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

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

22 Plaintiffs,

23 vs.

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

27 Defendants.  
28

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

**PLAINTIFFS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

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

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**NOTICE OF MOTION AND MOTION**

**PLEASE TAKE NOTICE** that at 10:00 a.m. on December 7, 2018 in Courtroom 3 of the United States District Court, located at 450 Golden Gate Avenue in San Francisco, Plaintiffs City of San Jose and Black Alliance For Just Immigration (“Plaintiffs”) will move for partial summary judgment on Count Three and Count Four of the Complaint pursuant to Rule 56(a) of the Federal Rules of Civil Procedure and the Local Rules for the United States District Court for the Northern District of California.

Plaintiffs request an order that Defendants’ decision to add a citizenship question to the 2020 Census short-form questionnaire was not in accordance with law and arbitrary and capricious as a matter of law.

The Motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities, the Declaration of Ana G. Guardado and exhibits thereto, the Declarations of Jeff Ruster, Monique Melchor, Opal Tometi, and Kristen Clements, and any additional matters that the Court may consider at the time of the hearing.

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**MEMORANDUM OF POINTS AND AUTHORITIES****INTRODUCTION**

1 While there may be “nothing unusual about a new cabinet secretary inclined to favor a  
2 different policy direction,” *In Re Dep’t of Commerce, et al.*, 586 U.S. \_\_\_ (2018) (Gorsuch, J.,  
3 concurring and dissenting), Congress has mandated that agencies abide by the Administrative  
4 Procedure Act (“APA”) when they implement such policies. Commerce Secretary Wilbur Ross  
5 disregarded the most basic principles of administrative procedure when he added a citizenship  
6 question to the 2020 Decennial Census (“Census”). The administrative record<sup>1</sup> reveals conduct on  
7 the part of Ross and his subordinates that violated a clear Congressional mandate and broke all  
8 the well-established internal rules for changing course with the Census. Ross’s decision, if  
9 upheld, would make a shambles of bedrock APA law.

10 Ross’s deviation from settled law and procedure is extraordinary. He ignored express  
11 statutory requirements that required the Census Bureau (“Bureau”) to provide topics for the  
12 Census by March 2017, absent “new circumstances” that “necessitate” a change.<sup>2</sup> He ignored  
13 settled Bureau protocol for the addition of questions to the Census (and, indeed, his staff appears  
14 to have deleted that protocol from a Bureau document without the Bureau’s knowledge). He  
15 disregarded the concrete and well-considered conclusions of the entire professional scientific staff  
16 of the Bureau that adding the question would impair the quality of Census data, while at the same  
17 time would *not* provide reliable citizenship data. And he concocted a charade that some other  
18 agency needed a citizenship question on the Census questionnaire. Any one of these undisputed  
19 facts, in itself, is sufficient to sustain a finding that Ross’s decision to add a citizenship question  
20 to the Census violated the APA. Taken in any combination, these decisions attain a level of  
21 arbitrariness and capriciousness rarely witnessed in an administrative action.

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26 <sup>1</sup> Defendants concede that all documents number stamped from 000001 through 0013099, aside from those created  
27 after March 26, 2018, are part of the administrative record in this matter. (*See* Declaration of Ana G. Guardado  
28 (“Guardado Decl.”), ¶2, Ex. 1.) Plaintiffs do not waive the right to rely on extra-record discovery ordered by this  
Court in opposition to any motion for summary judgment filed by Defendants, at trial should this Court deny  
Plaintiffs’ motion, or in support of their Enumeration Clause claim on which they are do not seek summary judgment.  
<sup>2</sup> 13 U.S.C. §§ 141(f)(1)-(3).

**STATEMENT OF UNDISPUTED FACTS**

**I. PLAINTIFFS ARE RELYING ONLY ON THE ADMINISTRATIVE RECORD FOR ALL ISSUES EXCEPT STANDING.**

For purposes of this Motion, Plaintiffs are relying solely on the administrative record produced by Defendants in this action. Plaintiffs are not relying on any documents that were produced pursuant to a finding of “bad faith” by Defendants, and do not rely on any of the “extra-record discovery that has already been produced.” Brief for Petitioner at 7, 14, *In re Dep’t of Commerce, et al., petition filed*, (October 29, 2018) (No. 18-557). The extra-record discovery ordered by this Court and others is certainly relevant and helpful to Plaintiffs claims, but Defendants’ actions are so egregious that the APA violation can be proved by the administrative record.

**II. DEFENDANTS IGNORED STATUTES AND REGULATIONS GOVERNING CHANGING THE CENSUS.**

**A. Ross Chose to Add the Citizenship Question for Reasons that Are Not in the Record.**

Discussions concerning adding the citizenship question began immediately after Wilbur Ross became Secretary of Commerce.<sup>3</sup> In March 2017, Earl Comstock, Director of Policy and Strategic Planning for the Department of Commerce, wrote Ross a response to “Your Question on the Census,” which appears to have been whether non-citizens are counted for Congressional apportionment. (0002521.)<sup>4</sup> A Bureau FAQ page confirmed that they are. (*Id.*) High-level Administration officials also lobbied Ross to add the citizenship question. On April 5, 2017, Ross’s executive assistant wrote to Ross’s wife that “Steve Bannon has asked that the Secretary talk to someone about the Census.” (0002561.) Ross also had discussions with Kansas Secretary of State Kris Kobach about adding the citizenship question, as Kobach reminded Ross in a July 21, 2017 email. (000763.)

But by the time Ross had these conversations, it was too late to change the content of the Census. The Bureau, pursuant to federal law, had already submitted its topics for the Census by

<sup>3</sup> See 163 Cong. Rec. S1455 (Feb. 27, 2017).

<sup>4</sup> The applicable portions of the administrative record are attached as Exhibit 3 to Guardado Decl.

1 the March 31, 2017 deadline<sup>5</sup> (000194), stating that only five subjects would be included in the  
 2 Census: age, gender, race/ethnicity, relationship, and homeowner status (000204-000213), and  
 3 noting that other topics including citizenship would be included on the American Community  
 4 Survey (“ACS”) as they have been in the past. (000214-67.) Thus, by April 2017, the Bureau had  
 5 notified Congress that citizenship would not be a topic on the Decennial Census.

6 Although the statutory deadline had passed, Ross complained to Comstock on May 2,  
 7 2017 that he was “mystified why nothing has been done in response to my months[’] old request  
 8 that we include the citizenship question.” (0003710.) Comstock responded that the Bureau had  
 9 already sent the topics to Congress, but suggested that a question could be added that was not  
 10 among those topics. (*Id.*) Comstock added that “[w]e need to work with Justice to get them to  
 11 request that citizenship be added back as a census question[.] . . . I will arrange a meeting with  
 12 DoJ staff this week to discuss.” (*Id.*)

13 **B. Commerce Sought Out Another Agency to Request the Question.**

14 By the next day, Senior White House Advisor Eric Branstad looked for a Department of  
 15 Justice (“DOJ”) contact “[r]egarding [a] Census and Legislative issue” to put in touch with  
 16 Comstock. (0003701.) Branstad referred Comstock to Mary Blanche Hankey at DOJ, with whom  
 17 Comstock met “in person to discuss the citizenship question.” (0002462 and 0012756.) Hankey  
 18 referred Comstock to James McHenry, the newly-appointed Acting Director of DOJ’s Executive  
 19 Office of Immigration Review,<sup>6</sup> with whom Comstock spoke several times. (*Id.*)

20 On July 21, 2017, while Comstock searched for an agency to request the citizenship  
 21 question, Kobach wrote to Ross “at the direction” of Bannon reminding him how important it was  
 22 to exclude non-citizens from apportionment counts. Kobach emphasized that, without a  
 23 citizenship question “aliens who do not actually ‘reside’ in the United States are still counted for  
 24 congressional apportionment.” (000764.) Kobach sent Ross the exact language of what ultimately  
 25

26 <sup>5</sup> See 13 U.S.C. §§ 141(f)(1)-(3).

27 <sup>6</sup> See <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-appointment-james-mchenry-director-executive-office>. Plaintiffs seek judicial notice of certain “relevant background information,” such as the identity of  
 28 individuals named in the record and the history of the census, through government documents, as is proper in APA proceedings. *Ursack, Inc. v. Sierra Interagency Black Bear Grp.*, No. 08-1808 SC, 2009 WL 2422784, at \*6 (N.D. Cal. Aug. 6, 2009), *aff’d*, 639 F.3d 949 (9th Cir. 2011).

1 became the citizenship question that Ross chose to add to the Census. (*Id.*) On August 8, Ross  
2 wrote to Comstock to ask “where is the DOJ in their analysis? If they still have not come to a  
3 conclusion please let me know your contact person and I will call the AG.” (001247.)

