United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: September 10, 2018
Docket #: 18-2652
Short Title: In re: United States Departmen

DC Docket #: 18-cv-2921
DC Court: SDNY (NEW YORK CITY)
DC Judge: Furman

DOCKETING NOTICE

A Petition for Writ of Mandamus filed the United States Department of Commerce, Wilbur Ross, the United States Census Bureau and Ron Jarmin has been docketed in the above referenced case under 18-2652. This number must appear on all documents related to this case that are filed in this Court. For pro se parties the docket sheet with the caption page, and an Acknowledgment and Notice of Appearance Form are enclosed. In counseled cases the docket sheet is available on PACER. Counsel must access the Acknowledgment and Notice of Appearance Form from this Court's website http://www.ca2.uscourts.gov.

The form must be completed and returned within 14 days of the date of this notice. The form requires the following information:

YOUR CORRECT CONTACT INFORMATION: Review the party information on the docket sheet and note any incorrect information in writing on the Acknowledgment and Notice of Appearance Form.

The Court will contact one counsel per party or group of collectively represented parties when serving notice or issuing our order. Counsel must designate on the Acknowledgment and Notice of Appearance a lead attorney to accept all notices from this Court who, in turn will, be responsible for notifying any associated counsel.

CHANGE IN CONTACT INFORMATION: An attorney or pro se party who does not immediately notify the Court when contact information changes will not receive notices, documents and orders filed in the case.

An attorney and any pro se party who is permitted to file documents electronically in CM/ECF must notify the Court of a change to the user's mailing address, business address, telephone

number, or e-mail. To update contact information, a Filing User must access PACER's Manage My Appellate Filer Account, https://www.pacer.gov/psco/cgi-bin/cmecf/ea-login.pl. The Court's records will be updated within 1 business day of a user entering the change in PACER.

A pro se party who is not permitted to file documents electronically must notify the Court of a change in mailing address or telephone number by filing a letter with the Clerk of Court.

CAPTION: The caption in a Petition for a Writ of Mandamus of Writ or Prohibition is *In re [EDIT], Petitioner*. It shall not bear the name of the district court judge. *(Local Rule 21(a))*.

DESIGNATIONS OF RESPONDENTS: All parties below other than the petitioner shall be deemed respondents for all purposes. *(FRAP21(b))*.

NO ANSWER: Unless the Court directs otherwise no answer to a petition for writ of mandamus or prohibition will be accepted. *(FRAP21(b))*.

Inquiries regarding this case may be directed to 212-857-8528.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 18-XXXX

Caption [use short title]

In re United States Department of Commerce

Motion for: Emergency Motion for Immediate Administrative Stay Pending Resolution of the Government's Petition For Writ of Mandamus

Set forth below precise, complete statement of relief sought:

We ask this Court to stay the district court's order compelling the depostion testimony of John Gore, the Acting Assistant Attorney General for the Department of Justice's Civil Rights Division, which is currently scheduled to take place on September 12, 2018, until this Court resolves the government's petition for writ of mandamus.

MOVING PARTY: United States, et al. (petitioners for writ of mandamus) **OPPOSING PARTY:** State of New York, et al.

☐ Plaintiff ☐ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Mark B. Stern **OPPOSING ATTORNEY:** Elena S. Goldstein

[name of attorney, with firm, address, phone number and e-mail]

U.S. Department of Justice
950 Pennsylvania Ave. NW, Washington, DC 20530
(202) 514-5089; Mark.Stern@usdoj.gov

Office of the NY State Attorney General
28 Liberty St, 20th Floor, New York, NY 10005
(212) 416-6201; elena.goldstein@ag.ny.gov

Court- Judge/ Agency appealed from: S.D.N.Y Honorable Jesse M. Furman, Nos. 18-CV-2921 & 18-CV-5025 (JMF)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☑ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☑ No

Requested return date and explanation of emergency: 5pm EST Tuesday, September 11, 2018. The deposition of Acting Assistant Attorney General Gore is scheduled to take place on September 12. A stay of the deposition is necessary so that this Court may consider the government's petition for writ of mandamus, which seeks to quash the deposition and halt further discovery in these cases.

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

/s Mark B. Stern **Date:** Sept. 7, 2018 Service by: ☐ CM/ECF ☑ Other [Attach proof of service]

No. 18-

Case Nos. 18-CV-2921 (JMF) (S.D.N.Y)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In Re UNITED STATES DEPARTMENT OF COMMERCE, WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce, BUREAU OF THE CENSUS, and RON S. JARMIN, in his capacity as the Director of the U.S. Census Bureau,
Petitioners.

PETITION FOR A WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
AND EMERGENCY MOTION FOR STAY
PENDING CONSIDERATION OF THIS PETITION

JOSEPH H. HUNT
Assistant Attorney General

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

MARK B. STERN
GERARD SINZDAK
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-0718

INTRODUCTION AND SUMMARY

Pursuant to the All Writs Act, 28 U.S.C. § 1651, and Rule 21 of the Federal Rules of Appellate Procedure, the federal government respectfully asks this Court to issue a writ of mandamus directing the halt of discovery the district court has authorized in these cases challenging the decision of Secretary of Commerce Wilbur Ross to ask a citizenship question on the decennial census, or at a minimum to quash the deposition the district court has ordered of the Acting Assistant Attorney General for the Department of Justice's Civil Rights Division, John Gore. Because plaintiffs have noticed a deposition of Acting Assistant Attorney General Gore for September 12, 2018, we also ask this Court to issue an immediate administrative stay of the order compelling the deposition, as a stay pending this Court's consideration of this important mandamus petition is necessary to preclude a significant breach of inter-branch comity. The district court denied the government's motion for a stay on September 7, 2018.[1]

Even setting aside that the Secretary of Commerce's eminently reasonable decision merely to ask a question about citizenship status on the decennial census should not be subject to judicial review under the Administrative Procedure Act (APA)—given the discretion vested in the Secretary by the Census Act and the

[1] The government attempted to file this petition on September 5 but was informed by the Clerk's office on September 7 that it needed to be refiled under two separate docket numbers and with service to the district court judge.

absence of any statutory standards that would guide judicial review—the Supreme Court and this Court have stressed that review should focus on "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); *National Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997). If "the record before the agency does not support the agency action . . . or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course . . . is to remand to the agency for additional investigation or explanation." *State of New York Dep't of Soc. Servs. v. Shalala*, 21 F.3d 485, 493 (2d Cir. 1994) (omissions in original) (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

The district court has not heeded this guidance. The government has filed an administrative record containing approximately 1,300 pages and a supplemental production containing over 11,000 pages. The district court has not attempted to ascertain whether that record supports the agency's action, and instead it has authorized wide-ranging discovery. Although the government strenuously objected to this course, it has provided another approximately 10,000 pages in discovery in the last two months and even has submitted to the depositions of senior Census Bureau and Department of Commerce officials.

The district court has now expanded that discovery to compel the deposition of the Acting Assistant Attorney General of the Department of Justice's Civil Rights Division. Judicial orders compelling the testimony of high-ranking government

officials are justified only under "exceptional circumstances," *Lederman v. New York City Dep't of Parks and Rec.*, 731 F.3d 199, 203 (2013), and no such circumstances exist here.

