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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

CITY OF SAN JOSE, *et al.*,

Plaintiffs,

v.

WILBUR L. ROSS, JR. in his official capacity as Secretary of Commerce, *et al.*,

Defendants.

Civil Action No. 3:18-cv-02279-RS

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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

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INTRODUCTION

Plaintiffs oppose Defendants' motion for summary judgment mainly by mischaracterizing the government's standing arguments and asking the Court to ignore the actual merits claims before it in favor of de novo review of the Secretary's policy judgment. As to standing, Plaintiffs suggest that their burden is much lower than it actually is (or, conversely, that the government is suggesting it is much higher), but cannot meet their burden to establish the substantial risk of injury necessary to proceed at this late stage of the litigation. Plaintiffs cannot refute the Census Bureau's well-considered position that non-response follow-up operations will address any undercount such that the Bureau will conduct a complete enumeration, instead complaining that the Bureau did not look into the issue further. But it is Plaintiffs' burden, not the Census Bureau's, to demonstrate an injury fairly traceable to a putative differential undercount, and Plaintiffs are left only with wildly speculative confidentiality concerns and their own experts' incomplete analysis of the potential for a differential undercount. At the summary judgment stage, such thin gruel is not sufficient to substantiate standing.

On the merits, Plaintiffs' contentions that the enumeration clause will be violated by a differential undercount fails for the same reasons that Plaintiffs cannot establish standing; setting aside that Plaintiffs are wrong on what the Constitution requires, they simply have not met their burden to show a differential undercount will occur given the Bureau's preparations to conduct a complete enumeration. Plaintiffs similarly fail to explain why Defendants are not entitled to summary judgment on claims under the Administrative Procedure Act (APA), 5 U.S.C. § 706. In arguing that the Secretary's decision was arbitrary and capricious, Plaintiffs offer up a narrative full of bureaucratic intrigue, but fall short in substantiating these serious charges of misconduct. Instead, Plaintiffs resort to characterizing benign intragovernmental consultation as malfeasance without any tangible evidence. By the same token, Plaintiffs' claims of statutory violations rely mainly on rhetoric rather than any actual legal requirement imposed by Congress. Regardless, Plaintiffs do not even purport to show a dispute of material fact for trial; this claim should be resolved by the Court as a question of law based on the record. Defendants' motion for summary judgment should be granted.

ARGUMENT

I. Plaintiffs Have Not Demonstrated Standing to Proceed with This Action.

Plaintiffs rebut at length the Defendants' non-existent position that Plaintiffs must establish literal certainly of harm. As Defendants stated in their opposition to Plaintiffs' motion for partial summary judgment, Plaintiffs must show a "substantial risk" of injury. Defs.' Opp'n at 5-7, ECF No. 104. This requirement underpins all of Plaintiffs' theories for standing—they cannot prevail absent such a substantial risk of an injury, even if they have spent money to ward off an ephemeral risk, or if their members are unusually concerned about an insubstantial possibility. Nor, of course, have Plaintiffs identified a single person who does not plan to respond to the 2020 census because of the inclusion of the citizenship question, but who would reverse course if the question were removed.

Plaintiffs claim that they will be injured in three ways—by expenditures on the census, by the effects of an undercount, and by a threatened loss of confidentiality of responses, Pls.' Opp'n at 3-4, ECF No. 103, yet have not presented a substantial risk of any of these.

A. Plaintiffs' Expenditures Are Insufficient to Establish Standing.

First, Plaintiffs refer to the funds spent by San Jose and BAJI to prepare for the census. As further explained in Defendants' opposition, these funds only establish standing if the risk that they address is substantial. Defs.' Opp'n at 4-5. As discussed *infra*, the risk of harm from an undercount is not sufficient to satisfy standing requirements. And, as further described in Defendants' opposition, neither Plaintiff identifies with specificity outlays that are *traceable to the citizenship question*, rather than to the outreach they would perform about any decennial census—such as outreach in fact paid for by San Jose prior to the 2010 census. Defs.' Opp'n at 8-9. That Plaintiffs previously did outreach for the 2010 census permits the inference that they generally find such outreach worthwhile, regardless of whether a citizenship question is present. But the reverse is not true. If Plaintiffs show that they plan to spend more *money* in preparation for the 2020 decennial census, that does not resolve the question of traceability—there could be many reasons for the change, such as increased awareness of the importance of the census. It is *Plaintiffs'* burden to demonstrate that they

have or will spend money traceable to the reinstatement of the citizenship question, and further that these funds are *redressable*—that if Secretary Ross removed the citizenship question tomorrow they would actually spend less money, even despite the San Jose residents and BAJI members who apparently fear sharing data with the "Trump administration" in light of the "Muslim ban" and other policies.