4 On September 8, 2017, Comstock reported to Ross that “Justice staff did not want to raise  
5 the question given the difficulties Justice was encountering in the press at the time (the whole  
6 Comey matter).” (0012756.) Instead, DOJ’s McHenry referred Comstock to an official at the  
7 Department of Homeland Security (“DHS”), who also declined to request a question on behalf of  
8 DHS. Comstock reported that attorneys from Commerce were going to “look into the legal issues  
9 and how Commerce could add the question to the Census itself.” (*Id.*)

10 Ross followed through on his promise to call Attorney General Jeff Sessions. Five days  
11 after Comstock told Ross that neither DOJ nor DHS would ask the Bureau to put the question on  
12 the Census, John Gore, the acting head of DOJ’s Civil Rights Division, wrote to Ross’s chief of  
13 staff to discuss “a DOJ-DOC issue.” (0002652.) By September 17, the Attorney General and Ross  
14 had spoken. (*Id.*) Danielle Cutrona from the Attorney General’s office told Ross’s Chief of Staff,  
15 “we can do whatever you all need us to do.” (*Id.*) When DOJ had not asked that Census add a  
16 citizenship question by November 27, 2017, Ross wrote to Peter Davidson, the General Counsel  
17 of Commerce: “Census is about to begin translating the questions into multiple languages and has  
18 let the printing contract. We are out of time. Please set up a call for me tomorrow with whoever is  
19 the responsible person at Justice. We must have this resolved.” (0011193.) Davidson reassured  
20 Ross that “I can brief you tomorrow . . . no need for you to call.” (*Id.*) Two weeks later, DOJ  
21 issued the request that Ross had sought for months.

22 **C. DOJ Reverses Course and Asks for a Citizenship Question.**

23 By this time, however, DOJ had already confirmed that it did not want a citizenship  
24 question on the Census. In accordance with the statutory deadlines described above, DOJ  
25 formally informed the Bureau that it “had no needs to amend the current content and uses or to  
26 request new content in the American Community Survey (ACS) for the 2020 Census.” (000311).  
27 In October 2016, Arthur Gary, General Counsel for the Justice Management Division of DOJ,  
28 supplemented this letter, formally requesting that the Bureau “consider a new topic in the ACS

1 relating to LGBT populations.” (*Id.*) Thus, as of the statutory deadline for adding new topics,  
2 DOJ had, consistent with the Bureau’s process, provided its complete update on its needs for the  
3 Census with no mention of a need for additional citizenship-related data.

4 That changed after Ross spoke with Attorney General Sessions. On December 12, 2017,  
5 Gary signed a new letter, this one to acting Census Director Ron Jarmin, “to formally request that  
6 the Census Bureau reinstate on the 2020 Census questionnaire a question regarding citizenship,  
7 formerly included in the so-called ‘long form’ census.” (000663.) (the “DOJ Request”). Gary  
8 based his request—which contradicts the one he had sent just a year before—on a purported need  
9 for “citizen voting-age population data for census blocks, block groups, counties, towns, and  
10 other locations.” (000664.)

### 11 **III. ROSS IGNORED EVIDENCE FROM BUREAU EXPERTS AND** 12 **STAKEHOLDERS AND IMPOSED HIS PREDETERMINED POSITION.**

#### 13 **A. The Bureau Proposes a Better Means of Providing CVAP Data.**

14 Upon receiving the DOJ Request, the career scientists at the Bureau set out to study how  
15 best to meet DOJ’s ostensible need for block-level CVAP data. On December 22, they prepared a  
16 technical memorandum (0011646-49) and an accompanying White Paper (0011634-45). In these  
17 documents, the experts at the Bureau analyzed the advantages and disadvantages of using a  
18 citizenship question on the Census to obtain CVAP data, identifying two advantages: (1) the  
19 provenance of the data is transparent and (2) the data are contemporaneous with the census by  
20 construction (0011647), and three disadvantages: (1) potential negative impact on voluntary  
21 cooperation with the census, (2) poorer quality citizenship data than would be available through  
22 administrative records, and (3) additional cost. (*Id.*)

23 The Bureau noted that the decline in response rate for household with at least one non-  
24 citizen to the ACS, which contains a citizenship question, was 5.1 percentage points more than  
25 the decline for all-citizen households. (0011647.) Additionally, the Bureau found that “there is a  
26 tendency for noncitizen ACS respondents to report being U.S. citizens.” (0011640.) Further, the  
27 cost of additional non-response follow up (“NRFU”) was calculated at \$32,000,000 based on the  
28 lower response rate. (0011647.) The Bureau found that administrative records—birth certificates,

1 Social Security data, drivers' licenses, and the like—could be used to cross-reference census data  
2 and provide DOJ with more accurate block-level CVAP information than using the citizenship  
3 question, without the drawbacks of adding the question itself. (0011647-48.)

4 **B. The Bureau's Full Review Concludes Administrative Records Are a Better**  
5 **Means of Obtaining CVAP Data.**

6 The Bureau's scientific staff then conducted a month-long review into the impact of three  
7 potential alternatives regarding citizenship and the Census, namely: (A) no change in data  
8 collection, (B) adding a citizenship question to the Census, and (C) obtaining citizenship status  
9 from administrative records for the whole population; they set forth their findings in a January 19,  
10 2018 Memo. (001277-85.) The Bureau compared the self-response rate in the short form census  
11 to the long form census (which, like the ACS, had contained a citizenship question) and the ACS  
12 since 2000. For 2000, it found that the decline in self-response from the short form to the long  
13 form was 3.3 percentage points higher for non-citizen households. (001280.) In 2010, the decline  
14 in self-response from the short form to the ACS was 5.1 percentage points higher for non-citizen  
15 households. (*Id.*) The Bureau also found that the item nonresponse rate on the ACS from 2013  
16 through 2016 was much greater than the comparable rates for other demographic variables. (*Id.*)  
17 The Bureau concluded that the increased burden<sup>7</sup> of the citizenship question would lead to a  
18 decline in *overall* self-response, and a larger decline in self-response in non-citizen households.  
19 The Bureau provided Ross with an estimate that NRFU costs would increase \$27.5 million by  
20 adding the citizenship question, emphasizing that the estimate was a conservative one. (001282.)  
21 In comparison, the cost to use administrative data on citizenship instead of adding the question to  
22 the Census would be between \$500,000 and \$2 million. (*Id.*)

23 The Bureau recommended either Alternative A (no change) or C (using administrative  
24 records), explaining that Alternative C would meet the stated use in the DOJ Request without  
25 increasing response burden or harming the quality of the Census count. It concluded that  
26 Alternative B (adding the citizenship question) would be very costly, would harm the quality of  
27 the census count, and would use substantially less accurate citizenship status data than are

28 <sup>7</sup> Survey methodologists consider "burden" to include both the direct time costs of responding and the indirect costs arising from nonresponse due to perceived sensitivity of the topic. (001281.)

1 available from administrative sources. (001277.)

2 **C. Ross Conducts Perfunctory Meetings with Stakeholders.**

3 Ross met with numerous stakeholders about the citizenship question, including officials,  
4 academics, and representatives of interest groups, the vast majority of whom rejected the addition  
5 of the citizenship question.<sup>8</sup> On January 26, 2018 six former directors of the Bureau, who served  
6 under administrations of both parties, wrote to Ross opposing adding the citizenship question,  
7 emphasizing that the Bureau’s well-established process had been ignored, noting that “adding an  
8 untested question on citizenship status at this late point in the decennial planning process would  
9 put the accuracy of the enumeration and success of the census in all communities at grave risk.”  
10 (001057.) They implored Ross to consider the “great deal of evidence that even small changes in  
11 survey question order, wording, and instructions can have significant, and often unexpected,  
12 consequences for the rate, quality, and truthfulness of response.” (001058.)

13 **D. Commerce Ignored the Answers to Follow-up Questions to the Bureau**

14 On January 30, 2018, following review of the January 19 Memo, Comstock asked the  
15 Bureau to respond to 35 follow-up questions (0005216), including one asking “[w]hat was the  
16 process that was used in the past to get questions added to the decennial Census or do we have  
17 something similar where a precedent was established?” (0009832-33.) The Bureau responded by  
18 setting forth its well-established process for adding questions:

19 The Census Bureau follows a well-established process when adding or changing content  
20 on the census or ACS to ensure the data fulfill legal and regulatory requirements  
21 established by Congress. Adding a question or making a change to the Decennial Census  
22 or the ACS involves extensive testing, review, and evaluation. This process ensures the  
23 change is necessary and will produce quality, useful information for the nation.

- 22 • The Census Bureau and the Office of Management and Budget (OMB) have laid  
23 out a formal process for making content changes.
- 24 • First, federal agencies evaluate their data needs and propose additions or changes  
25 to current questions through OMB.

25 <sup>8</sup> Among them were the Senior Vice President of Data Science for Nielsen, Christine Pierce, who stated that in her  
26 experience including a sensitive question “could make people less likely to respond.” (001276.) The leader of the  
27 bipartisan United States Conference of Mayors wrote that a citizenship question would “increase the burden on  
28 respondents, likely heighten privacy concerns around the census, and lower participation by immigrants who fear the  
government will use this information to harm them and their families.” (001066.) The attorneys general of Iowa and  
Mississippi opposed the question. (001201 and 001205.) A Chamber of Commerce leader wrote that the question  
could lead to inaccurate census data, which businesses use “to analyze demographic and economic trends required for  
business strategy.” (001238.)

- 1 • In order to be included, proposals must demonstrate a clear statutory or regulatory
- 2 need for data at small geographies or for small populations.
- 3 • Final proposed questions result from extensive cognitive and field testing to ensure
- 4 they result in the proper data, with an integrity that meets the Census Bureau's
- 5 high standards . . . .
- 6 • The final decision is made in consultation with OMB.