As a threshold matter, the district court's theory for permitting any discovery at all rests on its mistaken invocation of a narrow exception to the general rules precluding discovery in reviewing agency action. That exception applies where "there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decisionmakers." *National Audubon Soc'y*, 132 F.3d at 14. As discussed below, the court committed clear legal error in concluding that plaintiffs had met this demanding standard. The court stressed that there is evidence suggesting that the Secretary wanted to reinstate a citizenship question before he asked the Department of Justice whether inclusion of a citizenship question would provide data that enhances enforcement of the Voting Rights Act, and relied on its affirmative response in reinstating a citizenship question. Assuming this conclusion is correct, it is not improper or even uncommon for an agency head to favor a particular outcome prior to full consideration and final decision on an issue, or to discuss with other government officials possible legal and factual justifications for that preferred course of action. There is no bad faith where the decisionmaker ultimately believes the rationale on which he chooses to rest the agency action, whether or not the decisionmaker was inclined to pursue that course in the first instance for additional reasons.

Perhaps just as importantly, even accepting the flawed premise of the order permitting any discovery, the district court further erred in compelling the deposition of the head of a major Division of the Department of Justice. Acting Assistant Attorney General Gore was not the decisionmaker for the challenged action, and the district court did not and could not find that he or anyone else in the Department of Justice acted in bad faith in the course of the Department's submission of its views concerning whether the addition of a citizenship question to the decennial census would be useful to enforcement of the Voting Rights Act. There can be no basis for interrogating him about the Department's position, which is set forth in a reasoned letter included in the materials that are part of the administrative record. As courts have frequently recognized, exercise of their mandamus authority is proper to preclude depositions of high-ranking officials such as Acting Assistant Attorney General Gore.

Indeed, as far as the government is aware, it would be unprecedented for a Department of Justice officer of Acting Assistant Attorney General Gore's rank to be compelled to sit for a deposition in litigation challenging another agency's action or, in fact, in any context other than employment-related litigation. This Court should not allow this case to become the first such intrusion into the Department of Justice, and

it at least should stay the deposition while it gives this mandamus petition the careful consideration it is due.[2]

STATEMENT

A. Background

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

[2] The government has asked the district court to stay Acting Assistant Attorney General Gore's deposition while this mandamus petition is pending. The district court has not yet ruled on the government's motion.

2. As the district court explained in greater detail below, with the exception of 1840, censuses from 1820 to 1880 asked for citizenship or birthplace in some form, and decennial censuses from 1890 through 1950 specifically requested citizenship information. Opinion And Order, No. 18-cv-2921 (JMF) (S.D.N.Y. July 26, 2018) (Add. 100-69), Add. 107-09.

Citizenship-related questions continued to be asked of some respondents after the 1950 Census. In 1960, the Census Bureau asked 25% of the population for the birthplace of the respondent and his or her parents, although naturalization status was not requested. Add. 109-10. Between 1970 and 2000, the Census Bureau distributed a detailed questionnaire, known as the "long-form questionnaire," to a sample of the population. Add. 110-11. The long-form questionnaire included questions about the respondent's citizenship or birthplace. *Id.* The "short-form questionnaire," sent to the majority of households, did not ask for birthplace or citizenship status in those years. *Id.*

Beginning in 2005, the Census Bureau began collecting the more extensive long-form data—including citizenship data—through the American Community Survey ("ACS"), which is sent yearly to about one in 38 households. Add. 110-111. The replacement of the long-form questionnaire with the yearly ACS enabled the 2010 census to be a "short-form-only" census. The 2020 census will also be a "short-form-only" census. The ACS will continue to be distributed each year, as usual, to collect additional data, and will continue to include a citizenship question.

Because the ACS collects information from only a sample of the population, it produces annual estimates only for census tracts and census block groups. The decennial census attempts a full count of the population and produces population counts as well as counts of other, limited information (such as race) down to the smallest level, known as the "census block."[3] As in past years, the 2020 census questionnaire will pose a number of questions beyond the total number of individuals residing at a location, including questions regarding sex, Hispanic origin, race, and relationship status.

B. The Reinstatement of a Citizenship Question in the 2020 Census

On March 26, 2018, the Secretary of Commerce issued a memorandum reinstating a citizenship question on the 2020 Census questionnaire. Memorandum to Karen Dunn Kelley, Under Secretary for Economic Affairs, from the Sec'y of Commerce on Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire (Mar. 26, 2018) ("Ross Memo") (Add. 170-77). The Secretary's reasoning is set out in that memorandum and in a supplemental memorandum issued on June 21, 2018. *See* Add. 170-177, 178. The Secretary explained that, "[s]oon after [his] appointment," he "began considering various fundamental issues" regarding the 2020 Census, including whether to reinstate a citizenship question. Add. 178. As part of the Secretary's deliberative process, he and his staff "consulted with Federal

[3] *See* https://www.census.gov/geo/reference/webatlas/blocks.html.

governmental components and 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 the enforcement of the Voting Rights Act." *Id.*

In a December 17, 2017, letter, the Department of Justice responded that citizenship data is important to the Department's enforcement of Section 2 of the Voting Rights Act and that the decennial census questionnaire would provide census-block-level citizenship voting age population ("CVAP") data that are not currently available from the ACS surveys (which provide data only at the larger census block group level). Letter from Arthur Gary, General Counsel, Department of Justice, to Ron Jarmin, performing the nonexclusive duties of the Director, U.S. Census Bureau, (Dec. 12, 2017) ("Gary Letter") (Add. 179-81). Accordingly, the Department of Justice explained that having citizenship data at the census block level will permit more effective enforcement of the Act. *Id.*

After receiving the Department of Justice's letter, the Secretary asked the Census Bureau to evaluate the best means of providing the data identified in the letter, and the Census Bureau initially presented three alternatives. Add. 171-73. After reviewing those alternatives, the Secretary asked the Census Bureau to consider a fourth option as well. Add. 173. Ultimately, the Secretary concluded that this fourth option, under which a citizenship question would be reinstated on the decennial census, would provide the Department of Justice with the most complete and accurate CVAP data. Add. 174.

The Secretary also observed that, as detailed above, collection of citizenship data in the decennial census has a long history and that the ACS has included a citizenship question since 2005. Add. 171. The Secretary therefore found that "the citizenship question has been well tested." *Id.* He also confirmed with the Census Bureau that census-block-level citizenship data are not available using the annual ACS. *Id.*

The Secretary considered but rejected concerns that reinstating a citizenship question on the decennial census would negatively impact the response rate for noncitizens. Add. 172-75. While the Secretary agreed that a "significantly lower response rate by non-citizens could reduce the accuracy of the decennial census and increase costs for non-response follow up operations," he concluded that "neither the Census Bureau nor the concerned stakeholders could document that the response rate would in fact decline materially" as a result of reinstatement of a citizenship question. Add. 172. Based on his discussions with outside parties, Census Bureau leadership and others within the Department of Commerce, the Secretary determined that, to the best of everyone's knowledge, limited empirical data exists on how reinstatement of a citizenship question might impact response rates on the 2020 census. Add. 172, 174. The Secretary also emphasized that "[c]ompleting and returning decennial census questionnaires is required by Federal law," thus concerns regarding a reduction in response rates were premised on speculation that some will "violat[e] [a] legal duty to respond." Add. 176. Thus, "while there is widespread belief among many parties that

adding a citizenship question could reduce response rates, the Census Bureau's analysis did not provide definitive, empirical support for that belief." Add. 173; *see also* Add. 174-75. The Secretary further explained that the Census Bureau intends to take steps to conduct respondent and stakeholder-group outreach in an effort to mitigate the impact on response rates, if any, of including a citizenship question. Add. 175. In light of these considerations, the Secretary concluded that "even if there is some impact on responses, the value of more complete and accurate [citizenship] data derived from surveying the entire population outweighs such concerns." Add. 176.