B. Plaintiffs Cannot Show a Substantial Risk of an Undercount or Resulting Harm.

Defendants have previously explained that Plaintiffs fail to show that an undercount will occur, or that it would injure them if it did. Defs.' Opp'n at 5-8. Plaintiffs now attempt to rely on the Census Bureau's evaluations of past censuses, and its conclusions that hard-to-count populations are hard to count, while simultaneously rejecting the conclusions of Dr. John Abowd, chief scientist of the Census Bureau, that the Bureau is aware of the difficulties in counting such populations, well-funded to proceed in 2020, and *will* successfully enumerate everyone. This is an illogical position.

Plaintiffs also attempt to criticize Dr. Abowd's testimony that "credible quantitative evidence that the addition of the citizenship question would increase the net undercount or increase differential net undercounts for identifiable sub-populations" is lacking, Pls.' Opp'n at 6—on the grounds that the Census Bureau devoted insufficient resources to looking for such evidence. This reverses the proper burden. *Plaintiffs* must establish that they have standing, which in this case requires them to put forth such credible evidence of a substantial risk of a net or differential undercount and does not allow them to rely instead on a perceived lack of effort by an opposing party. Plaintiffs also claim that they have established a substantial risk of an undercount based on Dr. Abowd's statement that the reinstatement of a citizenship question "could drive the net undercounts way up or they could drive them way down." Pls.' Opp'n at 6. Dr. Abowd is simply stating that, in the absence of credible evidence, many possibilities are open but there are no certainties. Plaintiffs must do more than show that an undercount is possible in the sense that it is *possible* undersigned counsel will win a gold medal at the 2020 Olympics; they must show that an undercount—and resulting harm to their budgets or apportionment—is at a substantial risk of occurring.

C. Plaintiffs' Alleged Injuries from Fear of Loss of Confidentiality Are Rank Speculation.

Plaintiffs also claim standing based on BAJI members' sense of "fear and intimidation" based on concerns that their census responses will not be kept confidential. As with Plaintiffs' fears of loss of funding, Plaintiffs must demonstrate a substantial risk that BAJI members' confidentiality or privacy is actually in danger—speculative worry does not satisfy Article III. *Clapper v. Amnesty Int'l, USA*, 133 S. Ct. 1138, 1151 (2013). Plaintiffs do not dispute that, by law, census responses must be kept confidential. *See, e.g.*, 13 U.S.C. § 9. Plaintiffs cannot point to a single piece of evidence indicating that the Census Bureau will alter its longstanding and deeply held commitment to preserving the confidentiality of census responses, or make any other change that would lead to the disclosure of census responses. Plaintiffs' only attempt at making such a showing is based on unfounded speculation that DOJ will change its position, set forth in a 2010 memoranda, that census data remain confidential in light of the PATRIOT Act. Pls.' Opp'n at 7. Plaintiffs cite an email sent *to* Acting Assistant Attorney General (AAG) John Gore concerning draft responses to questions from Congress. Pls.' Opp'n at 7-8. The email advised AAG Gore that it was better not to issue too broad of a response "in case the issues addressed in the OLC opinion or related issues come up later for renewed debate." Pls.' Opp'n at 8 (quoting Case Decl., Ex. B at 3). This anodyne piece of public relations advice—where possible, avoid taking a position—is completely unremarkable, and, at most, indicates that the author of the email thought it was theoretically possible that DOJ's position could one day be debated (as, indeed, is true for virtually every DOJ position). Plaintiffs offer no evidence that AAG Gore, or any decisionmaker in DOJ, shared that view—or that the *Census Bureau*, or indeed, Congress, would reverse the well-established policies that protect respondents' confidentiality.

Indeed, at his deposition, AAG Gore was asked about this specific email. He testified that "to the extent [Plaintiffs' counsel is] suggesting that [the author of the email] said anything about what this administration would do, that's flatly inconsistent with the actual words on the page." Gore Tr. 309:18-21, Federighi Decl., Ex. A. He further testified that he was *not* aware of any ongoing deliberations about whether to revisit the position in DOJ's memo. Gore Tr. 311:8-17. Although

Plaintiffs have presumably identified what they felt was the most concerning sentence in the 120,000 pages of DOJ documents that they received, they completely fail to present *any* evidence of a risk to the confidentiality of census responses, much less a substantial risk, and therefore lack standing on that ground.

D. No Genuine Issues of Material Fact Concerning Standing.

Plaintiffs also claim that, failing everything else, a genuine issue of material fact exists as to their standing. Pls.' Opp'n at 8-9. Plaintiffs appear to confuse *uncertainty* with a dispute of material fact. The mere fact that Dr. Abowd testified that he expected a complete enumeration in the 2020 census, but that it was within the realm of possibility than an undercount could occur, does not create a disputed fact. Rather it creates a somewhat uncertain fact, and it certainly does not establish a substantial risk of an undercount. Plaintiffs' contention to the contrary that any dispute over "whether an undercount 'will' happen itself shows that there is no dispute that there is a 'substantial risk' that it will happen," Pls.' Opp'n at 8 n.8, verges on nonsense.

