “began a thorough assessment that included legal, program, and policy considerations.” *Id.*
13 This review included, for example, the preparation by the Census Bureau of a technical review of the
14 request, *id.* at 1277-85; a detailed exchange between the Commerce Department and the Census
15 Bureau about the technical review, *id.* at 1286-97; multiple meetings between the Secretary and
16 Census Bureau leadership to discuss the Census Bureau’s “process for reviewing the DOJ request,
17 their data analysis, [the Secretary’s] questions about accuracy and response rates, and their
18 recommendations,” *id.* at 1313; and extensive engagement with stakeholders, *id.* at 763-1276. At the
19 conclusion of this process, the Secretary determined that the “census-block-level citizenship data
20 requested by DOJ [was] not available” from existing surveys conducted by the Census Bureau. *Id.* at
21 1314. The Secretary also reasonably accepted DOJ’s determination that, because “DOJ and the
22 courts use CVAP data for determining violations of Section 2” of the VRA, “having these data at the
23 census block level will permit more effective enforcement.” *Id.* at 1313.

24 The Secretary thus proceeded to evaluate the available options. AR 1317. Through extensive
25 consultation with the Census Bureau, the Secretary identified four alternatives: making no change in
26 data collection but assisting DOJ with statistical modeling (“Option A”); reinstating a citizenship
27 question on the decennial census (“Option B”); obtaining citizenship data from administrative

1 records for the whole census population (“Option C”); and, at the request of the Secretary after
2 receiving the Census Bureau’s analysis, a combination of reinstating a question on the census and
3 utilizing administrative-record data (“Option D”). *Id.* at 1314-17. With the goal of “obtaining *complete*
4 *and accurate data*” on citizenship, *id.* at 1313, the Secretary concluded that Option D—“placing the
5 question on the decennial census and directing the Census Bureau to determine the best means to
6 compare the decennial census responses with administrative records”—would “provide DOJ with
7 the most complete and accurate CVAP data in response to its request.” *Id.* at 1317.

8 Thus, the Secretary traced the steps from the facts found during the agency’s extensive review
9 of DOJ’s request to his ultimate decision. AR 1313-20. This reasonable explanation of the
10 decisionmaking process is all that is required to survive arbitrary-and-capricious review. Even if the
11 Court doubts that the Secretary’s conclusions necessarily follow from the facts found, the Court
12 “should ‘uphold a decision of less than ideal clarity if the [Secretary’s] path may reasonably be
13 discerned.’” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (citation omitted). And
14 here, the Secretary’s path is readily understood from his memorandum, including a “rational
15 connection between the facts found and the choices made.” *State Farm*, 463 U.S. at 43.

16 **3. The Secretary engaged in an appropriate process, including the**
17 **consideration of alternatives, and explained his rationale.**

18 To the extent Plaintiffs suggest that the Secretary’s decision was arbitrary and capricious
19 because he “relied on factors which Congress has not intended [him] to consider,” “failed to consider
20 an important aspect of the problem” or “offered an explanation for its decision that runs counter to
21 the evidence before the agency,” *id.*, those claims are clearly belied by the record. The Secretary
22 engaged in a process that identified various issues, considered alternative proposals, and explained
23 his rationale for rejecting or accepting the different options presented based on the evidence before
24 him. What matters for APA review is that the Secretary engaged in this process and deliberately
25 considered the options—not whether his decision was “the best one possible or even whether it [was]
26 better than the alternatives.” *Elec. Power Supply Ass’n*, 136 S. Ct. at 782.

27 Plaintiffs cannot show, for example, that the Secretary failed to consider effects on the
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1 response rates. State of California, FAC ¶¶ 37, 41, 55. The Secretary reviewed the available materials
2 and concluded that “no one provided evidence that reinstating a citizenship question on the decennial
3 census would materially decrease response rates.” AR 1315, 1317. The Secretary further explained
4 that the Bureau could address any nonresponse through NRFU and, in any event, “the value of more
5 complete and accurate data derived from surveying the entire population outweighs such concerns.”
6 *Id.* at 1319. That judgment was informed by the fact that there is a legal duty to respond to the
7 census, 13 U.S.C. § 221, and the Secretary concluded that the value of providing accurate data to
8 DOJ was “of greater importance than any adverse effect that may result from people violating their
9 legal duty to respond.” AR 1319. Plaintiffs also cannot show that the Secretary failed to consider
10 the issue of testing for the reinstatement of a citizenship question. State of California, FAC ¶ 38.
11 When the Census Bureau receives a request from other agencies for a new question on the ACS, the
12 Bureau typically “work[s] with the other agencies to test the question (cognitive testing and field
13 testing).” AR 1296. In reviewing DOJ’s request to reinstate a citizenship question, the Bureau
14 concluded that, “[s]ince the question is already asked on the American Community Survey, [it] would
15 accept the cognitive research and questionnaire testing from the ACS instead of independently
16 retesting the citizenship question.” *Id.* at 1279. In his memorandum, the Secretary thus reasonably
17 concluded that “the citizenship question has already undergone the cognitive research and
18 questionnaire testing required for new questions.” *Id.* at 1319.