7 (0009832-33.)<sup>9</sup>

8 But this response from the Bureau was not included in the administrative record that  
 9 Commerce initially produced in this matter. Instead, an entirely new answer, which nothing in the  
 10 administrative record suggests was ever shown to or approved by anyone at the Bureau, was  
 11 included. That answer reads:

12 Because no new questions have been added to the Decennial  
 13 Census (for nearly 20 years), the Census Bureau did not feed [*sic*]  
 14 bound by past precedent when considering the Department of  
 15 Justices' request. Rather, the Census Bureau is working with all  
 16 relevant stakeholders to ensure that legal and regulatory  
 17 requirements are filled and that questions will produce quality,  
 18 useful information for the nation. As you are aware, that process is  
 19 ongoing at your direction.

20 (001296.) It was only after Judge Furman ordered completion of the administrative record that  
 21 Defendants produced the Bureau's original response to Commerce's question 31.

22 **E. Commerce Demands New Analysis from Census.**

23 After the Bureau provided its conclusions in the January 19 Memo, Ross demanded  
 24 analysis of a fourth alternative option, Alternative D, under which the Bureau would include the  
 25 citizenship question on the Census, but then use administrative records, such as Social Security  
 26 records, to provide CVAP data. (001316, 0009812.) On March 1, 2018, the Bureau presented its  
 27 findings, concluding that, because the drop in self-response rate that would come from including  
 28 a citizenship question would remain, "Alternative D would result in poorer quality citizenship  
 data than Alternative C." (001312.) After all, it "would still have all the negative cost and quality

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<sup>9</sup> This well-established process is derived from the several federal laws that govern the specific manner in which the census is to be developed and conducted, including the Paperwork Reduction Act of 1995, *see* 44 U.S.C. §§ 3504(e)(3)(A), 3506(e)(4); 5 C.F.R. § 1320.18(c). The Bureau itself has issued Statistical Quality Standards applicable to "all information products released by the Bureau and the activities that generate those products"—including the decennial census. *See* Statistical Quality Standards, U.S. Census Bureau, July 2013, *available at* [https://www.census.gov/content/dam/Census/about/about-the-bureau/policies\\_and\\_notices/quality/statistical-quality-standards/Quality\\_Standards.pdf](https://www.census.gov/content/dam/Census/about/about-the-bureau/policies_and_notices/quality/statistical-quality-standards/Quality_Standards.pdf) at ii. These standards are discussed in the administrative record. (001093-95.)

1 implications of Alternative B” set forth in the January 19 Memo. (*Id.*) But it would not resolve  
 2 any concerns about using administrative records instead of the question, because those people  
 3 “refusing to self-respond due to the citizenship question are particularly likely to refuse to  
 4 respond in NRFU as well, resulting in a proxy response.” (001311; *see also* 0009816 (discussing  
 5 further problems with Alternative D).)

6 **F. Ross Issued His Decision Without Considering Key Findings and Without**  
 7 **Disclosing that He Asked DOJ to Make the Request**

8 On March 22, 2018, despite having worked for nearly a year to get DOJ, then DHS, then  
 9 DOJ again, to issue a request for the citizenship question, Ross testified under oath to the House  
 10 Ways and Means Committee that “[DOJ], as you know, initiated the request for inclusion of the  
 11 citizenship question.”<sup>10</sup> This testimony was consistent with Ross’s memo, (“Decision Memo”)  
 12 issued four days later, in which he wrote that DOJ “requested” that he add the citizenship  
 13 question and that “[f]ollowing receipt” of this request, he took a “hard look” at the issue.  
 14 (001313-20.) Nowhere in the Decision Memo did Ross discuss his and his staff’s strenuous  
 15 efforts to get DOJ to make this request.

16 In the Decision Memo, Ross dismissed the concerns of statistical experts, former Bureau  
 17 chiefs, and others who had warned that adding a citizenship question would lower data quality.  
 18 When considering Option C (the administrative record only option), Ross emphasized inaccurate  
 19 response rates and dismissed administrative records, but when considering Option D (adding the  
 20 citizenship question and using administrative records), he ignored inaccurate responses and  
 21 praised administrative records. (001317.) Ross did not consider concerns of experts that the  
 22 question needed to be tested in the context and on the instrument that it was going to be used  
 23 because some question having something to do with citizenship had been asked “in some form or  
 24 another for nearly 200 years.”<sup>11</sup> He dismissed the higher costs associated with adding the

25 <sup>10</sup> *See* Transcript of a Hearing Before the Committee on Ways and Means, U.S. House of Representatives, March  
 26 22, 2018, serial no. 115-FC09, *available at* <https://docs.house.gov/meetings/WM/WM00/20180322/108053/HHRG-115-WM00-Transcript-20180322.pdf>.

27 <sup>11</sup> As the Bureau notes, this statement is not true. Aside from a question in 1870 that was used to count freed slaves  
 28 who were denied the right to vote, no citizenship question was asked between 1820 and 1890, and none was asked in  
 1950. *See History, 2000 Census of Population and Housing*, U.S. Census Bureau, December 2009 p. 131, *available at* <https://www.census.gov/history/pdf/Census2000v1.pdf>. From 1950 through 2000, the question was asked only as  
 part of a survey on the “long-form” questionnaire, and since 2010, the question was asked as part of the American

1 question. (001319.) He concluded by stating that “[t]he citizenship data provided to DOJ will be  
2 more accurate with the question than without it” without citing to any study, authority, or expert  
3 for this conclusion. (*Id.*)

4 **G. Ross Discloses Some of the Truth After Litigation Begins.**

5 After Plaintiffs filed a motion to expand discovery based on evidence of improper  
6 influence, Ross issued a “supplement” to his administrative determination indicating that, indeed,  
7 “senior governmental officials” had discussed adding a citizenship question months before DOJ  
8 “initiated” the issue. (001321.)

9 **IV. ADDING THE QUESTION HAS HARMED, IS HARMING, AND WILL HARM**  
10 **PLAINTIFFS**

11 **A. San Jose is Spending Money on Outreach Now to Reduce the Negative Impact**  
12 **of Including a Citizenship Question.**

13 Aware that adding the citizenship question to the Census will depress self-response rates,  
14 the Bureau and Commerce have publicly stated that local communities need to do more than they  
15 have in past decades to protect their interest in a full count. In July 2018, Ross wrote to the United  
16 States Commission on Civil Rights asking “Federal, state, and local leaders” to conduct outreach  
17 regarding the citizenship question, and that “[b]y encouraging non-citizens, their friends, and their  
18 families to respond to the census, these community leaders can help the Census Bureau conduct a  
19 complete and accurate count.”<sup>12</sup> On October 2, 2018 Ross issued a public statement about how  
20 Commerce has “encouraged [states] to establish so-called ‘Complete Count Committees’” that  
21 would work to “encourage participation in the Census.”<sup>13</sup>

22 San Jose has already spent, and will continue to spend, precious municipal resources to  
23 encourage participation in the Census *specifically because* a citizenship question will be added.  
24 Jeff Ruster, San Jose’s Assistant Director of Economic Development, has detailed the expenses

25 Community Survey. (0005477.)

26 <sup>12</sup> Letter from Secretary Ross to Catherine Lhamon, United States Commission on Civil Rights, July 5, 2018,  
27 <https://www.usccr.gov/press/2018/07-17-18-letter.pdf>. The letter and other “government documents” in this section  
28 are subject to judicial notice under Fed. R. Evid. 201; going outside the administrative record to establish standing is  
routine in APA cases. *See, e.g., Northwest Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527–28  
(9th Cir. 1997) (considering affidavits for the limited purpose of standing).

<sup>13</sup> *See* <https://www.commerce.gov/news/secretary-speeches/2018/10/remarks-secretary-wilbur-l-ross-us-census-national-partnership-press>.

1 that San Jose has already incurred, and will continue to incur, directly traceable to the inclusion of  
2 the citizenship question. Ruster personally assisted in the preparations for a “Complete Count  
3 Committee,” just as Ross recommended, bringing together over 100 representatives from  
4 community-based, educational, government, and private sector organizations. (Ruster Decl. ¶ 7.)  
5 He has worked to identify low visibility housing and developed programs to encourage hard-to-  
6 count populations to participate. (Ruster Decl. ¶ 5.) In working directly on these outreach  
7 programs, Ruster heard firsthand from community representatives about concerns due to the  
8 citizenship question being added. (Ruster Decl. ¶ 8.) Community members have informed him  
9 that hard-to-count populations, including non-citizens, will not respond to the Census if it  
10 includes a citizenship question. (Ruster Decl. ¶ 8.) In fact, at the presentation of the Santa Clara  
11 County Complete Count Committee meeting in September 2018, the very first obstacle listed was  
12 “Citizenship Question.” (Ruster Decl., Ex. 1, SJBAJI00020.)

13 Even if the Bureau were to compensate for the lowered self-response rate entirely through  
14 the use of NRFU, San Jose will have already diverted funds from other activities to lessen the  
15 impact of the question. San Jose has allocated \$300,000 to such efforts, expects to allocate at least  
16 \$300,000 more, and will divert resources from other programs to “outreach specifically aimed at  
17 increasing participation among groups more likely to resist responding because of the inclusion of  
18 a citizenship question.” (Ruster Decl. ¶ 13). These funds will be diverted before the Census takes  
19 place, and will therefore be used—if the citizenship question is included—whether or not NRFU  
20 procedures ultimately correct any initial undercount. (Ruster Decl. ¶¶ 14-15.) If the Bureau is  
21 enjoined from putting the citizenship question on the Census, San Jose would be able to use these  
22 funds for other purposes. (Ruster Decl. ¶ 16.)