Plaintiffs once again cherry-pick the Census Bureau's analysis, accepting the agency's calculations of *past* undercounts and attempting to parlay those into predictions about the *future*, despite the contrary opinion of Dr. Abowd. Indeed, there is no reason to assume that the Census Bureau's performance in 2020 will be the same as in 2010, given that it has spent the past ten years improving its systems as a result of lessons learned in 2010.

Finally, Plaintiffs seek to rely on the expert declarations of Drs. Barreto and O'Muircheartaigh.[1] Dr. Barreto conducted a survey to attempt to gauge the impact of the citizenship question on response rates to the 2020 census. Barreto Decl. ¶¶ 62-78, Pls.' Opp'n, Ex. 1, ECF No. 103-3. This survey, however, failed to sufficiently address the ultimate enumeration, after households are encouraged to respond; NRFU, including review of administrative records and proxies; and imputation. Although at the end of the survey Dr. Barreto asked respondents in the same survey if additional contact would change their mind, Barreto Decl. ¶ 81, but this ignores the effects of

[1] Defendants address these arguments here, rather than with the Enumeration Clause arguments, as Plaintiffs' standing to proceed is jurisdictional.

administrative records proxy data, and imputation; and is an unsatisfactory measure of response to in-person contact with an enumerator because "asking someone about their intention to do something and actually measuring what they do in a field experiment is very different." Abowd Tr. 1162:13 – 1163:3, Federighi Decl., Ex. B. As to the Census Bureau's extensive efforts to enumerate those who do not initially respond, both Drs. Barreto and O'Muircheartaigh make highly general statements, essentially conveying that hard-to-count populations are, in fact, hard to count, but neither predicts with specificity what NRFU success-rate they would therefore expect for the households that Dr. Barreto believes will choose not to self-respond due to a citizenship question.

Crucially, even if the Court were to assume that Dr. Barreto's estimated undercount is correct, Plaintiffs identify no admissible evidence indicating that they will actually be harmed (for example, evidence that residents of San Jose or BAJI members will lose congressional representation). To the contrary, Defendants' expert, Dr. Gurrea, began his analysis with the estimated undercounts generated from Dr. Barreto's survey (however unsubstantiated), and assuming historical success rates for NRFU, Dr. Gurrea concluded that "congressional apportionment in any state (including California) does not change due to reinstatement of a citizenship question." Gurrea Decl. ¶¶ 11, 14, 66-70, Defs.' MSJ, Ex. B, ECF No. 100-2. Using a similar method, Dr. Gurrea concluded that any effects on funding from Dr. Barreto's predicted undercount would likely be very small. Gurrea Decl. ¶ 11. Although Plaintiffs apparently disagree, their failure to come forward with reliable evidence, as opposed to mere supposition, falls short of establishing a genuine dispute of material fact relating to their injuries from the reinstatement of a citizenship question.

II. Summary Judgment Is Appropriate For Defendants on Plaintiffs' Enumeration Clause Claim.

As this Court explained at the motion-to-dismiss phase, the Enumeration Clause issue presented "a close question" and "[w]hether plaintiffs can ultimately sustain this showing on the merits remains to be seen." Order Denying MTDs at 28-29, ECF No. 86. At summary judgment, Plaintiffs must accordingly meet a higher burden, which they have failed to do.

As this Court has noted, "demographic questions have long been a part of the enumeration

process since its inception" and Plaintiffs are therefore, necessarily "not taking the position that every single past census that included a citizenship question was constitutionally defective." *Id.* at 26-27. Instead, Plaintiffs must show, using admissible evidence, that the citizenship question "is so uniquely impactful on the process of *counting* itself, that it becomes akin to a mechanics-of-counting-type challenge." *Id.* at 28 (emphasis added). For the same reasons that Plaintiffs cannot show a substantial likelihood of an undercount or of any harm, as discussed *supra* at Part I.B, Plaintiffs have not shown a genuine dispute of material fact regarding the likelihood of a total failure of enumeration sufficient to violate the Enumeration Clause.

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

The Secretary's decision was not arbitrary and capricious because he set out to understand the costs and benefits of reinstating a citizenship question before making his decision and explained his reasoning based on the record before him. In opposing Defendants' motion for summary judgment on Plaintiffs' arbitrary-and-capricious claim, Plaintiffs argue that Defendants' motion should be denied as "boilerplate statements regarding the deference to agency decision-making in ordinary APA cases." Pls.' Opp'n at 11. But Plaintiffs' disregard for the fundamental standards that undergird judicial review of agency action is no basis to deny Defendants' motion. Plaintiffs contend that Defendants acted egregiously and unlawfully and thus reason that *their* case "is no ordinary APA case," such that the ordinary rules of deference should not apply. *See id.* Yet every plaintiff in an APA case believes the government has acted unlawfully, often egregiously, and Plaintiffs' particular objections to the action under review in this case do not entitle them to *de novo* review of the Secretary's judgment. Plaintiffs cannot contest that the only question before the Court in an arbitrary-and-capricious claim is whether the agency's decision "was the product of reasoned decisionmaking." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* ("*State Farm*"), 463 U.S. 29, 52 (1983). And Plaintiffs' arguments on this point fail.