C. Procedural Background

1. The plaintiffs in these two cases are governmental entities (including states, cities, and counties) as well as several non-profit organizations.[4] They claim that the Secretary's action violates the Enumeration Clause of the Constitution, various statutes and regulatory requirements; is arbitrary and capricious under the Administrative Procedure Act; and denies equal protection by discriminating against racial minorities. All of their claims rest on the speculative premise that reinstating a citizenship question will reduce the response rate to the census because,

[4] Challenges to the Secretary's decision have also been brought in district courts in Maryland and the Northern District of California. *See Kravitz v. U.S. Department of Commerce*, No. 18-cv-1041-GJH (D. Md.) (filed April 11, 2018); *La Union del Pueblo Entero v. Ross*, No. 18-cv-1570 (D. Md.) (filed May 31, 2018); *California v. Ross*, No. 18-cv-1865 (N.D. Cal.) (filed March 26, 2018); *City of San Jose v. Ross*, No. 18-cv-2279 (N.D. Cal.) (filed April 17, 2018).

notwithstanding the legal duty to answer the census, 13 U.S.C. § 221, some members of households containing aliens without lawful status may be deterred from doing so (and those individuals will be disproportionately minorities).

2. Plaintiffs announced their intention to seek discovery even before the administrative record had been filed. At a pre-trial conference held on May 9, 2018, plaintiffs asserted that "an exploration of the decision-makers' mental state" was necessary and that extra-record discovery on that issue, including deposition discovery, was thus justified, "prefatory to" the government's production of the administrative record. Transcript, Dkt. No. 150 (S.D.N.Y. May 18, 2018), No. 18-cv-2921 (JMF), at 9-10.

At a hearing on July 3, 2018, the district court granted plaintiffs' request for extra-record discovery over the government's strong objections. Add. 80-92. The court concluded that plaintiffs had made a sufficiently strong showing of bad faith or improper behavior to warrant extra-record discovery. Add. 85. The court offered four reasons to support this determination. First, the court stated that the Secretary's supplemental memorandum "could be read to suggest" that the Secretary "had already decided to add the citizenship question before he reached out to the Department of Justice; that is, that the decision preceded the stated rationale." *Id.* Second, the court noted that the record submitted by the Department "reveals that Secretary Ross overruled senior Census Bureau staff," who recommended against adding a question. Add. 85-86. Third, plaintiffs had alleged that the Secretary used an abbreviated

decisionmaking process in deciding to add a citizenship question, as compared to other instances in which questions had been added to the census. Add. 86. And fourth, the court found that plaintiffs had made "a prima facie showing" that the Secretary's stated justification for reinstating a citizenship question—that it would aid the Department of Justice in enforcing Section 2 of the Voting Rights Act—was "pretextual," given that the Department of Justice had not previously suggested that citizenship data collected through the decennial census was needed to enforce the Voting Rights Act. Add. 86-87.

3. Following that order, the Department supplemented the administrative record with over 11,000 pages of documents, including materials reviewed and created by direct advisors to the Secretary. *See* Dkt. Nos. 212, 216, 222, No. 18-cv-2921 (JMF). The government also produced additional documents in response to discovery requests, including nearly 10,000 pages from the Department of Commerce, and over 2,500 pages from the Department of Justice. Plaintiffs have also deposed several senior Census Bureau and Commerce Department officials, including the Acting Director of the Census Bureau and the Chief of Staff to the Secretary.[5]

4. On July 26, 2018, the district court entered an order granting the government's motions to dismiss plaintiffs' Enumeration Clause claim. Add. 145-159.

[5] Plaintiffs have challenged the government's discovery responses on numerous grounds, leading to additional litigation on ancillary discovery matters. *See, e.g.*, Dkt. Nos. 201, 203, 220, 228, 237, No. 18-cv-2921 (JMF).

The district court denied the government's motion to dismiss plaintiffs' APA and equal protection claims, concluding that plaintiffs had alleged sufficient facts to demonstrate standing at the motion to dismiss stage, Add. 115-30; that plaintiffs' claims were not barred by the political question doctrine, Add. 131-36; that the conduct of the census was not committed to the Department's discretion by law, Add. 137-44; and that plaintiffs' allegations, accepted as true, stated a plausible claim of intentional discrimination sufficient to support their equal protection claim, Add. 159-67.

5. On August 10, plaintiffs filed a motion to compel the deposition testimony of John Gore, Acting Assistant Attorney General for the Department of Justice's Civil Rights Division. Dkt. No. 236, No. 18-cv-2921 (JMF). Plaintiffs asserted that AAG Gore's deposition was necessary given his alleged involvement in the drafting of the Gary Letter to Secretary Ross. *Id.* at 1.

On August 17, the district court entered an order compelling AAG Gore's testimony. Order, No. 18-cv-2921 (JMF) (S.D.N.Y. Aug. 17, 2018) (Add. 1-3). The court concluded that Gore's testimony was "plainly 'relevant'" to plaintiffs' case in light of his "apparent role" in drafting the Gary Letter, and summarily concluded that he "possesses relevant information that cannot be obtained from another source." Add. 2.

ARGUMENT

I. The Court Should Exercise Its Mandamus Authority to Correct Orders That Disregard Established Principles of Judicial Review of Agency Decisions.

A. Mandamus Review Is Appropriate.

Although a writ of mandamus is an extraordinary remedy, it "has been used 'both at common law and in the federal courts . . . to confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction.'" *In re City of New York*, 607 F.3d 923, 932 (2d Cir. 2010) (alteration in original) (citing *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004)). This Court has recognized that "mandamus provides a logical method by which to supervise the administration of justice within the Circuit" in cases in which "a discovery order present[s] an important question of law." *In re von Bulow*, 828 F.2d 94, 97 (2d Cir. 1987); *see also In re Nielsen*, No. 17-3345, Dkt. No. 171, at 1 (2d Cir. Dec. 17, 2017) (mandamus is appropriate where a petition raises "a discovery question … of extraordinary significance") (quoting *In re City of New York*, 607 F.3d at 939).

Recognizing the important considerations of inter-branch comity implicated when a plaintiff seeks to compel the testimony or presence of high-ranking officials, the courts of appeals have regularly exercised their mandamus authority to preclude such testimony. *See, e.g., In re United States*, 624 F.3d 1368, 1372 (11th Cir. 2010) (issuing a writ of mandamus to preclude required testimony of EPA Administrator); *In re McCarthy*, 636 F. App'x 142, 144 (4th Cir. 2015) (issuing writ of mandamus to

preclude deposition of EPA Administrator); *In re United States*, 542 F. App'x 944 (Fed. Cir. 2013) (issuing writ of mandamus to preclude deposition of the Chairman of the Federal Reserve Board); *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008) (issuing writ of mandamus to preclude deposition of the Vice President's chief of staff); *In re United States*, 197 F.3d 310, 314 (8th Cir. 1999) (issuing writ of mandamus to preclude testimony of Attorney General and Deputy Attorney General); *In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995) (issuing writ of mandamus to preclude testimony of three members of the Board of the FDIC); *In re United States*, 985 F.2d 510, 512 (11th Cir. 1993) (issuing writ of mandamus to preclude testimony of the Commissioner of the FDA); *United States Board of Parole v. Merhige*, 487 F.2d 25, 29 (4th Cir. 1973) (issuing writ of mandamus to preclude deposition of members of the Board of Parole); *cf. Bacon v. Department of Housing and Urban Development*, 757 F.2d 26 5, 269 (Fed. Cir. 1985) (affirming order precluding deposition of the Secretary of the Department of Housing and Urban Development). Similarly, the Ninth Circuit issued a writ of mandamus to quash an order requiring the Assistant Attorney General for the Department of Justice's Tax Division to appear at a settlement conference. *United States v. U.S. Dist. Court for Northern Mariana Islands*, 694 F.3d 1051, 1059-62 (9th Cir. 2012). And as noted, the government is unaware of *any* instance of an Assistant Attorney General being compelled to sit for a deposition in a regulatory challenge such as this.