23 **B. Including the Citizenship Question Will Lower Self-Response Rates, Leading**  
24 **to Incorrect Enumerations and a Likely Differential Undercount.**

25 In its post-enumeration analysis of the 2010 Decennial Census, the Bureau found that  
26 even though the census “did not have a significant percent net undercount” it had a significant  
27 undercount by race or Hispanic origin.<sup>14</sup> With the citizenship question, these undercounts are

28 <sup>14</sup> See 2010 Census Coverage Measurement Memorandum Series #2010-G-01 (“Census Coverage Memo”), available  
at [https://www.census.gov/coverage\\_measurement/pdfs/g01.pdf](https://www.census.gov/coverage_measurement/pdfs/g01.pdf). The Bureau found a net undercount of 2.06% in the

1 likely to be even higher. As long ago as 1980, and as recently as 2016, the Bureau has held that a  
 2 citizenship question would “enhance the problems of enumerating minorities thereby  
 3 exacerbating the undercount”<sup>15</sup> and lead to a “reduced rate of response overall and an increase in  
 4 inaccurate response.”<sup>16</sup> In analyzing the DOJ Request, the Bureau calculated that on instruments  
 5 including a citizenship question, the “decline in self-response was 5.1 percentage points greater  
 6 for noncitizen households than for citizen households.” (001280.) While the Bureau will attempt  
 7 to follow up with non-respondents using NRFU, it emphasized that “[t]hose refusing to self-  
 8 respond due to the citizenship question are particularly likely to refuse to respond in NRFU as  
 9 well, resulting in a proxy response.” (001311.) If the Bureau was unable to obtain an accurate  
 10 count of Blacks and Latinos without a citizenship question, it is pure speculation on their part that  
 11 they will obtain an accurate count with one.

12 **C. San Jose Has a Substantial Risk of Being Harmed by the Addition of the**  
 13 **Citizenship Question.**

14 According to the Bureau, 174,510 of San Jose’s 1,009,363 residents—over 17%—are  
 15 non-citizens, while under 7% of the national population are non-citizens. San Jose’s population is  
 16 32.6% Hispanic, nearly double the national percentage of 17.3%.<sup>17</sup> Any undercount of non-  
 17 citizens will therefore disproportionately affect San Jose.

18 Kristen Clements administers grants programs, including the Community Development  
 19 Block Grant program (“CDBG”) and the Home Investment Partnerships Program (“HOME”) for  
 20 San Jose. (Clements Decl. ¶¶ 1, 3, 4.) Both programs receive funding based on federal formulas  
 21 linked to census data. (Clements Decl. ¶¶ 12, 14, 22.) If the Census underreports the population of  
 22 San Jose relative to jurisdictions with fewer non-citizens, San Jose will receive less funding than  
 23 it otherwise would. (Clements Decl. ¶¶ 23-27.)

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24 black population in the 2010 Census, a net undercount of 1.54% for the Hispanic population, a net undercount of  
 25 4.88% in the American Indian population, and a net *overcount* of almost a percent of the white population. *Id.* at 1-2.  
 26 <sup>15</sup> Defendants’ Reply Memorandum and Opposition to Plaintiffs’ Motion for Summary Judgment, *Federation for*  
*American Immigration Reform (FAIR), et al., v. Philip M. Klutznick, et al.*, 79-3269 (D.D.C. Jan 3, 1980) 1980 WL  
 683642 at 22.

27 <sup>16</sup> Brief of Former Directors of the U.S. Census Bureau as Amici Curiae in Support of Appellees, *Evenwel v. Abbott*,  
 136 S. Ct. 1120 (2016), 2015 WL 5675832 at 23-26.

28 <sup>17</sup> The Bureau’s data on ACS are available at <https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml> (enter  
 “San Jose” or “United States” and click under “2016 American Community Survey”).

1 Monique Melchor oversees San Jose’s programs funded through the Workforce  
2 Innovation and Opportunity Act (“WIOA”). (Melchor Decl. ¶¶ 1,3.) Funds allocated through  
3 WIOA are awarded based on several factors, including data from the Bureau of Labor Statistics  
4 (“BLS”) and the Bureau. (Melchor Decl. ¶¶ 5,6.) Because this funding is allocated, in part, on  
5 data provided by the Bureau, an undercount of San Jose relative to cities with a lower population  
6 of non-citizens would result in a reduction in funding and a decrease in services provided to this  
7 vulnerable population. (Melchor Decl. ¶¶ 10,11.)

8 **D. BAJI Has Suffered and Will Suffer Harm Unless the Question Is Removed.**

9 Plaintiff Black Alliance for Just Immigration (“BAJI”) is a California nonprofit  
10 corporation with offices in Oakland, Los Angeles, and New York. (Declaration of BAJI’s  
11 Executive Director Opal Tometi (“Tometi Decl.”) ¶ 2.) It is a membership organization with  
12 approximately 1200 members, predominantly Black immigrants, refugees, and/or African  
13 Americans concentrated in Oakland and other parts of the Bay Area, San Jose, Los Angeles, New  
14 York, Miami, Atlanta, and Washington, D.C. BAJI’s core mission is to educate and engage Black  
15 immigrant communities to organize and advocate for racial, social and economic justice for  
16 themselves and other underrepresented communities. (Tometi Decl. ¶¶ 4–7.)

17 Several of BAJI’s members have told BAJI that they would be reluctant to participate in  
18 the Census if it contains a question about their citizenship status, expressing fears about  
19 confidentiality and privacy, particularly in the context of the heightened anti-immigrant political  
20 rhetoric. Others have expressed concern about the effects of the question, such as political  
21 dilution and the loss of federal funding, on the historically underrepresented communities whom  
22 BAJI represents. (Tometi Decl. ¶¶ 9–11.)

23 To address, and attempt to mitigate, the effects of the addition of a citizenship question to  
24 the Census, BAJI has diverted time and money from other important organizational activities to  
25 educate its constituents about the citizenship question and advocate against its inclusion and  
26 prepare additional outreach efforts to mobilize their constituents to respond to the Census so that  
27 they may be properly counted. (Tometi Decl. ¶¶ 12–14.) BAJI has engaged partner organizations  
28 and donors in conversations about census outreach, begun preparing strategies to engage Black

1 immigrant communities in the Census, and is soliciting potential funding for census outreach and  
 2 education. (Tometi Decl. ¶ 18.) Outreach to encourage the participation of its constituents in the  
 3 Census will require the expenditure of additional money, staff time, and operational expenses,  
 4 including materials, computers, telephones, and other office equipment. (Tometi Decl. ¶ 14.) To  
 5 date, BAJI has dedicated numerous staff hours to addressing the addition of a citizenship question  
 6 to the Census and expects to allocate at least an additional \$200,000 in the next two years.  
 7 (Tometi Decl. ¶¶ 19–20.) The inclusion of a citizenship question on the Census will therefore  
 8 require BAJI to divert its limited and essential resources prior to the date the Census is conducted,  
 9 regardless of whether the Bureau’s NRFU procedures ultimately correct any initial undercount  
 10 and the ultimate impact of the question itself. (Tometi Decl. ¶¶ 16, 19.)

### **STANDARD OF REVIEW**

12 Summary judgment shall be granted if the record shows that there is no genuine dispute as  
 13 to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P.  
 14 56(a). Under the APA, this Court “shall hold unlawful and set aside agency action” that is “found  
 15 to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,”  
 16 “contrary to constitutional right, power, privilege, or immunity,” “in excess of statutory  
 17 jurisdiction, authority, or limitations,” or “without observance of procedure required by law.” 5  
 18 U.S.C. §706(2). Plaintiffs’ third and fourth counts, that Defendants’ decision to add the question  
 19 was “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right” and  
 20 “arbitrary and capricious” under the APA, are appropriate for summary judgment. *See NW*  
 21 *Motorcycle Ass’n v. United States Dep’t Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994) (Finding that  
 22 where a review of a final agency determination is limited to administrative record, resolution of  
 23 the matter does not require fact finding, does not present any genuine issues of material fact and  
 24 summary judgment is appropriate).

### **ARGUMENT**

#### **I. PLAINTIFFS HAVE STANDING TO CHALLENGE ROSS’S DECISION.**

27 To satisfy Article III’s standing requirements, “a plaintiff must show (1) it has suffered an  
 28 ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural

1 or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3)  
2 it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable  
3 decision.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81,  
4 (2000). Both San Jose and BAJI easily meet these standards.

5 **A. Injury to San Jose and BAJI Is Both Actual and Reasonably Imminent.**

6 Ross himself acknowledged the need for entities like San Jose and BAJI to try to  
7 ameliorate the effects of the citizenship question in his imploring them to conduct outreach to  
8 encourage responses to the Census.<sup>18</sup> But this costs money, so “both the challenged conduct” (the  
9 decision to add the citizenship question) and “the attendant injury” (the expenditures made by San  
10 Jose, and BAJI, as directed by Ross, to protect its interest in an accurate count) “have already  
11 occurred.” *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1118 (9th Cir. 2017), *cert. denied*, 138 S. Ct.  
12 931 (2018).