Importantly, Plaintiffs nowhere claim that there are disputes of material fact as to the arbitrary-and-capricious claim that require judicial fact finding after trial. Plaintiffs assert in conclusory fashion that "the evidence precludes summary adjudication of the APA claim in

Defendants' favor," Pls.' Opp'n at 12, and to that end, Plaintiffs suggest that the Court must consider extra-record evidence in denying Defendants' motion. (It should not, as explained *infra*.) But Plaintiffs nowhere explain why this claim ought to go to trial. That should come as no surprise, as APA claims are decided on the record before the agency, 5 U.S.C. § 706, and the very notion of judicial fact finding in an APA case—much less a *trial*—is a significant departure. *See, e.g.*, *Herguan Univ. v. ICE*, 258 F. Supp. 3d 1050, 1063 (N.D. Cal. 2017) ("[W]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal." (quoting *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009))). Proceeding to trial on this arbitrary-and-capricious claim would be unusual in the extreme,[2] and this Court should resolve the APA claims at summary judgment.

A. Plaintiffs Fail to Establish that the Court Should Rely on Extra-Record Discovery to Address Plaintiffs' APA Claim.

At the outset, Plaintiffs ask this Court to set aside the basic principles of administrative-record review that form the bedrock of any APA claim and instead engage in a plenary evaluation of all extra-record materials obtained through discovery. Despite moving for partial summary judgment based on the administrative record, Plaintiffs' opposition to Defendants' motion is rooted mainly in materials obtained through extra-record discovery. Plaintiffs are too impatient to air their grievances about a policy decision they oppose to pause and consider the Supreme Court's exhortation that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (*per curiam*); *see also, e.g. Fla. Light & Power Co v. Lorion*, 470 U.S. 729, 743 (1985).

Instead, Plaintiffs' argument seems to be that because the Court authorized limited extra-record discovery, the Court also must ignore limits on APA review and interrogate the substance of the Secretary's policy decision. But this Court has not so held. In authorizing extra-record discovery, the Court did not resolve the question of what materials would be subject to the Court's review in

[2] Although the New York challenges to the reinstatement of a citizenship question proceeded to trial, Defendants respectfully submit that those cases could and should have been resolved on cross-motions for summary judgment.

resolving the APA claim, nor did the Court suggest that this discovery order invited *de novo* review of the Secretary's judgment. Setting aside whether the Court's order authorizing extra-record discovery was correct in the first place, a question on which the Supreme Court has granted Defendants' petition for a writ of certiorari in the related New York challenges to the Secretary's decision, a bad-faith finding in authorizing discovery does not overcome the clear rule that this Court "cannot substitute its judgment for that of the agency." *Ctr. for Bio. Diversity v. Zinke*, 868 F.3d 1054, 1057 (9th Cir. 2017).

The Ninth Circuit has made this point clear. In *Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005), the court emphasized that in "limited circumstances, district courts are permitted to admit extra-record evidence" for four enumerated purposes, including a showing of bad faith, but "[t]he scope of these exceptions permitted by [Ninth Circuit] precedent is constrained, so that the exception does not undermine the general rule." *Id.* at 1029-30 (quoting *Sw. Ctr. for Bio. Diversity v. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996)). Indeed, "[w]ere the federal courts routinely or liberally to admit new evidence when reviewing agency decisions, it would be obvious that the federal courts would be proceeding, in effect, de novo rather than with the proper deference to agency processes, expertise, and decision-making." *Id.* Thus, "[t]hese limited exceptions operate to *identify and plug holes* in the administrative record." *Id.* (emphasis added). And these "exceptions to the normal rule regarding consideration of extra-record materials 'only appl[y] to information available at the time, not post-decisional information.'" *Tri-Valley CAREs v. Dep't of Energy*, 671 F.3d 1113, 1130-31 (9th Cir. 2012). Thus, the Court should consider contemporaneous extra-record materials obtained through discovery only as necessary to plug any holes in the administrative record.

B. The Secretary's Decision Was Neither Pretextual Nor Unreasonable.

Plaintiffs argue the Secretary's decisionmaking process was both unreasonable and pretextual but fail to substantiate their claims, even when relying on extra-record discovery. Pls.' Opp'n at 13-19. In making this argument, Plaintiffs seem to agree, as they must, that courts uphold an agency's decision "when the agency's explanation is clear enough that its 'path may reasonably be discerned.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (quoting *Bowman Transp., Inc. v. Ark-*

Best Freight Sys, Inc., 419 U.S. 281, 286 (1974)). But instead of grappling with the standard, Plaintiffs drape allegations of misconduct over the decisionmaking process in an effort to persuade the Court to set aside the Secretary's decision in an area where he has virtually unlimited discretion. In so doing, Plaintiffs ignore that courts are obliged to "presum[e] the agency action to be valid and affirm[] the agency action if a reasonable basis exists for its decision." *Pacific Dawn LLC v. Pritzker*, 831 F.3d 1166, 1173 (9th Cir. 2016). Absent evidence of the misconduct they seek to conjure, describing normal agency processes as "secret[] demand[s]" and "back-door justification[s]" is insufficient basis to set aside agency action. Pls.' Opp'n at 13-14.