B. The Court Should Vacate the Orders, Which Constitute Clear and Significant Error, and Direct the District Court to Quash Discovery and the Deposition of Acting Assistant Attorney General Gore.

1. The conduct of this litigation upends fundamental principles of judicial review of agency action. In agency review cases, "[t]he APA specifically contemplates judicial review on the basis of the agency record." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). The Supreme Court has emphasized that it is "not the function of the court to probe the mental processes" of the agency decisionmaker in conducting administrative review. *United States v. Morgan*, 304 U.S. 1, 18 (1938) (*Morgan I*). "Just as a judge cannot be subjected to such a scrutiny . . . so the integrity of the administrative process must be equally respected." *United States v. Morgan*, 313 U.S. 409, 422 (1941) (*Morgan II*). "[A]gency officials should be judged by what they decided, not for matters they considered before making up their minds." *National Sec. Archive v. CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014).

For these reasons, "under the APA, discovery rights are significantly limited." *Sharkey v. Quarantillo*, 541 F.3d 75, 92 n.15 (2d Cir. 2008); *see Nat'l Audobon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997) ("Generally, a court reviewing an agency decision is confined to the administrative record compiled by that agency when it made the decision."). Rather than permit wide-ranging discovery, "the task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." *Id.*; *see also*

Estate of Landers v. Leavitt, 545 F.3d 98, 113 (2d Cir. 2009) (as revised) (holding that interrogatories could not be considered because the court "must uphold or set aside the agency's action on the grounds that the agency has articulated"). "The validity of the [decisionmaker's] action must . . . stand or fall on the propriety of [his] finding." *Camp v. Pitts*, 411 U.S. 138, 143 (1973). If the agency's action "is not sustainable on the administrative record made," then the administrative "decision must be vacated and the matter remanded to [the agency] for further consideration." *Id.*

2. The district court's orders requiring discovery and the deposition of Acting Assistant Attorney General Gore, in particular, contravene these principles. *See In re City of New York*, 607 F.3d at 943 (a party's right to mandamus relief is "clear and indisputable" where, among other things, a district court "bases its ruling on an erroneous view of the law"). While an exception to the "general 'record rule'" may be made "where there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decisionmakers," *National Audubon Soc'y*, 132 F.3d at 14, the district court's order here rests on a fundamental misunderstanding of what constitutes "bad faith" in the context of administrative decisionmaking.

As discussed above, the Supreme Court has "made it abundantly clear" that APA review focuses on the "contemporaneous explanation of the agency decision" that the agency rests upon, *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978) (citing *Camp*, 411 U.S. at 143); *SEC v. Chenery Corp.* 318 U.S. 80, 88 (1943) (courts must "confine[] . . . review to a judgment upon the validity of the grounds

upon which the [agency] itself based its action"), and the decision must be upheld if the record reveals a "rational" basis supporting it, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983). In light of these fundamental principles of deference to an agency's objective explanation, the type of "bad faith" necessary to authorize extra-record discovery under the APA requires a strong demonstration that the Commerce Secretary did not actually believe his stated rationale for reinstating a citizenship question. *See Jagers v. Federal Crop Ins. Corp.*, 758 F.3d 1179, 1186 (10th Cir. 2014) (rejecting argument that "the agency's subjective desire to reach a particular result must necessarily invalidate the result, regardless of the objective evidence supporting the agency's conclusion"). Absent such a showing, the Commerce Secretary "should be judged by what [he] decided, not for matters [he] considered before making up [his] mind[]." *National Sec. Archives*, 752 F.3d at 462.

The district court neither articulated that legal standard nor made such a factual finding. Instead, the court stated four reasons for believing that this is the rare case in which discovery is proper to explore the mental processes of the decisionmaker. First, the Secretary "thought reinstating a citizenship question could be warranted" before contacting the Department of Justice, and it is therefore possible "that the decision preceded the stated rationale." Add. 85. Second, "Secretary Ross overruled senior Census Bureau staff," who recommended against reintroducing a citizenship question. Add. 85-86. Third, plaintiffs alleged that the Secretary used an abbreviated decisionmaking process in deciding to reintroduce a citizenship question, because

Commerce did not "spend[] considerable resources and time . . . testing the proposed changes." Add. 86. Fourth, in the court's view, plaintiffs had made "a prima facie showing" that the Secretary's stated justification for reinstating a citizenship question was "pretextual," because the Department of Justice had not previously suggested that citizenship data collected through the decennial census was needed to enforce the Voting Rights Act. Add. 86-87.

The district court relied on these factors again in denying a stay, but, contrary to the court's understanding, these factors are legally irrelevant to a proper determination of bad faith. It is not improper, or indeed uncommon, for agency decisionmakers to favor a particular outcome prior to full consideration of the issue, and it is entirely appropriate for a decisionmaker to confer with other government officials to evaluate whether his favored course of action makes sense and on what legal and factual basis it might be pursued. In making such decisions, agency decisionmakers routinely overrule their subordinates, and it has never been thought that in fulfilling their responsibilities they thereby act in bad faith. Indeed, as the Supreme Court observed in a case in which the Secretary of Commerce overruled the recommendations of the Census Bureau, "the mere fact that the Secretary's decision overruled the views of some of his subordinates is by itself of no moment in any judicial review of his decision." *Wisconsin v. City of N.Y.*, 517 U.S. 1, 23 (1996). With respect to the length of the decisionmaking process, the Secretary gave a reasoned explanation for his decision to reinstate a citizenship question without additional

testing. *See* Add. 176 (explaining that because the question "is already included on the ACS" it "has already undergone the . . . testing required for new questions"). And the district court's doubts as to the Department of Justice's need for reinstatement of a citizenship question do not call into question the sincerity of the Commerce Secretary's stated rationale, particularly because the Department of Justice explained its reasoning. Add. 179-81. Indeed, contemporaneous emails produced in response to the district court's discovery order only reinforce the conclusion that Commerce officials sincerely believed "that DOJ has a legitimate need for the question to be included." Add. 182.

While vacatur of an agency action may be appropriate in rare circumstances where a final decisionmaker has prejudged an issue, to obtain discovery on such a theory, plaintiffs must make a strong showing that the decisionmaker "act[ed] with an 'unalterably closed mind' and [was] 'unwilling or unable' to rationally consider arguments." *Air Transport Ass'n of Am., Inc. v. National Mediation Bd.*, 663 F.3d 476, 486-88 (D.C. Cir. 2011). The district court did not make such a finding here, nor would it remotely be supported by the facts of this case. Nothing in the record suggests that Secretary Ross was unwilling or unable to rationally consider the arguments for and against reinstating the question. *See Air Transport Ass'n of Am.*, 663 F.3d at 487 (denying discovery into a National Mediation Board order despite accusations that the Board improperly coordinated its rulemaking with unions, and

despite a letter from dissenting Board members asserting "that the Board's behavior gave 'the impression' of prejudgment.").