13 Additionally, the Ninth Circuit has held that plaintiffs have standing to challenge a  
14 procedural action when “it is reasonably probable that the challenged action will threaten their  
15 concrete interests.” *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 341 F.3d 961, 969–70 (9th  
16 Cir. 2003). A plaintiff need not “demonstrate that it is literally certain that the harms they identify  
17 will come about.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 414 n.5 (2013); *see also Susan B.*  
18 *Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). At a minimum, the Bureau’s analyses of  
19 the need and impact of a citizenship question and Ross’s own pleas for cities and organizations to  
20 take extra steps reflect Defendants’ own knowledge that the posing of the citizenship question  
21 will lead to a higher non-response rate and a more difficult NRFU process. Defendants  
22 themselves know that the risk is real.

23 Moreover, however confident Defendants might be that they will be able to count  
24 everyone, their own track record says the opposite: even without a citizenship question, they have  
25 fallen significantly short in counting the very populations—notably Latinos and Blacks—who are  
26 likely to be disproportionately among the immigrant populations whom Defendants acknowledge  
27

28 

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<sup>18</sup> See notes 12 and 13, *supra*.

1 are going to be difficult to count accurately.<sup>19</sup> If these populations cannot be counted accurately  
 2 when there is no citizenship question, the risk they will not be counted accurately when the  
 3 Census contains the citizenship question is substantial.

4 **B. San Jose Has Standing.**

5 **1. San Jose Has Suffered and Will Suffer an Injury in Fact.**

6 When plaintiffs identify a “substantial risk” of harm and “reasonably incur costs to  
 7 mitigate or avoid that harm,” those costs establish Article III standing. *Clapper*, 568 U.S. at 414  
 8 n.5. At summary judgment, facts set forth in the undisputed declaration of a city official  
 9 “sufficiently demonstrate[] Article III injury.” *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1198  
 10 (9th Cir. 2004). As set forth above, San Jose has already diverted money to encourage hard-to-  
 11 count populations to participate in the Census *specifically* because the Bureau has announced that  
 12 it will include a citizenship question and asked that cities perform more outreach. Loss of money  
 13 is the prototypical “concrete, actual injury.” *See Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163,  
 14 1172 (9th Cir. 2002). And the expenditures—both now and in the future—are “actual or  
 15 imminent.” *Friends of the Earth, Inc.*, 528 U.S. at 180.

16 The loss of funds that will result from a likely undercount constitutes an additional  
 17 concrete injury. Based upon Defendants’ admissions of the obstacles to an accurate count caused  
 18 by the citizenship question, it is reasonably likely that there will be some undercount in San Jose  
 19 that would not have occurred absent the citizenship question. Any differential undercount  
 20 attributable to the citizenship question will harm San Jose to some degree for purposes of  
 21 standing. *See Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017)  
 22 (receipt of two unwanted text messages sufficient to confer Article III standing).

23 **2. San Jose’s Injury Is Fairly Traceable to the Citizenship Question.**

24 To demonstrate that an injury is fairly traceable to a government action, a plaintiff must  
 25 show that the “government’s unlawful conduct is at least a substantial factor motivating the third  
 26 parties’ actions.” *Mendina v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014) (quotation omitted).  
 27 The particular efforts that San Jose has undertaken which constitute the basis of its injury are

28 <sup>19</sup> Census Coverage Memo at 1-2 (finding differential undercounts by race and Hispanic origin in the 2010 census).

1 those precisely suggested by Defendants to mitigate the potential undercounts likely to be caused  
2 by inclusion of the citizenship question in the Census. Further, the potential loss of funds by San  
3 Jose is directly related to the reasonably likely undercount, which is directly traceable to the  
4 inclusion of a citizenship question. “[W]hat matters is not the length of the chain of causation, but  
5 rather the plausibility of the links that comprise the chain.” *Mendina*, 768 F.3d at 1012–13  
6 (quotation and citation omitted); *Presidio Golf Club v. Nat’l Park Serv.*, 155 F.3d 1153, 1160 (9th  
7 Cir. 1998) (finding that harm to a golf club, in the form of losing membership, is “fairly  
8 traceable” to agency building a rival clubhouse that lured members away).

9 **3. San Jose’s Injury Will Be Redressed by Removing the Citizenship**  
10 **Question.**

11 “[T]o have standing, a federal plaintiff must show only that a favorable decision is *likely*  
12 to redress his injury, not that a favorable decision *will inevitably* redress his injury.” *Beno v.*  
13 *Shalala*, 30 F.3d 1057, 1065 (9th Cir. 1994). If there is no citizenship question, that portion of the  
14 undercount attributable to the citizenship question—and San Jose’s subsequent funding loss—  
15 will be eliminated as well. Because San Jose’s “injuries will not occur if the Plan is not  
16 implemented,” it has Article III standing. *City of Sausalito*, 386 F.3d at 1199.

17 **C. BAJI Has Standing.**

18 **1. BAJI Has Suffered and Will Suffer an Injury in Fact Due to a**  
19 **Diversion of Its Resources and the Frustration of Its Mission.**

20 BAJI has standing for similar reasons. An injury in fact is established where a nonprofit  
21 organization shows “a drain on its resources from both a diversion of its resources and frustration  
22 of its mission.” *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002); *Havens Realty*  
23 *Corp. v. Coleman*, 455 U.S. 363, 378 (1982). As set forth above, adding the citizenship question  
24 has forced and will continue to force BAJI to divert resources. Moreover, the question is  
25 reasonably likely to disproportionately impact immigrant-rich communities and therefore frustrate  
26 BAJI’s mission to foster racial, economic, and social equality for Black immigrants.

27 Harm caused by infringement on “noneconomic values” also provides BAJI standing  
28 through its members. *Ass’n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150,  
154 (1970). Several BAJI members expressed fear as to the confidentiality of their citizenship

1 status. A loss of privacy, like other “aesthetic, emotional or psychological harms also suffice for  
 2 standing purposes.” *Baker v. Castle & Cooke Homes Hawaii, Inc.*, No. CIV. 11-00616 SOM,  
 3 2012 WL 1454967, at \*4 (D. Haw. Apr. 25, 2012). Injury can stem from a loss of “reputational  
 4 and privacy interests that have long been protected in the law.” *Spokeo*, 867 F.3d at 1114.<sup>20</sup>

5 Here, Defendants’ stated purpose for adding the question is to provide the Bureau with  
 6 block-level data on residents’ citizenship status. But the Bureau publishes CVAP data, and census  
 7 blocks are so small (sometimes only a single household) that making such information public will  
 8 intrude on BAJI members’ privacy interests.<sup>21</sup>

9 **2. BAJI’s Injury Is Fairly Traceable to the Citizenship Question and Will**  
 10 **Be Redressed By Its Removal.**

11 Because it is the addition of the citizenship question that is frustrating BAJI’s mission and  
 12 leading to the diversion of its resources to mitigate harmful effects of the question and BAJI’s  
 13 members’ privacy concerns, the removal of the untimely question would directly resolve the  
 14 injury. BAJI’s injury is concrete, traceable to the citizenship question, and will be redressed  
 15 setting aside Defendants’ action. *See, e.g., Fair Hous. of Marin*, 285 F.3d 899.

16 **II. THE DECISION TO ADD THE CITIZENSHIP QUESTION WAS MADE IN**  
 17 **EXCESS OF STATUTORY JURISDICTION, AUTHORITY, OR LIMITATIONS.**

18 Courts must set aside agency actions that are made “in excess of statutory jurisdiction,  
 19 authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C). Defendants failed to  
 20 follow the “unambiguously expressed intent of Congress” when they added the citizenship  
 21 question to the Census, so their decision must be set aside. *Chevron, U.S.A., Inc. v. Nat. Res. Def.*  
 22 *Council, Inc.*, 467 U.S. 837, 843 (1984). When “a statute’s language carries a plain meaning, the  
 23 duty of an administrative agency is to follow its commands as written, not to supplant those  
 24 commands with others it may prefer.” *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018).

25 \_\_\_\_\_  
 26 <sup>20</sup> The burden of filling out the question on the form itself is at least as much of an imposition as receiving an  
 unwanted text message, and that alone confers standing on every one of BAJI’s members. *Van Patten*, 847 F.3d at  
 1043.

27 <sup>21</sup> Harm to the privacy interests of BAJI members provides them standing not only because of the psychological  
 28 damage it entails, but also because it is protected by law. The Census Act requires that no “officer or employee of the  
 Department of Commerce or bureau or agency thereof” may “make any publication whereby the data furnished by  
 any particular establishment or individual under this title can be identified.” 13 U.S.C. § 9(a)(2).

1           **A. The Secretary Is Required to Submit Census Topics Three Years in Advance**  
 2           **and May Not Modify Them Unless He Find “New Circumstances.”**

3           While the Census Act provides the Secretary of Commerce the right to conduct a census  
 4           “in such form and content as he may determine,” the *process* in which Ross must develop and set  
 5           forth that form and content is strictly regulated by federal law. That process is clear:

6           (f) With respect to each decennial and mid-decade census conducted under  
 7           subsection (a) or (d) of this section, the Secretary shall submit to the committees of  
 8           Congress having legislative jurisdiction over the census—

9           (1) not later than 3 years before the appropriate census date, a report  
 10           containing the Secretary’s determination of the subjects proposed to be included,  
 11           and the types of information to be compiled, in such census;

12           (2) not later than 2 years before the appropriate census date, a report  
 13           containing the Secretary’s determination of the questions proposed to be included  
 14           in such census; and

15           (3) after submission of a report under paragraph (1) or (2) of this  
 16           subsection and before the appropriate census date, if the Secretary finds new  
 17           circumstances exist which necessitate that the subjects, types of information, or  
 18           questions contained in reports so submitted be modified, a report containing the  
 19           Secretary’s determination of the subjects, types of information, or questions as  
 20           proposed to be modified.