1. The Secretary came into office prepared to consider various census issues and appropriately consulted with DOJ.

Plaintiffs begin by arguing that the Secretary's consideration of whether to reinstate a citizenship question prior to receipt of the DOJ letter renders any subsequent analysis arbitrary and capricious. Pls.' Opp'n at 14-15. This argument focuses on two points: that the Secretary considered the issue early on his tenure at the Commerce Department and that one of the Secretary's advisors communicated with the Justice Department to inquire whether it would be interested in the inclusion of a question. *See id.* Separately, Plaintiffs also object to the involvement of the Attorney General in a decision of importance to his Department—the request to include a citizenship question on the census. *Id.* at 16. None of these points is evidence of arbitrary or capricious decisionmaking.

As an initial matter, the fact that the Secretary considered the issue before DOJ sent its request is unremarkable. Soon after the Secretary was confirmed, he "began considering various fundamental issues" regarding the 2020 Census, "including funding and content," as well as schedule, contracting issues, systems readiness, and the upcoming 2018 End-to-End Test. AR 1321; *see also* AR 317-322, 1416-1470. These issues examined by the Secretary early in his tenure "included whether to reinstate a citizenship question," which he and his staff "thought . . . could be warranted." AR 1321. The Secretary questioned why a citizenship question was not on the census questionnaire and sought other general background "factual information." AR 2521-2522, 12465, 12541-12543; *see also* AR 3699. As Justice Gorsuch has explained, "there's nothing unusual about a new cabinet secretary coming to

office inclined to favor a different policy direction," *In re Dep't of Commerce*, __ S. Ct. __, 2018 WL 5259090, at *1 (Oct. 22, 2018) (opinion of Gorsuch, J.), and the Secretary's exploration of those issues with his staff prior to contacting other agencies to determine whether they might support the question shows preparation, not misconduct. Plaintiffs' expectations for the policymaking process do not seem to be rooted in the actual reality of governance.

Plaintiffs also make the unsupported assertion that the Secretary and other government officials sought to reinstate a citizenship question on the decennial census "so that non-citizens could be excluded from congressional apportionment." Pls.' Opp'n at 14. But the evidence Plaintiffs cite does not substantiate their claim. First, Plaintiffs argue that policy advisor Earl Comstock "wrote Ross emails regarding how non-citizens are treated for apportionment," citing two emails in the administrative record. Pls.' Opp'n at 14. The first is an email from Comstock to a Justice Department official explaining that Comstock was the contact for Commerce issues; there is no mention of the census, much less apportionment. AR 2462. The second document is an email from Comstock to the Secretary that simply addresses the question whether undocumented aliens are counted for apportionment purposes, referencing standard Census Bureau materials. AR 2521. Neither email contains evidence of an intent to reinstate the question to affect apportionment.

Plaintiffs also point to an email from advisor David Langdon explaining that undocumented aliens have long been counted. AR 12465. And Plaintiffs point out that counsel at the Commerce Department were analyzing questions related to how questions of citizenship are related to apportionment, including the unremarkable conclusion that the Commerce Department has no authority over deciding how any data about the population, including citizenship data, is used for apportionment—only conducting the actual enumeration. Pls.' Opp'n at 15. These emails illustrate that a new Commerce Secretary endeavored to educate himself about how the Census Bureau conducts an actual enumeration and what the reinstatement of a citizenship question might entail. The information Plaintiffs cite reinforces the conclusion that the Secretary and his advisors simply sought to understand these issues; after extensive discovery, Plaintiffs adduced no evidence to support the claim that the Secretary sought to include a citizenship question on the decennial census

to affect apportionment. Plaintiffs somehow leap from these innocuous emails to allegations of misconduct, but the Court should reject Plaintiffs' insinuations as a cynical effort to characterize their insubstantial evidence.

Next, Plaintiffs cite contacts with White House official Steve Bannon and Kansas Secretary of State Kris Kobach. Pls.' Opp'n at 14-15. Plaintiffs ask the Court to impute these officials' putative motives to the Secretary based only on the fact of their communications. Suffice it to say that policymakers can (and should) speak with stakeholders with a wide variety of opinions, and it would be nonsensical to impute all of those opinions to the agency decisionmaker simply because he or she heard them. And here, Plaintiffs would have the Court jump to this conclusion on little more than Plaintiffs' suggestion that it must be so. To the contrary, as Defendants have noted elsewhere, the Secretary rejected Mr. Kobach's proposed question, which focused on legal status, AR 763-764, and adopted the question used in the American Community Survey (ACS).