The district court identified only one case in which a court concluded that extra-record discovery was justified in light of an agency's bad faith. Add. 85 (citing *Tummino v. von Eschenbach*, 427 F. Supp. 2d 212, 233 (E.D.N.Y. 2006)). In that case, the evidence of bad faith differed markedly from the evidence the district court relied on here. In allowing discovery in *Tummino*, the district court emphasized that the agency's five-year delay in deciding the plaintiff's citizen petition "alone raise[d] questions about . . . good faith," particularly because the agency "[b]y its inaction . . . ha[d] evaded judicial review of its decisionmaking." *Id.* at 232. The court also relied on "the unanimous conclusion of [a] joint advisory committee" contradicting the agency's reasoning, specific "statements of some senior decisionmakers" indicating "that the real reason" for the agency's inaction rested on "matters . . . beyond the mandate of the agency," and a report issued by the General Accountability Office finding that the agency's "decisionmaking processes were unusual in . . . significant respects." *Id.* at 232-33. None of those same factors are present here. Most importantly, the Secretary issued his final decision in a formal memorandum, and there can be no claim that the agency has acted in a procedurally improper manner.

Indeed, the administrative record here provides a more than adequate basis on which to evaluate the decision challenged in this case.[6]

3. Even accepting the mistaken premises of the district court's reasoning in allowing any discovery, it was clear error to compel the testimony of the Acting Assistant Attorney General. Depositions of high-ranking government officials are justified only under "exceptional circumstances," *Lederman v. New York City Dep't of Parks and Rec.*, 731 F.3d 199, 203 (2013), both because it is "not the function of [a] court to probe the mental processes" of agency decisionmakers, *Morgan II*, 313 U.S. at 422, and because such officials have "greater duties and time constraints than other witnesses," *Lederman* 731 F.3d 199 at 203 (2d. Cir. 2013). Such orders all raise significant "separation of powers concerns." *In re United States*, 624 F.3d 1368, 1372 (11th Cir. 2010).

There are no "exceptional circumstances" that would warrant the deposition of the Assistant Attorney General for the Department of Justice's Civil Rights Division, a Senate-confirmed official who heads one of only seven litigating divisions at the Department of Justice. The district court concluded that an order compelling Acting Assistant Attorney General Gore's testimony was justified in light of his "apparent

[6] The district court expressly declined to rest its discovery order on plaintiffs' constitutional claim, explaining "that the APA itself provides for judicial review of agency action that is 'contrary to' the Constitution." Add. 88 (citing *Change v. U.S. Citizenship & Immigration Servs.*, 254 F. Supp. 3d 160, 162 (D.D.C. 2017)). That reasoning was correct, and plaintiffs' constitutional challenges provide no independent justification for discovery here.

role in drafting the Department of Justice's December 12, 2017 letter requesting that a citizenship question be added to the census[.]" Add. 2. For this reason, the court stated, his testimony was "plainly 'relevant'" to plaintiff's claims, "within the broad definition of that term for purposes of discovery." *Id.* But the fact that a high-ranking official's testimony might be in some way "relevant" to a plaintiff's claims when the term "relevant" is given its broadest possible meaning does not come close to satisfying the "exceptional circumstances" standard. Given the breadth of the definition, compelled testimony of high-ranking government decisionmakers would be routine instead of exceptional.

Indeed, deposing Acting Assistant Attorney General Gore will achieve no legitimate purpose. For example, if the purpose of the deposition is to explore the extent to which the census information will in fact assist enforcement of the Voting Rights Act, the deposition plainly contravenes the rule that review is limited to the administrative record. After reviewing the record, were the district court to conclude that the extent of the data's usefulness was crucial to its ruling and that the existing record is insufficient, the proper course would be to remand or permit supplementation of the record. Alternatively, if the purpose of the deposition is to demonstrate bad faith, it is equally improper. Secretary Ross was the decisionmaker, not Acting Assistant Attorney General Gore. Moreover, at no point in this litigation has the district court found that the Department of Justice acted in bad faith in recommending that a citizenship question be added to the census, and plaintiffs have

provided no basis to believe that the reasons the Department of Justice gave for supporting the reinstatement of a citizenship question did not represent the Department's views. In addition, Acting Assistant Attorney General Gore's testimony on such topics is likely to be protected by privilege, rendering a deposition focused on topics particularly improper and futile.[7]

Moreover, deposing a high-ranking Department of Justice official is especially unnecessary given the voluminous discovery that Plaintiffs have already received. The district court justified its denial of a stay in part on the ground that the government had made available officials including the Director of the Census Bureau. But, of course, the government's cooperation cannot be a basis for expanding discovery to include officials of a different Department. *See* Add. 183-93. That the government did not previously seek mandamus relief until the court expanded discovery to include the Department of Justice in no sense militates against the

[7] In its initial order permitting discovery, the district court reasoned that "plaintiffs' allegations that the current Department of Justice has shown little interest in enforcing the Voting Rights Act" raised doubts about the Secretary's stated rationale for reinstating a citizenship question. Add. 87. The court's reasoning is deeply flawed. As the Justice Department explained in the Gary Letter, citizenship data is useful in enforcing Section 2 of the Voting Rights Act, which prohibits "vote dilution" by state and local officials engaged in redistricting. Add. 179. Because redistricting cycles are tied to the census and the next cycle of redistricting will not begin until after the census is taken, there is little Section 2 enforcement to be undertaken at this time. Moreover, the Justice Department informed Secretary Ross that citizenship data would be useful for enforcement of the Voting Rights Act. That is true regardless of whether the current administration will have the opportunity to use the information collected.

urgency of the petition. Plaintiffs have to date received thousands of pages of materials from the Department of Commerce, including materials reviewed and created by the Secretary's most senior advisers. The district court nowhere explained why information about the Secretary's intent in reintroducing a citizenship question cannot be obtained through this extensive evidence, much of it involving the Secretary's closest advisers. *See Lederman*, 731 F.3d at 203 (depositions of high-ranking officials was not justified where plaintiffs failed to show "that the relevant information could not be obtained elsewhere").

The district court similarly erred in downplaying the intrusion of a deposition and attendant preparation. The court stated that it was "unpersuaded" that compelling the Acting Assistant Attorney General to sit for a "single deposition" would unduly hinder him in the performance of his duties or unduly burden the Department of Justice. Add. 2. But such logic would permit the deposition of high-ranking officials as a matter of course, as each individual case is likely to involve only a "single deposition." As this Court has explained, absent strict limits on plaintiffs' ability to depose high-ranking officials in each case, those officials will soon find themselves "spend[ing] 'an inordinate amount of time tending to pending litigation'" in the relevant case and others. *Lederman*, 731 F.3d at 203 (quoting *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007)). The district court simply disregarded the judgment of this Court and every other court of appeals to consider the intrusion effected by compelling testimony or the presence of a high-ranking official. *See supra*

pp. 14-15. This Court should not allow the unprecedented deposition of an Acting Assistant Attorney General in these circumstances.[8]

II. This Court Should Stay Acting Assistant Attorney General Gore's Deposition Pending Review of the Petition.

Because plaintiffs have noticed the deposition of Acting Assistant Attorney General Gore for September 12, 2018, the government asks that this Court issue an immediate administrative stay of his deposition pending its consideration of the mandamus petition. Absent a stay, the deposition will occur and the injury will be irremediable. A stay pending this Court's consideration will not harm plaintiffs and will not meaningfully delay the resolution of these proceedings. Plaintiffs face no imminent harm from the Secretary's decision to reinstate a citizenship question on the 2020 Census. In addition, discovery is not scheduled to conclude until October 12, and no deadlines have been set for trial or summary judgment briefing.