21           13 U.S.C. § 141(f). For the Census, Ross was required to submit a report regarding the “subjects  
 22           proposed to be included, and the types of information to be compiled, in such census” by March  
 23           2017. Once that report was submitted, those “subjects” and “types of information” could be  
 24           modified only if Ross submitted to Congress a report in which he “finds *new circumstances exist*  
 25           which *necessitate*” that those subjects change. 13 U.S.C. § 141(f)(3) (emphasis added). Ross did  
 26           not follow this mandate.

27           **B. The Statute Is Unambiguous and this Court Need Not Apply Chevron**  
 28           **Deference.**

          “Where the statute speaks to the direct question at issue, we afford no deference to the  
 agency’s interpretation of it and ‘must give effect to the unambiguously expressed intent of  
 Congress.’” *North Carolina v. E.P.A.*, 531 F.3d 896, 906 (D.C. Cir.), *on reh’g in part*, 550 F.3d  
 1176 (D.C. Cir. 2008) *quoting Chevron U.S.A., Inc.*, 467 U.S. at 842–43. When evaluating a  
 statute, a court begins, as it does in any context, with the plain language of “the existing statutory  
 text.” *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). Courts may also apply “the canon against  
 reading conflicts into statutes” along with “other traditional canons” of construction to determine  
 whether a statute is ambiguous. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018). Where,

1 interpreted under these canons, “a statute’s language carries a plain meaning, the duty of an  
2 administrative agency is to follow its commands as written, not to supplant those commands with  
3 others it may prefer.” *SAS Inst., Inc.*, 138 S. Ct. at 1355. Although agency interpretations of  
4 ambiguous statutes are accorded deference, when a statute is unambiguous, or “the canons supply  
5 an answer, ‘*Chevron* leaves the stage.’” *Epic Sys. Corp.*, 138 S. Ct. at 1630 (quotation omitted).

6 The controlling statute in this case is not ambiguous. 13 U.S.C. § 141(f) states that the  
7 Secretary “shall” submit the required reports. “The word ‘shall’ generally imposes a  
8 nondiscretionary duty . . . .” *SAS Inst., Inc.*, 138 S. Ct. at 1351. The two reports are distinct and  
9 have separate contents: the first must set forth the “subjects” and “types of information” on the  
10 census, and the second must set for the “questions proposed to be included in such census.” 13  
11 U.S.C. §§ 141(f)(1), (2). The Secretary may “modify” those subjects, types of information, or  
12 questions only if he “finds new circumstances exist which necessitate” the change, and *submits*  
13 *another report* setting forth those new circumstances. 13 U.S.C. § 141(f)(3).

14 The statute plainly prohibits submitting a question that is not among the “topics”  
15 submitted the previous year without a finding of “new circumstances” for two reasons. First, if  
16 the topics included in Section 141(f)(1) impose no limitations on the questions, then Section  
17 141(f)(1) is entirely superfluous, as the Secretary could submit a report listing any number of  
18 topics, or none at all, and simply modify those topics when submitting questions a year later. Of  
19 the canons of construction, “one of the most basic” is that a “statute should be construed so that  
20 effect is given to all its provisions, so that no part will be inoperative or superfluous, void or  
21 insignificant.” *Corley v. United States*, 556 U.S. 303, 314 (2009) (quotations omitted). Second,  
22 adding a question that is not among the topics submitted the year before would by necessity add a  
23 topic (the topic of the new question) and therefore require a finding of “new circumstances.” 13  
24 U.S.C. § 141(f)(3). Finally, moving a topic from the ACS to the Census qualifies as  
25 “modify[ing]” the topic, and therefore requires the same finding as adding a topic. *Id.*

26 **C. Commerce Violated the Census Act.**

27 Defendants submitted their topics in March 2017 as required by law. (000194-270.) In  
28 March of 2018, after Ross issued the Decision Memo, Commerce submitted its “Questions

1 Planned for the 2020 Census and American Community Survey.”<sup>22</sup> While the report states that  
2 the “statistics” are “essential” for enforcing the Voting Rights Act, it fails to identify any “new  
3 circumstances” that support its addition, and certainly none that “necessitate” the change. In fact,  
4 neither Ross’s Decision Memo nor the DOJ Request even hint at any “new circumstances” that  
5 precipitated DOJ’s request.

6 While precedent on what constitutes “new circumstances” under the Census Act is scarce,  
7 courts have interpreted the phrase in other contexts. Certain environmental regulations require  
8 agencies to supplement reports when “new circumstances or information relevant to  
9 environmental concerns” arise. 40 C.F.R. § 1502.9(c)(1)(ii). The Ninth Circuit has held that this  
10 obligation “extends only to new information or circumstances regarding environmental impacts  
11 that may not have been appreciated or considered when the EIS was prepared,” and that agencies  
12 need not “consider new alternatives that come to light after issuance of the EIS.” *N. Idaho Cmty.*  
13 *Action Network v. U.S. Dep’t of Transp.*, 545 F.3d 1147, 1155 (9th Cir. 2008). No such “new  
14 circumstances” exist here. Ross violated the statute, and his decision must be overturned.

### 15 **III. THE DECISION TO ADD A CITIZENSHIP QUESTION MUST BE STRUCK** 16 **DOWN AS ARBITRARY AND CAPRICIOUS.**

17 The APA requires courts to set aside agency actions that are “arbitrary, capricious, an  
18 abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706 (2)(A); *see Motor*  
19 *Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (“*State Farm*”).  
20 Agency action is arbitrary and capricious when any of the following factors are met: “the agency  
21 has relied on factors which Congress has not intended it to consider, entirely failed to consider an  
22 important aspect of the problem, offered an explanation for its decision that runs counter to the  
23 evidence before the agency, or is so implausible that it could not be ascribed to a difference in  
24 view or the product of agency expertise.” *State Farm* at 43. While there is some deference in  
25 arbitrary and capricious review, “the agency must examine the relevant data and articulate a  
26 satisfactory explanation for its action including a rational connection between the facts found and

27 \_\_\_\_\_  
28 <sup>22</sup> Available at <https://www2.census.gov/library/publications/decennial/2020/operations/planned-questions-2020-acs.pdf>. Although Ross stated in the Decision Memo that the citizenship question would be placed last (001320), the Bureau’s submission lists it second.

1 the choice made.” *State Farm* at 43 (quotation and citation omitted). When the agency’s “new  
2 policy rests upon factual findings that contradict those which underlay its prior policy; or when its  
3 prior policy has engendered serious reliance interests that must be taken into account,” it must  
4 provide a “reasoned explanation” for the change. *FCC v. Fox Television Stations, Inc.*, 556 U.S.  
5 502, 515-516 (2009).

6 **A. Ross’s Explanation for the Decision Was Implausible and Pretextual.**

7 The administrative record shows that Ross’s stated reason for adding the question—that  
8 DOJ approached the Bureau asking for the question to better enforce the Voting Rights Act—is  
9 pretextual and implausible. Rather, this decision has always been about, at a minimum,  
10 apportionment.<sup>23</sup> In March 2017, just weeks after Ross took office, he and Comstock were  
11 exchanging emails about the citizenship question which expressly connected the issue to citizens  
12 being counted for congressional apportionment. (0002521.) By May 2, 2017, Ross’s “request that  
13 we include the citizenship question” was already “months[’s]old.” (0003710.) He had met with  
14 White House Chief Strategist Stephen Bannon and Election Integrity Commission Vice-Chair  
15 Kris Kobach, and had Earl Comstock, his chief policy officer research whether non-citizens are  
16 counted in apportionment. (0002521.) Kobach’s July 2017 email to Ross not only provided him  
17 with the exact language that would find its way into the citizenship question in the Census, but  
18 was sent “at the direction of Steve Bannon.” (000764.) Kobach specifically stated that the  
19 citizenship question could be used to exclude non-citizens from apportionment counts, noting that

20  
21 <sup>23</sup> A citizenship question in the Census has long been sought by those who wish to exclude non-citizens from  
22 congressional apportionment. Steven Camarota, the author of a number of papers recommending excluding non-  
23 citizens from apportionment, wrote that to do so, the citizenship question would “have to move to the short form in  
24 order to exclude non-citizens.” *The Impact of Non-Citizens on Congressional Apportionment*, *Center for Immigration*  
25 *Studies*, December 6, 2005 available at <https://cis.org/Impact-NonCitizens-Congressional-Apportionment>. When Dr.  
26 Camarota met with Ross, he explained that he no longer thinks the question would lower citizen participation, and  
27 that “concerns about decreased participation are unfounded.” (001206.) Then-United States Senator David Vitter  
28 introduced an amendment to an appropriations act in 2009 that would have required the Bureau to add a citizenship  
question to the short form of the 2010 Decennial Census. *See Vitter-Bennet Amendment No. 2644 to the Commerce,*  
*Justice Science and Related Agencies Appropriations Act of 2010*, available at  
<https://www.congress.gov/congressional-record/2009/10/13/senate-section/article/S10339-2..> At the time, Senator  
Vitter said on the floor of the Senate, “If you vote against this amendment, you are voting for your State having less  
representation in the House of Representatives than they would if illegals are not counted in reapportionment. *See*  
*Congressional Record*, October 7, 2009, SR10192, available at [https://www.congress.gov/crec/2009/10/07/CREC-](https://www.congress.gov/crec/2009/10/07/CREC-2009-10-07-pt1-PgS10181-2.pdf)  
[2009-10-07-pt1-PgS10181-2.pdf](https://www.congress.gov/crec/2009/10/07/CREC-2009-10-07-pt1-PgS10181-2.pdf). Judicial notice as relevant background is proper because courts “regularly take  
judicial notice of congressional records.” *Hadley v. Kellogg Sales Co.*, 243 F. Supp. 3d 1074, 1087 (N.D. Cal. 2017)).