Lastly, Plaintiffs suggest that the DOJ letter should be disregarded as a sham because Commerce Department officials were in contact with DOJ to discuss the issues before DOJ sent its letter and because the Attorney General was involved in DOJ's decisionmaking. Pls.' Opp'n at 15-16. Notably, Plaintiffs rely exclusively on characterizations of deposition testimony rather than any evidence in the actual administrative record, but regardless, the back-and-forth between the agencies prior to DOJ's decision to send the letter evidences an effort on the part of the Commerce Department to be sure that a citizenship question would actually yield data helpful to the government. As the Secretary explained, the Commerce Department sought only to understand "whether the Department of Justice (DOJ) would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act." AR 1321. After all, DOJ previously had requested that the ACS include a citizenship question for the purposes of carrying out its enforcement responsibilities under the Voting Rights Act. AR 278-283, 9203-9216.

The fact that the Commerce Department and DOJ continued those discussions with respect to including a citizenship question on the decennial census, including through conversations between the Secretary and the Attorney General, should be unsurprising. Plaintiffs find it alarming that the

Attorney General would be involved in an issue involving the questions to be included on the decennial census. *See* Pls.' Opp'n at 16. But surely, that officials at the highest levels of both the Commerce Department and DOJ sought to be fully informed and involved in this decision is evidence of a fulsome consideration. Plaintiffs cite a "remarkable role played by political appointees" but never pause to explain why it is problematic for the leadership of a government agency to be immersed in decisionmaking. *See id.* Plaintiffs' fixation on this point belies their actual purpose in making this argument; they disagree with the Secretary and the former Attorney General and thus consider their discussions on this issue to be illegal. In Plaintiffs' view, it seems, political appointees should not have a role in decisionmaking on significant issues. The Court should reject an argument that yields the curious suggestion that high-level agency officials should not consult before issuing formal requests of each other, particularly on an issue as significant as the decennial census.

2. The Secretary reasonably accepted the rationale set forth in the Justice Department's letter for requesting a citizenship question.

Plaintiffs also argue that the DOJ letter must be pretextual, and that the Secretary acted arbitrarily and capriciously in relying on it, because they disagree with DOJ's request for block-level citizenship data. Pls.' Opp'n at 16-17. As an initial matter, the Secretary reasonably relied on DOJ's letter explaining their request for inclusion of a citizenship question on the census to aid in DOJ's efforts to enforce the VRA. As explained in Defendants' opposition to Plaintiffs' motion for summary judgement at 27-29, DOJ's process in issuing the Gary Letter is not under review in this lawsuit, and Plaintiffs cannot rely on putative flaws in DOJ's reasoning in the Gary Letter to impeach Commerce's decisionmaking process. For present purposes, "the critical question is whether the action agency's *reliance* was arbitrary and capricious." *City of Tacoma v. FERC*, 460 F.3d 53, 75 (D.C. Cir. 2006). And here, Plaintiffs have not shown that the Secretary was unreasonable in choosing not to second-guess DOJ about what would be helpful to DOJ's efforts to enforce the VRA.

Plaintiffs instead continue in their effort to refute DOJ's (non-existent) position concerning the *necessity* of a citizenship question on the census. DOJ's position has never been that CVAP data from the decennial census (rather than the ACS or another source) is "necessary" to enforce Section

2 of the Voting Rights Act. Instead, as the Gary Letter stated, in order to enforce Section 2 of the VRA, DOJ "needs a reliable calculation of the citizen voting-age population" and that that data was "critical." AR 663. In order to obtain this data, the Gary Letter stated that "the decennial census questionnaire is the most appropriate vehicle." AR 663. Remarkably, Plaintiffs read something sinister into AAG Gore's mere confirmation of what the Gary Letter says. Gore Tr. 299:8-14 ("Q. Okay. So is it correct, as this comment notes, that the December 12 letter requesting a citizenship question be added to the census did not say that it was necessary to collect CVAP data through the census questionnaire for VRA enforcement? A. That is correct."). Plaintiffs also misstate AAG Gore's testimony when they claim that he "testified that DOJ had never declined to bring a VRA claim because it relied on statistical estimates." Pls.' Opp'n at 16. In fact, AAG Gore testified to the opposite—that he was not aware of a case when a plaintiff *other than DOJ* had declined to bring a case for such a reason. Gore Tr. 204:3-15.