This Court recently granted a stay of discovery proceeding pending disposition of a petition for writ of mandamus under similar circumstances. *See In re Duke*, No. 17-3345 (2d Cir. Oct. 20, 2017) (order of Cabranes, J). A stay is likewise warranted here.

[8] The district court faulted the government for opposing the Gore deposition without stating that a court should be reluctant to permit discovery of high-ranking officials. Principles of inter-branch comity dictate such reluctance, and the district court did not conclude that the government had waived that argument.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for writ of mandamus, and it should issue an administrative stay to preclude the deposition of the Acting Assistant Attorney General for the Civil Rights Division pending its consideration of the petition.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General

/s/ Mark B. Stern
MARK B. STERN
GERARD SINZDAK
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-0718

SEPTEMBER 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the word limit of Federal Rule of Appellate Procedure 21(d)(1) because the motion contains 6,649 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word 2013 in a proportionally spaced typeface, 14-point Garamond font.

s/ Mark B. Stern
MARK B. STERN

CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2018, I electronically filed the foregoing with the Clerk of the Court by emailing the petition to newcases@ca2.uscourts.gov. The petition was served on the district court at Hon. Jesse Furman Furman_NYSDChambers@nysd.uscourts.gov

Service in compliance with Federal Rule of Appellate Procedure 21(a)(1) will be accomplished by e-mail to the following recipients:

Sania.Khan@ag.Ny.Gov; Ajay.Saini@ag.Ny.Gov; Elena.Goldstein@ag.Ny.Gov; Elizabeth.Morgan@ag.Ny.Gov; Laura.Wood@ag.Ny.Gov; Matthew.Colangelo@ag.Ny.Gov; Lourdes.Rosado@ag.Ny.Gov; Mark.Kohler@ct.Gov; David.Lyons@state.De.Us; Valerie.Nannery@dc.Gov; Mmartin@atg.State.Il.Us; Nathan.Blake@ag.Iowa.Gov; Jgrimm@oag.State.Md.Us; Jonathan.Miller@state.Ma.Us; Ann.Lynch@state.Ma.Us; Mercy.Cover@massmail.State.Ma.Us; Jacob.Campion@ag.State.Mn.Us; Rachel.Apter@njoag.Gov; Tmaestas@nmag.Gov; Rpark@ncdoj.Gov; Scott.Kaplan@doj.State.Or.Us; Mfischer@attorneygeneral.Gov; Aroach@riag.Ri.Gov; Mmcguire@oag.State.Va.Us; Benjamin.Battles@vermont.Gov; Julio.Thompson@vermont.Gov; Laurac5@atg.Wa.Gov; Andrew.Worseck@cityofchicago.Org; Christie.Starzec@cityofchicago.Org; Tjeneret@law.Nyc.Gov; Grubin@law.Nyc.Gov; Benjamin.Field@phila.Gov; Jdana@providenceri.Gov; Brittany.Feitelberg@sfcityatty.Org;

Jdreavesoffice@gmail.Com; Gary.Smith@seattle.Gov;

Yvonne.Hilton@pittsburghpa.Gov; Rrios@rolandorioslaw.Com;

Jackic.Melmed@state.Co.Us; Matt@jerzyklaw.Com; Littwm@co.Monterey.Ca.Us;

Ian.Kaplan@epcounty.Com; Rncoglianese@columbus.Gov; Dale.Ho@aclu.Org;

Rpees@akingump.Com.; Acahn@cair.Com; Bnunes@cov.Com;

Mithun.Mansinghani@oag.Ok.Gov; Ferrara@acla-Inc.Org; Asenteno@maldef.Org;

Chajec@irli.Org; David@theusconstitution.Org; Gabrielle.Boutin@doj.Ca.Gov;

Matthew.Wise@doj.Ca.Gov; Epaltzik@jmpllp.Com.

s/ Mark B. Stern
MARK B. STERN

ADDENDUM

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al.,

Plaintiff,

-v-

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Defendants.

18-CV-2921 (JMF)

NEW YORK IMMIGRATION COALITION, et al.,

Plaintiff,

-v-

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Defendants.

18-CV-5025 (JMF)

ORDER

JESSE M. FURMAN, United States District Judge:

Two discovery-related letter motions filed by Plaintiffs in these actions remain pending, in whole or in part: one filed on August 10, 2018, seeking an order compelling Defendants to make John Gore, Acting Assistant Attorney General for Civil Rights, available for deposition, (18-CV-2921, Docket No. 236); and another filed on August 13, 2018, seeking an order compelling Defendants to produce "materials erroneously withheld" from the Administrative Record, (18-CV-2921, Docket No. 237).[1] Defendants responded in letters dated August 15, 2018. (18-CV-2921, Docket Nos. 250, 255; *see also* 18-CV-2921, Docket Nos. 253-54).

[1] Plaintiffs' August 13th letter also sought other relief, which the Court addressed in an Order entered on August 14, 2018. (18-CV-2921, Docket No. 241).

Upon review of the parties' letters and applicable case law, the Court sees no need for a conference at this time. First, the Court grants Plaintiffs' letter motion for an order compelling Defendants to make Acting Assistant Attorney General Gore available for deposition. Given the combination of AAG Gore's apparent role in drafting the Department of Justice's December 12, 2017 letter requesting that a citizenship question be added to the decennial census and the Court's prior rulings — namely, its oral ruling of July 3rd concerning discovery, (18-CV-2921, Docket No. 207), and its Opinion of July 26th concerning Defendants' motions to dismiss (18-CV-2921, Docket No. 215, at 60-68) — his testimony is plainly "relevant," within the broad definition of that term for purposes of discovery. *See, e.g.*, *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126 (JMF), 2016 WL 6779901, at *2 (S.D.N.Y. Nov. 16, 2016) ("Although not unlimited, relevance, for purposes of discovery, is an extremely broad concept." (internal quotation marks omitted)). Moreover, given Plaintiffs' claim that AAG Gore "ghostwrote DOJ's December 12, 2017 letter requesting addition of the citizenship question," (Docket No. 236, at 1), the Court concludes that AAG Gore possesses relevant information that cannot be obtained from another source. *See Marisol A. v. Giuliani*, No. 95-CV-10533 (RJW), 1998 WL 132810, at *2 (S.D.N.Y. Mar. 23, 1998).

Further, the Court is unpersuaded that compelling AAG Gore to sit for a single deposition would meaningfully "hinder" him "from performing his numerous important duties," let alone "unduly burden" him or the Department of Justice (18-CV-2921, Docket No. 255, at 3), which is the relevant standard under Rule 45 of the Federal Rules of Civil Procedure. *See, e.g.*, *Pisani v. Westchester Cty. Health Care Corp.*, No. 05-CV-7113 (WCC), 2007 WL 107747, at *2 (S.D.N.Y. Jan. 16, 2007) (denying a Rule 45 motion to quash subpoena, but recognizing that "special considerations arise when a party attempts to depose a high level government official").