1 without it, “aliens who do not actually ‘reside’ in the United States are still counted for  
2 congressional apportionment.” (*Id.*) Prior to the issuance of the DOJ Request in December 2017,  
3 there is no evidence in the record of any reason for adding the citizenship question other than  
4 removing non-citizens from apportionment counts.

5 Ross wanted the Bureau to add the citizenship question, but no agency had asked for it. So  
6 Comstock, with Ross’s express approval, set out on a scheme to engineer a request from another  
7 agency—any agency—by reaching out first to the White House and then DOJ. (0002462,  
8 0003701.) When DOJ initially refused to order the Bureau to add the citizenship question,  
9 Comstock sought help from DHS and was again rebuffed. (0012756.) Only after Ross followed  
10 through on a promise to “call the AG” was the DOJ Request issued. (001247, 0002652.)

11 Agency decisions may be set aside for improper political influence when “the pressure  
12 was intended to and did cause the [Agency’s] actions to be influenced by factors not relevant  
13 under the controlling statutes.” *Sokaogon Chippewa Cmty. (Mole Lake Band of Lake Superior*  
14 *Chippewa) v. Babbitt*, 961 F. Supp. 1276, 1286 (W.D. Wis. 1997). While the Census Act requires  
15 that the Bureau strive towards accuracy, Commerce in fact acted at the political direction of the  
16 executive branch and Ross, and took steps to conceal the fact that it was doing so. When an  
17 agency rationale is concocted for no reason except to “provide a pretext for the ulterior motive”  
18 of the decision-maker, that decision is arbitrary and capricious. *Woods Petroleum Corp. v. U.S.*  
19 *Dep’t of Interior*, 18 F.3d 854, 859 (10th Cir. 1994) (invalidating agency decision as arbitrary and  
20 capricious where action was pretext for ulterior motive).

21 Ross did not even hint that DOJ had not, in fact, initiated the request for the citizenship  
22 question when he testified before Congress on March 22, 2018 or anywhere in his decision  
23 memorandum of March 26, 2018. (001313-20). Only after this litigation was filed, did Ross  
24 supplement the administrative record and own up to the fact that the issue was first raised by  
25 “high government officials,” and not DOJ. (001321.) *See Home Box Office, Inc. v. F.C.C.*, 567  
26 F.2d 9, 54-55 (D.C. Cir. 1977) (“[W]here, as here, an agency justifies its actions by reference  
27 only to information in the public file while failing to disclose the substance of other relevant  
28 information that has been presented to it, a reviewing court cannot presume that the agency has

1 acted properly . . . but must treat the agency’s justifications as a fictional account of the actual  
2 decisionmaking process and must perforce find its actions arbitrary”) (per curiam).

3 The covert nature of Comstock’s scheme, Ross’s collusion with Bannon, Kobach, and  
4 Sessions, and the ensuing secrecy and contradictory statements demonstrate that “impartial  
5 evaluation of the project envisioned by the statute was impermissibly distorted by extraneous  
6 pressures.” *D.C. Fed’n of Civic Assoc’ns v. Volpe*, 459 F.2d 1231, 1237 (D.C. Cir. 1971)  
7 (Bazelon, J.) (overturning an agency decision because “[e]ven if the Secretary had taken every  
8 formal step required by every applicable statutory provision, reversal would be required, in my  
9 opinion, because extraneous pressure intruded into the calculus of considerations on which the  
10 Secretary’s decision was based”). Ross’s shifting and contradictory accounts of this process  
11 provide compelling evidence that the stated reason for the change was pretextual. Courts have  
12 struck down actions by agencies for acting “in bad faith and in response to political pressure” on  
13 more minor transgressions than those set forth here. *Tummino v. Torti*, 603 F. Supp. 2d 519, 548  
14 (E.D.N.Y. 2009), *amended sub nom. Tummino v. Hamburg*, No. 05-CV-366 ERK VVP, 2013  
15 WL 865851 (E.D.N.Y. Mar. 6, 2013) (negating FDA refusal to approve medication when director  
16 overruled agency scientific staff).

17 **B. Defendants Departed From Long-Standing Census Procedure, Then Altered**  
18 **the Bureau’s Description of Its Procedure Without Its Knowledge.**

19 “It is well settled that an agency, even one that enjoys broad discretion, must adhere to  
20 voluntarily adopted, binding policies that limit its discretion.” *Padula v. Webster*, 822 F.2d 97,  
21 100 (D.C. Cir. 1987) (citation omitted)). Here, not only did Ross fail to follow the Bureau’s well-  
22 established process for changing census content, Commerce altered the description of the process  
23 in the record.

24 **1. The Evidence Shows that Ross Deviated from Pre-Testing Protocols.**

25 Ross departed from the ordinary review process that the Bureau and Commerce use to add  
26 new questions. The Bureau’s Statistical Quality Standards require pre-testing before adding  
27 questions to the Census, and even on those “rare occasions” where “cost or schedule constraints  
28 may make it infeasible to perform complete pretesting” it still requires a detailed procedure

1 including obtaining a formal waiver before any content may be added to a survey.<sup>24</sup> The  
 2 Statistical Quality Standards specifically state that “All Census Bureau employees and Special  
 3 Sworn Status individuals *must* comply with these standards.”<sup>25</sup> The failure of an agency to  
 4 comply with its own regulations and policies constitutes arbitrary and capricious conduct. *De*  
 5 *Loss v. Dep’t of Hous. & Urban Dev.*, 714 F. Supp. 1522, 1534 (S.D. Iowa 1988).

6 Moreover, when in this matter, Commerce asked the Bureau about its process for adding  
 7 questions, the Bureau provided a summary to Commerce of the above-described “well-  
 8 established process.” Sometime after this document was received by Commerce on March 1, this  
 9 section had been deleted and replaced. (001296.) The removal of the Bureau’s description of its  
 10 testing process presents one of two possibilities, both of which evince arbitrariness. Either  
 11 Commerce removed the Bureau’s opinion before it was presented to Ross, in which case  
 12 Commerce “so distort[ed] the record that an agency decisionmaking body can no longer rely on  
 13 [it] in meeting its obligations under the law.” *Nat’l Small Shipments Traffic Conference, Inc. v.*  
 14 *I.C.C.*, 725 F.2d 1442, 1450–51 (D.C. Cir. 1984) (holding that inaccurate staff-prepared  
 15 summaries of adverse comments required that the decision-maker be independently informed of  
 16 the comments themselves). Or Ross reviewed the statement from the Bureau and ignored it, and  
 17 then it was altered in the record, resulting in a “revisionist” administrative review that is not  
 18 entitled to deference. *Brooklyn Heights Ass’n v. Nat’l Park Serv.*, 818 F. Supp. 2d 564, 569  
 19 (E.D.N.Y. 2011) (vacating agency decision that relied on a decision that ignored its “own  
 20 regulations as well as its . . . manual”). Concealing evidence that undermines an agency decision  
 21 is the kind of “administrative misconduct not covered by the other more specific paragraphs” that  
 22 renders a decision arbitrary and capricious. *Assoc. of Data Processing Serv. Orgs., Inc. v. Bd. of*  
 23 *Governors of Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984) (Scalia, J.).

24 **2. The Evidence Shows that Adding the Question Without Testing Will**  
 25 **Have Unpredictable Adverse Consequences.**

26 Ross wrote in his Decision Memo that the citizenship question “has been well tested”  
 27 because a question regarding citizenship “had been asked in some form or another for nearly 200

28 <sup>24</sup> Statistical Quality Standards, U.S. Census Bureau, July 2013, Standard A2, Subrequirement A2-3, p. 8.

<sup>25</sup> *Id.* p. ii (emphasis added).

1 years.” (001318.) Not only is this statement false,<sup>26</sup> but Ross failed to consider that the context  
 2 and form of such questions—to say nothing of the fact that the early censuses were conducted  
 3 entirely in-person—determine whether the specific question he approved needs to be tested in  
 4 2018. In 1820, for example, the question was simply a checkbox on a column, reading “ALIENS  
 5 – foreigners not naturalized” and was to be asked of “White Persons” only.<sup>27</sup> In 1870,  
 6 enumerators counted whether a respondent was “a male citizen of the United States of 21 years or  
 7 upwards whose right to vote is denied or abridged on grounds other than ‘rebellion or other  
 8 crime,’” hardly a citizenship count of the entire population.<sup>28</sup> And the question has not appeared  
 9 on any census asked of the entire population since 1950.<sup>29</sup>

10 Ross was given extensive evidence that testing questions is context-dependent. Six former  
 11 Bureau chiefs emphasized that a “great deal of evidence that even small changes in survey  
 12 question order, wording, and instructions can have significant, and often unexpected,  
 13 consequences for the rate, quality, and truthfulness of response.” (001058.) In the ACS, the  
 14 citizenship question follows the question, “Where was this person born,” which contextualizes the  
 15 request for citizenship.<sup>30</sup> Defendants cannot point to any context in which the citizenship question  
 16 has ever been asked in the form that they now propose. By stating that prior tests of different  
 17 questions on a similar topic were sufficient, despite concerns from those who know best, Ross  
 18 “ignore[d] critical context” and “cherry-pick[ed] evidence.” *Water Quality Ins. Syndicate v.*  
 19 *United States*, 225 F. Supp. 3d 41, 69 (D.D.C. 2016). “In light of the serious reliance interests at  
 20 stake, the Department’s conclusory statements do not suffice to explain its decision.” *Encino*  
 21 *Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016).