Plaintiffs also rely on the expert opinions of Dr. Lisa Handley and Professor Pamela Karlan to illustrate their view that DOJ's stated reasons for seeking citizenship data were pretextual. But these opinions are far afield of any evidence properly subject to review in an APA claim. Indeed, Plaintiffs introduce this evidence in a transparent effort to contradict the judgment of both DOJ and the Secretary—inviting this Court to substitute its own judgment for the Secretary's—rather than any proper purpose tethered to an exception to administrative-record review. Even where extra-record evidence may be admitted, "reviewing courts may not look to this evidence as a basis for questioning the agency's scientific analyses or conclusions." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014). Indeed, the Ninth Circuit has emphasized that a district court which might otherwise *properly* admit evidence "may not *use* the admitted extra-record evidence 'to determine the correctness or wisdom of the agency's decision.'" *Id.* (quoting *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980)). "Such use is never permitted," as it "overstep[s] the bounds of [these exceptions] by opening the administrative record as a forum for the experts to debate the merits." *Id.* Yet that is precisely what Plaintiffs seek to do with the expert opinions of Dr. Handley and Professor Karlan—open up the record as a forum for experts to debate the merits of the Gary Letter.

3. The Secretary was not required to share every facet of his consultation process when discussing the issues with relevant stakeholders.

Lastly, Plaintiffs briefly suggest that the Secretary acted unlawfully by "hid[ing] the fact" that the Commerce Department was "behind the DOJ Request." Pls.' Opp'n at 18. Here, Plaintiffs again seek to characterize the conduct of government officials as nefarious and furtive, part of a vast web of deception, when the evidence is amenable to a simpler explanation. In fact, all that Plaintiffs have pointed out is that agency officials considered the question whether to reinstate a citizenship question, inquired "whether the Department of Justice (DOJ) would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act," AR 1321, and *then* proceeded with an appropriate examination of the DOJ request upon its receipt. And this information was publicly disclosed by Defendants as part of the administrative record. AR 1321. Moreover, Plaintiffs mischaracterize public statements about the agency's process that focused on the analysis of the DOJ request and did not, reasonably enough, purport to recount a total history of every discussion of a citizenship question at the Commerce Department. *See* Pls.' Opp'n at 18-19. And to the extent Plaintiffs seem to suggest that the Commerce Department misled the Census Bureau, there is no suggestion in any of the cited testimony that the Census Bureau was not aware of all of the facts necessary to conduct its analysis, nor is there anything improper about the Secretary declining to disclose the entire history of his conversations at every step of the consultation process with every member of the Department's staff. *See id.* Plaintiffs see a conspiracy , but all the record shows is a back-and-forth consultative process.

C. The Secretary Adequately Considered the Issue of Testing.

Lastly, Plaintiffs argue that the Secretary unlawfully departed from past practice by "[e]liminating the testing protocol" for new questions. Pls.' Opp'n at 19-24. This argument is rooted in misunderstandings both of the Secretary's analysis and of the Census Bureau's view as to whether the reinstatement of a citizenship question necessitated further testing before inclusion in the decennial census. The Secretary's analysis was based on the record before him, and the Census Bureau explained to the Secretary that, "[s]ince the question is already asked on the American

Community Survey, [it] would accept the cognitive research and questionnaire testing from the ACS instead of independently retesting the citizenship question." AR 1279. The Bureau further explained that "the citizenship question has already undergone the cognitive research and questionnaire testing required for new questions." AR 1319. In any event, "no new questions ha[d] been added to the Decennial Census (for nearly 20 years)" and the Bureau accordingly "did not fee[l] bound by past precedent." AR 1296. Plaintiffs do not explain why that should not be enough for the Secretary; he inquired with the relevant officials, who made clear to the Secretary that the proposed citizenship question had been adequately tested through its regular inclusion in the ACS. AR 1279, 1319.

Plaintiffs nowhere demonstrate that the Secretary's decisionmaking process was arbitrary and capricious under these circumstances. Plaintiffs point out that previous questions relating to citizenship were in different contexts or had different wording. Pls.' Opp'n at 20-21. But "[p]retesting is not required for questions that performed adequately in another survey." U.S. Census Bureau, Statistical Quality Standards at 8 (July 2013), https://www.census.gov/content/dam/Census/about/about-the-bureau/policies_and_notices/quality/statistical-quality-standards/Quality_Standards.pdf. And in any event, here Plaintiffs simply seek to substitute their judgment for that of the Census Bureau, on which the Secretary reasonably relied (and on which Plaintiffs rely in making other arguments). By the same token, Plaintiffs' arguments about testing protocols and procedure are rooted in expert opinions from a former Census Bureau official who believes additional testing was required. But again, the Court "may not look to this evidence as a basis for questioning the agency's scientific analyses or conclusions." *San Luis & Delta-Mendota Water Auth.*, 776 F.3d at 993. Plaintiffs' efforts to second-guess the agency's decisionmaking process in hindsight, by relying on other experts' views or other *post hoc* considerations, simply is not permissible under the APA, as it "inevitably leads the reviewing court to substitute its judgment for that of the agency." *Ctr. for Bio. Diversity v. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006). The Court's review is limited to determining whether the agency articulated a rational explanation for its decision based on the facts before it, and here the Secretary did so.