19 Lastly, to the extent Plaintiffs suggest the Secretary’s decision was pretextual, they cannot
20 demonstrate that he did not believe the rationale set forth in his decision memorandum or that his
21 initial policy preferences, whatever they may have been, render his ultimate decision arbitrary and
22 capricious. Even if the Secretary had *additional* reasons for reinstating a citizenship question or
23 expressed interest in adding a question before hearing from DOJ, the APA analysis would remain
24 unchanged. *Jagers v. Fed. Crop Ins. Corp.*, 758 F.3d 1179, 1186 (10th Cir. 2014) (rejecting argument that
25 “the agency’s subjective desire to reach a particular result must necessarily invalidate the result,
26 regardless of the objective evidence supporting the agency’s conclusion”). It is utterly unremarkable
27 for an agency head to enter office with predispositions toward certain policy choices. That the

1 Secretary thought reinstatement of a citizenship question “could be warranted,” AR 1321, asked his
2 staff to explore such an action, and decline to accept some of his staff’s recommendations is neither
3 unexpected nor evidence of improper decisionmaking. *Wisconsin*, 517 U.S. at 23 (“[T]he mere fact
4 that the Secretary’s decision overruled the views of some of his subordinates is by itself of no moment
5 in any judicial review of his decision.”). As Justice Gorsuch explained, “there’s nothing unusual about
6 a new cabinet secretary coming to office inclined to favor a different policy direction, soliciting
7 support from other agencies to bolster his views, disagreeing with staff, or cutting through red tape.”
8 *In re Dep’t of Commerce*, ___ S. Ct. ___, 2018 WL 5259090, at *1 (U.S. Oct. 22, 2018) (Gorsuch, J.,
9 concurring in part and dissenting in part).

10 **B. The Secretary’s decision was not otherwise unlawful.**

11 Plaintiffs also argue that the Secretary’s decision was unlawful because it did not conform to
12 the requirements of the Constitution or federal statute. To the extent Plaintiffs again argue that the
13 Secretary will fail to conduct an “actual Enumeration” or otherwise violate constitutional mandates,
14 State of California, FAC ¶ 55, those claims are unavailing for the reasons set forth above. Likewise,
15 Plaintiffs’ claim that the Secretary’s decision violates his duty to “take a decennial census of
16 population” under 13 U.S.C. § 141(a), State of California, FAC ¶ 54, is unconvincing for the same
17 reasons. Plaintiffs cannot claim that the congressional delegation in the Census Act narrowed the
18 Secretary’s discretion beyond that afforded by the Constitution itself. *See Wisconsin*, 517 U.S. at 19.

19 Plaintiffs also contend that the Secretary violated the Information Quality Act (IQA), Pub. L.
20 No. 106-554, § 1(a)(3) (Dec. 21, 2001) (published at 44 U.S.C. § 3516 note), and a provision of the
21 Census Act governing the contents of certain reports to Congress, 13 U.S.C. § 141(f)(3). State of
22 California, FAC ¶ 54. The IQA neither informs the Secretary’s exercise of discretion over the
23 questions on the census nor provides a private right of action or a basis for APA review. *See, e.g., Salt
24 Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006); *Family Farm All. v. Salazar*, 749 F. Supp. 2d 1083, 1092
25 (E.D. Cal. 2010); *Ams. for Safe Access v. U.S. Dep’t of Health & Human Servs.*, No. 07-cv-1049 (WHA),
26 2007 WL 4168511, at *4 (N.D. Cal. Nov. 20, 2007) (“[T]he IQA and OMB guidelines do not create a
27 duty to perform legally required actions that are judicially reviewable.”). Plaintiffs’ allegations of

1 purported violation of 13 U.S.C. § 141(f)(3), meanwhile, are both factually incorrect and beyond the
2 scope of this Court’s jurisdiction. Defendants submitted the required reports to Congress, and the
3 Secretary explained the basis for including a citizenship question. In any event, it is Congress itself,
4 not third-party litigants, that oversees agency reports to Congress; such reports are neither “agency
5 action” subject to judicial review, 5 U.S.C. § 551, nor can any purported defects create the sort of
6 redressable Article III injury necessary to sustain the Court’s jurisdiction. *Guerrero v. Clinton*, 157 F.3d
7 1190, 1195 (9th Cir. 1998); *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 316-19 (D.C. Cir. 1988).

8 **CONCLUSION**

9 For the foregoing reasons, summary judgment should be granted in Defendants’ favor on
10 both of Plaintiffs’ claims, and this case should be dismissed with prejudice.

11 Date: November 2, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November, 2018, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing.

/s/ Kate Bailey

KATE BAILEY