22 \_\_\_\_\_  
 23 <sup>26</sup> Aside from a question in 1870 counting freed slaves denied the right to vote, no citizenship question was asked  
 24 between 1820 and 1890, and none was asked in 1960. *See History, 2000 Census of Population and Housing*, U.S.  
 25 Census Bureau, December 2009 p. 131, available at <https://www.census.gov/history/pdf/Census2000v1.pdf> .

26 <sup>27</sup> *See Historical Census Records*, available at <https://www.census.gov/history/pdf/1830-2-042018.pdf>.

27 <sup>28</sup> *See Historical Census Records*, available at  
 28 [https://www.census.gov/history/www/through\\_the\\_decades/index\\_of\\_questions/1870\\_1.html](https://www.census.gov/history/www/through_the_decades/index_of_questions/1870_1.html). The question was used  
 to enforce the Fourteenth Amendment, which reduced apportionment counts for denying voting rights to “any of the  
 male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way  
 abridged, except for participation in rebellion, or other crime.” U.S. Const. Am. XIV.

<sup>29</sup> *See History, 2000 Census of Population and Housing*, U.S. Census Bureau, December 2009 p. 131, available at  
<https://www.census.gov/history/pdf/Census2000v1.pdf>.

<sup>30</sup> *See American Community Survey*, available at <https://www2.census.gov/programs-surveys/acs/methodology/questionnaires/2017/quest17.pdf>.

1           **C.     Ross’s Explanation Runs Counter to the Evidence Before the Agency.**

2           The Ninth Circuit has emphasized that “a policy change violates the APA if the agency  
3 ignores or countermands its earlier factual findings without reasoned explanation for doing so”  
4 *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (quotation and  
5 citation omitted). Ross “offered an explanation for its decision that runs counter to the evidence  
6 before the agency” and must be set aside. *State Farm* at 43.

7                           **1.     The Evidence Shows that Adding the Question Will Decrease Response  
8 Rates and Increase Burdens.**

9           Ross wrote that Commerce’s review found only “limited empirical evidence exists about  
10 whether adding a citizenship question would decrease response rates materially.” (001317.) In  
11 fact, such evidence was overwhelming and unrebutted. In its January 19 memo, the Bureau  
12 concluded that households with at least one non-citizen failed to respond to a survey containing  
13 the citizenship question at higher rates. Ross discounted this conclusion but did not rebut the  
14 Bureau’s finding that the only difference between groups that responded less frequently was “the  
15 presence of at least one noncitizen in noncitizen households.” (001281.) The Bureau also found  
16 that the breakoff rate (the rate at which a respondent stops completing the survey) was *nine times*  
17 *higher* for Hispanics than for non-Hispanic Whites specifically at the citizenship question. (*Id.*)  
18 Ross did not address the findings on the breakoff rate in his Decision Memo and “failed to  
19 explain how the other sources it relied on provide substantial evidence.” *Genuine Parts Co. v.*  
20 *Env’tl. Prot. Agency*, 890 F.3d 304, 315 (D.C. Cir. 2018).

21           Moreover, Ross acknowledged that the Bureau found there would be an “increased  
22 burden” on those who answered the question but wrote that there would be no “additional  
23 imposition” unless the respondent is a non-citizen. (001317.) But the Bureau made clear that the  
24 burden, or imposition, would be borne by *everyone* who answers the question. The Bureau wrote  
25 that “[s]urvey methodologists consider burden to include both the direct time costs of responding  
26 and the indirect costs arising from nonresponse due to perceived sensitivity of the topic.”  
27 (001281.) When an agency relies on an inaccurate definition of a key term for its decision, that  
28 decision must be set aside. *See Am. Motorcycle Ass’n Dist. 37 v. Norton*, Nos. C 03-03807 SI, C

1 03-02509 SI, 2004 WL 1753366 at \*11 (N.D. Cal. Aug. 3, 2004) (setting aside an agency  
2 decision based on a flawed definition of “adverse modification”). Ross ignored the burden that  
3 will be imposed upon *all* respondents by adding the question.

4 **2. Ross Ignored the Impact of Inaccurate Responses and the Value of**  
5 **Administrative Records.**

6 In its January 19 Memo, the Bureau found that direct citizenship questions provide  
7 “substantially less accurate citizenship status data than are available from administrative sources.”  
8 (001277.) This was one of the reasons that the Bureau recommended increasing accuracy by  
9 linking responses to “an accurate, edited citizenship variable from administrative records to the  
10 final 2020 Census microdata files.” (001283.) In its analysis of Option D (adding the question and  
11 using administrative records), the Bureau emphasized that these concerns would remain—the  
12 option would “still have all the negative cost and quality implications” of adding the question and  
13 “result in poorer quality data” than using administrative records alone. (001312.)

14 Considering Option C (using administrative records), Ross noted that the Bureau would  
15 have to correct for inaccurate responses, noting the Bureau’s finding that, when asked a  
16 citizenship question, a significant number of non-citizens “inaccurately mark ‘citizen’” (001316.)  
17 His analysis of Option D omits this finding, noting only that asking the citizenship question  
18 “gives each respondent the opportunity to provide an answer.” (001317.) And while he  
19 discounted administrative records when considering Option C, writing that the “Bureau is still  
20 evolving its use of administrative records” he wrote that the Bureau could “further enhance its  
21 administrative record data sets,” when using those records under Option D. (001316-17.)

22 In short, Ross dismissed administrative records and highlighted self-response error when  
23 evaluating Option C, but praised administrative records and dismissed self-response error when  
24 evaluating Option D. (001316-17.) Also, Ross wrote that “The citizenship data provided to DOJ  
25 will be more accurate with the question than without it.” (001319.) Not only did Ross cite no  
26 evidence for this conclusion (none exists), he simply “ignore[d] evidence contradicting [his]  
27 position,” rendering the decision arbitrary and capricious.” *Butte Cty., Cal. v. Hogen*, 613 F.3d  
28 190, 194 (D.C. Cir. 2010); *see also Michigan v. E.P.A.*, 135 S. Ct. 2699, 2707 (2015) (holding

1 that an EPA regulation that entirely ignores costs is arbitrary and capricious).

2 **3. Ross’s Decision Relied on a Flawed and Incredible DOJ Request that**  
 3 **Was Itself Contrary to the Record Evidence.**

4 The only evidence that Ross mustered in support of the citizenship question was the DOJ  
 5 Request. The essential credibility of DOJ’s request is completely belied not only by the fact that  
 6 DOJ had only months earlier stated it did not need any different data from the Census, but also  
 7 from the tooth-pulling by Ross to get DOJ to ask the question. Beyond that, it fails to distinguish  
 8 between the information it supposedly seeks—CVAP data for census blocks (00664)<sup>31</sup>—and the  
 9 means of obtaining that information. It asks that a specific method—putting the citizenship  
 10 question on the Census—for obtaining the data but “provides no analysis or factual data to  
 11 support this concern” over other means of doing so. *State v. Bureau of Land Mgmt.*, 286 F. Supp.  
 12 3d 1054, 1065 (N.D. Cal. 2018).

13 And while the DOJ Request does not provide any technical or scientific analysis to  
 14 support its need for a citizenship *question* to obtain citizenship *data*, the Bureau scientists found a  
 15 better means of obtaining these data. (001277-85.) Nevertheless, Ross simply implemented DOJ’s  
 16 recommendation. “While the action agency is not required ‘to undertake an independent analysis’  
 17 of another agency’s conclusions, it may not ‘blindly adopt [those] conclusions.’” *Ergon-W.*  
 18 *Virginia, Inc. v. United States Env’tl. Prot. Agency*, 896 F.3d 600, 610 (4th Cir. 2018) quoting *City*  
 19 *of Tacoma, Washington v. F.E.R.C.*, 460 F.3d 53, 76 (D.C. Cir. 2006).

20 **IV. RELIEF SOUGHT.**

21 Ordinarily, after striking down an agency action, courts “should remand a case to an  
 22 agency for decision.” *I.N.S. v. Orlando Ventura*, 537 U.S. 12, 16 (2002). But remand is not  
 23 required when there is “no conceivable circumstance” in which remand could produce a different  
 24 outcome. *Mulry v. Driver*, 366 F.2d 544, 550 (9th Cir. 1966). If, for example, this Court finds that  
 25 the Secretary’s decision violated the law because the topic of citizenship was not timely  
 26 submitted to Congress, it is not possible that a remand could produce a different outcome.

27 Even if the administrative determination is overturned on grounds of arbitrariness and

28 <sup>31</sup> Plaintiffs do not concede the accuracy of this statement and reserve their right to introduce evidence to refute it at trial or in opposition to Defendants’ summary judgment motion if appropriate.



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Respectfully submitted,

Dated: November 2, 2018

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**FILER’S ATTESTATION**

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

Dated: November 2, 2018

s/ Ana G. Guardado  
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