And finally, any applicable privileges can be protected through objections to particular questions at a deposition; they do not call for precluding a deposition altogether. *See, e.g.*, *In re Application of Chevron Corp.*, 749 F. Supp. 2d 135, 141 (S.D.N.Y. 2010) (denying motion to quash subpoenas and directing parties to make their specific objections during the deposition).

Second, Plaintiffs' request for an order compelling "production of materials erroneously withheld" is denied without prejudice. (18-CV-2921, Docket No. 237). Although the Court previously characterized Plaintiffs' allegations as "troubling" (18-CV-2921, Docket No. 241), it accepts Defendants' representations (backed by declarations from two relevant officials at the Department of Commerce) that they have now "taken all proper and reasonable steps to ensure that the administrative record and supplemental materials are complete," (18-CV-2921, Docket No. 250, at 2). If or when Plaintiffs have reason to believe otherwise, they may renew their letter motion in accordance with the Court's Individual Rules and Practices for Civil Cases and its Order of July 5th. (18-CV-2921, Docket No. 199). But there is no basis for relief now.

For the foregoing reasons, Plaintiffs' letter motion of August 10th is GRANTED to the extent it seeks an order compelling Defendants to make AAG Gore available for a deposition, and their letter motion of August 13th is DENIED to the extent it seeks an order compelling Defendants to produce "materials erroneously withheld." The Clerk of Court is directed to terminate 18-CV-2921, Docket Nos. 236 and 237, and 18-CV-5025, Docket Nos. 81 and 82.

SO ORDERED.

Dated: August 17, 2018
New York, New York

JESSE M. FURMAN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

STATE OF NEW YORK, et al.,

Plaintiffs,

v. 18 Civ. 2921 (JMF)

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Argument

Defendants.

----------x

NEW YORK IMMIGRATION COALITION,et al.,

Plaintiffs,

v. 18 Civ. 5025 (JMF)

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Argument

Defendants.

----------x

New York, N.Y.
July 3, 2018
9:30 a.m.

Before:

HON. JESSE M. FURMAN,

District Judge

APPEARANCES

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL
Attorneys for Plaintiffs
BY: MATTHEW COLANGELO
AJAY P. SAINI
ELENA S. GOLDSTEIN
- and -
ARNOLD & PORTER KAYE SCHOLER
BY: JOHN A. FREEDMAN
- and -
LAW OFFICE OF ROLANDO L. RIOS
BY: ROLANDO L. RIOS

United States Department of Justice
Civil Division, Federal Programs Branch
Attorneys for Defendants
BY: BRETT SHUMATE
KATE BAILEY
JEANNETTE VARGAS
STEPHEN EHRLICH

(Case called)

MR. COLANGELO: Good morning, your Honor.

Matthew Colangelo from New York for the state and local government plaintiffs.

One housekeeping matter, your Honor, if I may. The plaintiffs intended to have two lawyers oppose the Justice Department's motion to dismiss; Mr. Saini argue the standing argue and Ms. Goldstein argue the remaining 12(b)(1) and 12(b)(6) arguments; and then I will argue the discovery aspect of today's proceedings. And I may ask my cocounsel from Hidalgo County, Texas, Mr. Rios, to weigh in briefly on one particular aspect of expert discovery that we intend to proffer. So with the Court's indulgence, we may swap counsel in and out between those arguments.

THE COURT: Understood. Thank you.

MS. GOLDSTEIN: Elena Goldstein also from New York for the plaintiffs.

MR. SAINI: Ajay Saini also from New York for the plaintiffs.

MR. FREEDMAN: Good morning, your Honor.

John Freedman from Arnold & Porter for the New York Immigration Coalition plaintiffs.

MR. RIOS: Rolando Rios for the Cameron and Hidalgo County plaintiffs, your Honor.

MR. SHUMATE: Good morning, your Honor.

Brett Shumate from the Department of Justice on behalf of the United States. I'll be handling the motion to dismiss augment today. My colleague, Ms. Vargas, will be handling the discovery argument.

MS. VARGAS: Good morning, your Honor.

Jeannette Vargas with the U.S. Attorney's Office for the Southern District of New York.

MS. BAILEY: Kate Bailey with the Department of Justice on behalf of the United States.

MR. EHRLICH: Stephen Ehrlich from the Department of Justice on behalf of defendants.

THE COURT: Good morning to everybody.

Just a reminder and request that everybody should speak into the microphones. First of all, the acoustics in this courtroom are a little bit subpar. Second of all we're both on CourtCall so counsel who are not local can listen in and also, I don't know if there are folks in the overflow room, but in order for all of them to hear it's important that everybody speak loudly, clearly, into the microphone.

Before we get to the oral argument a couple housekeeping matters on my end. First, I did talk to judge Seeborg following his conference I think it was last Thursday in the California case. He mentioned that there is some new cases since the initial conference in this matter, perhaps in Maryland. Does somebody want to update me about that and tell

me what the status of those cases may be.

MS. BAILEY: There is an additional case that's been filed in Maryland, Lupe v. Ross.

THE COURT: What was the plaintiff's name?

MS. BAILEY: Lupe. L-U-P-E. That case has just been filed and a schedule has not been set yet but it is before Judge Hazel, same as the case that was already filed in Maryland.

THE COURT: And that raises a citizenship question challenge?

MS. BAILEY: Yes, your Honor.

THE COURT: Are there any other cases aside from that?

MS. BAILEY: No, your Honor.

THE COURT: All right. Any objection to my potentially at some point reaching out to Judge Hazel?

MS. BAILEY: No, your Honor.

THE COURT: All right.

I have one minor disclosure, which is that there were a number of amicus briefs filed in this case, one of which was filed on behalf of several or a number of members of Congress, one of whom was Congresswoman Maloney. My 14-year-old daughter happened to intern for her primary campaign for about a week and two days earlier this month. I did consider whether I should either reject the amicus brief or if it would warrant anything beyond that, and I did not -- I decidedly did not;

that disclosing it would suffice.

I should mention that my high school son is going to be starting as a Senate Page next week. I don't think that's affiliated with any particular senator but since several senators were on that brief as well I figured I'd mention it, but suffice it to say that their responsibilities are commensurate with their ages. Don't tell them I said that. They did not do anything in the census and will not.

All right. Finally, briefing in the New York Immigration Coalition case is obviously continuing. The government filed its brief last Friday. Plaintiffs will be filing their opposition by July 9. And reply is due July 13.

Per my order of the 27th, June 27th that is, and the plaintiffs' letter of June 29, I take it everybody's understanding is that that briefing is going to focus on arguments and issues specific to that case, and essentially the government has already incorporated by reference its arguments, to the extent they're applicable, from the states case and the plaintiffs will not be responding separately to that.

MR. FREEDMAN: That's correct, your Honor.

THE COURT: And suffice it to say that my ruling in the states case will apply to that case to the extent that there are common issues.

Any other preliminary matters? Otherwise, I'm prepared to jump into oral argument and we'll go from there.

All right. So let's do it then. I think the best way to proceed is I'm inclined to start with standing, then go to -- folks should not be using that rear door but I'll let my deputy take care of that.

Start with standing and then I'll hear first from defendants as the moving parties and then plaintiffs can respond. And then I want to take both the political question doctrine and the APA justiciability together. I recognize that there are discrete issues and arguments but, nevertheless, there is some thematic overlap. And then, finally, I want to take up the failure to state a claim under the enumeration clause. Candidly, I want to focus primarily on that. So in that regard I may move you a little quickly through the first preliminary arguments.