Plaintiffs make one last point. They take issue with the editing of a Census Bureau document responding to questions from the Secretary, which included a question about the process for adding new questions to the census. AR 1296, 13023. Plaintiffs do not suggest this response was inaccurate such that the Secretary did not have before him the appropriate information, and senior Census Bureau officials signed off on the position as articulated. AR 13023. Plaintiffs place significant importance on the final version of the document, which states:

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

AR 1296. Yet Plaintiffs point to nothing in this statement that is inaccurate, for all their efforts to do so through depositions of government officials. The Secretary relied on accurate information provided to him, ultimately from the Census Bureau, and regardless of what Plaintiffs' experts would have done in the same situation, the APA does not contemplate plaintiffs eliciting testimony from shadow officials to substitute their judgment for that of the officials who actually hold those positions.

IV. The Secretary's Decision Was Not in Excess of Statutory Jurisdiction or Otherwise Unlawful.

Contrary to Plaintiffs' assertion, and as set forth in Defendants' opposition at 16-17, Secretary Ross did act in accordance with 13 U.S.C. § 141(f)(3) in reporting the topics and questions for the 2020 decennial census to Congress. In addition, and as set forth in Defendants' opposition at 14-15, Secretary Ross's compliance with the congressional reporting requirements of § 141(f) is not subject to judicial review because there is no final agency action and any injury is unredressable. Finally, if a problem did exist, the Secretary could submit a specifically-labelled § 141(f)(3) report at any time prior to the 2020 decennial census.

Plaintiffs conflate the question of whether the Secretary's decision to reinstate a citizenship question is subject to judicial review with the question of whether the Secretary complied with a congressional reporting requirement. Although Defendants respectfully disagree with this Court's resolution of their motion to dismiss, they now defend the Secretary's decision on the merits, *see infra* Part III. The requirement that Secretary Ross report to Congress the topics and subjects, however, does not constitute a final agency action and is not redressable.

Plaintiffs first claim that the purported failure to report to Congress renders the Secretary's decision to reinstate a citizenship question unlawful. Pls.' Opp'n at 28-29. Plaintiffs offer no evidence that § 141(f) is a substantive limit on the Secretary's power. To the contrary, the best interpretation is that § 141(f) is a ministerial requirement in light of the broad authority that Congress has delegated to the Secretary to set the form of the decennial census. *See Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996) (holding that Congress "has delegated its broad authority over the census to the Secretary" (citing 13 U.S.C. § 141(a))). There is no reason that Congress would need to put in place an additional substantive limitation, as it is perfectly capable of intervening, if, based on the Secretary's reports, it finds it appropriate to do so.

Second, Plaintiffs suggest that "The Reports Themselves May Be Challenged as Final Agency Action." Pls.' Opp'n at 29. Their complaint, however, does not actually raise a challenge to the reports, nor have they sought leave to amend their complaint. *See* Compl. ¶¶ 7-8 (defining the Secretary's action as the March 26, 2018 decision memo, not the report to Congress). Furthermore, the authority offered by Plaintiffs is unavailing and inapposite because it does not contain examples of judicial review of reports to Congress. In *Natural Resources Defense Council v. National Highway Traffic Safety Admin.*, 894 F.3d 95 (2d Cir. 2018), the court found that the agency had acted *ultra vires*—not because of a congressional reporting requirement—but because it enacted a rule which vitiated the effect of a congressional statute. *See also Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) (striking down an agency's attempt to issue a rule because Congress had only authorized the agency to submit a report to Congress); *Tutein v. Daley*, 43 F. Supp. 2d 113, 114 (D. Mass. 1999) (discussing a substantive report to Congress pursuant to 16 U.S.C. § 1854, which triggered a

requirement for the creation of a fishery management plan within one year based on the report, and not reaching claims about the report in the opinion cited by Plaintiffs, because of ripeness concerns), *Am. Fed'n of Gov't Employees, AFL-CIO, Local 3669 v. Shinseki*, 821 F. Supp. 2d 337 (D.D.C. 2011), *aff'd*, 709 F.3d 29 (D.C. Cir. 2013) (analyzing a decision paper with no relationship to any congressional report); *Doe v. Tenenbaum*, 127 F. Supp. 3d 426, 433 (D. Md. 2012) (addressing public safety reports, not reports to Congress); *Farrell v. Tillerson*, 315 F. Supp. 3d 47, 59 (D.D.C. 2018) (analyzing agency's refusal to issue Certificate of Loss of Nationality, not report to Congress); *Reed v. Salazar*, 744 F. Supp. 2d 98, 116 (D.D.C. 2010) (dealing with lack of NEPA report, not report to Congress). Therefore, as discussed in Defendants' opposition and for the reasons set forth by the Ninth Circuit in *Guerrero v. Clinton*, 157 F.3d 1190, 1195 (9th Cir. 1998), review of the Secretary's compliance with a congressional reporting requirement—either directly or indirectly through his decision—is inappropriate.

CONCLUSION

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

Date: November 26, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of November, 2018, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing.

/s/ Carol Federighi

CAROL FEDERIGHI