So Mr. Shumate, let me start with you and focus on standing in the first instance.

Use this microphone actually.

MR. SHUMATE: Good morning, your Honor. May it please the Court, Brett Shumate for the United States.

Congress directed the Secretary of Commerce to conduct the census in such form and content as he may determine. For the 2020 census, Commerce decided to reinstate the question about citizenship on the census questionnaire. That questionnaire already asks a number of demographic questions about race, Hispanic origin, and sex. As far back as 1820 and

as most recently as 2000 Commerce asked a question about citizenship on the census questionnaire.

THE COURT: Let me just make you cut to the chase because I got the preliminaries, I've read the briefs, I'm certainly familiar with the history, I'm familiar with your overall argument.

On the question of standing, let me put it to you bluntly, why is your argument not foreclosed by the Second Circuit's decision in Carey v. Klutznick?

MR. SHUMATE: It's not foreclosed by Carey, your Honor, because the injury in this case, the alleged injury is not fairly traceable to the government. Instead, the injury that's alleged here is the result of the independent action of third parties to make a choice not to respond to the census in violation of a legal duty to do so. That was not at issue in the Carey case. The Carey case is also distinguishable on --

THE COURT: So you make two distinct arguments with respect to standing. The first is that there is no injury in fact; and the second is that there is no traceability.

Is the injury in fact argument foreclosed by Carey v. Klutznick?

MR. SHUMATE: No, it's not, your Honor, for two reasons. Carey was a post-census case. So the injury there was far more concrete than it is here. Here, we're two years out from the census and the injuries that are alleged here are

quit speculative. They depend on a number of speculative links in the chain of causation that he we didn't have in Carey v. Klutznick.

First we have to speculate first about why people might not respond to the census. They might not respond for a number of reasons. Paragraphs 47 to 53 of the plaintiffs' complaint point to a number of different reasons: Distress to the government, political climate, a number of different things. But even assuming there is an increase in the -- a decrease in the initial response rate, it's speculative whether the Census Bureau's extensive efforts to follow up, what they call nonresponse follow-up operations, will fail.

THE COURT: Can I consider those efforts in deciding this question? Are those in the complaint? Am I not limited to the allegations in the complaint?

It seems to me that you're relying pretty heavily on records and issues outside of the complaint. That may well be appropriate at summary judgment and, as many of the cases you've cited are, in fact, on summary judgment. So why is that appropriate for me to look at and consider at this stage?

MR. SHUMATE: Your Honor, on a 12(b)(1) motion to dismiss the Court can consider evidence outside the pleadings for purposes of establishing its jurisdiction.

Even if you limit the allegations to the complaint, paragraph 53 makes no allegation that the Census Bureau's

extensive efforts that they intend to implement to follow up with individuals who may not respond to the census initially will fail.

And then, finally, the third element of that speculative chain of causation is that it's speculative whether any undercount that results will be material in a way that will ultimately affect the plaintiffs. As they acknowledge, there are very complex formulas to determine apportionment and federal funding. And we just don't know at this point whether any undercount will be sufficient to cause them to have an injury in 2020.

In Carey it was very different. It was in the census year. There were already preliminary estimates that the census figures were inaccurate because the Census Bureau was including or using inaccurate address lists in New York City. So it was -- there was a far stronger and tighter causal nexus between the alleged injury and the government's action in that case. And that case also didn't involve a question on the citizenship -- a question on the census form.

THE COURT: You seem to reject the substantial risk standard, citing the footnote in Clapper and suggest that it's limited to Food and Drug Administration type cases.

What's your authority for that proposition and don't the cases that are cited in the Clapper footnote stand for the proposition that it's not so limited?

MR. SHUMATE: Your Honor, I think under either standard the plaintiffs' claims will fail. I think the substantial risk test involves -- the cases that I have seen it will have involved cases involving risk of Food and Drug enforcement, or cases where there's a risk that the government may institute prosecution, something like that.

The far more accepted test is certainly impending injury. Either test, the plaintiffs can't show that there's a substantial risk that their injuries will ultimately occur because of these speculative chain of inferences that they have to rely on to tie the addition of a question on a form to their ultimate injury here, which is a loss of federal funding.

THE COURT: Are not they basing that inference on statements of the government itself and former and current government officials?

In other words, the government itself has said that adding a citizenship question will depress response rates. They've alleged in the complaint that there are states and counties and cities that have a high incidence of immigrants and it, therefore, would seem to follow that it would be particularly depressed in those states.

At this stage in the proceedings, doesn't it demand too much to expect them to be able to prove concretely what the actual differential response rate is going to be and what the concrete implications of that are going to be?

MR. SHUMATE: Your Honor, they don't have to prove it concretely. But those allegations that they're pointing to only go to the initial response rate.

There's always been an undercount in the census in terms of the initial response rate. I think in the 2010 census it was 63 percent of the individuals responded to the initial census questioning. So I think that's what the individuals -- the Census Bureau are referring to, that there may be a drop in the initial response rate. But there are no allegations that the Census Bureau's follow-up operations, which are quite extensive, that those will fail. The only allegation that they pointed to, I think it is paragraph 53 of the complaint that says because of the reduced initial response rate, the Census Bureau will have to hire additional enumerators to follow up with those individuals. But it is entirely speculative whether those efforts will fail. It's also speculative, even assuming those efforts fail, whether the undercount will be material in a way that ultimately affects the plaintiffs. Because this is a pre-census case, it's not like Carey where there, like I said earlier, there were already preliminary figures suggesting that the Census Bureau had an inaccurate count in New York City.

THE COURT: Let me ask you about traceability. Why is that argument not foreclosed by the Circuit's decision last Friday in the NRDC v. NHTSA case. I don't know if you've seen it, but the Court held that -- rejected an argument by the

government that the connection between the potential industry compliance and the agency's imposition of coercive penalties intended to induce compliances too indirect to establish causation and proceeds to say: As the case law recognizes, it is well settled that for standing purposes petitioners need not prove a cause-and-effect relationship with absolute certainty. Substantial likelihood of the alleged commonality meets the test. This is true even in cases where the injury hinges on the reactions of the third parties to the agency's conduct.

MR. SHUMATE: I think the key is the language that you read about coercive effect. There is no coercive effect here by the government. In fact, the government is attempting to coerce people to respond to the census. There's a statute that requires individuals to respond to the census.

At the most what the plaintiffs have alleged is that the government's addition of the citizenship question will encouraged people not to respond to the census, even though there may be a small segment of the population who would otherwise respond not for -- putting aside the citizenship question. This is a lot more like the Simon case from 1976, which involved hospitals -- the IRS revenue ruling that granted favorable tax treatment to hospitals. The allegation in that case was that the government's decision was encouraging the hospitals to deny access to indigents to hospital services. And the Court said no, the injury in that case is not fairly

traceable to the government's action, even though it may have encouraged the hospitals to deny access, because it was fairly traceable to the independent decisions of third parties, the hospitals themselves.

That's exactly what we have here. We have an independent decision by individuals not to respond to the census. Moreover, that independent decision is unlawful because there's a statute that makes individuals -- it requires individuals to respond to the census.

THE COURT: Why does that matter? I think you made an effort to distinguish Rothstein on that ground, or at least the ground that the defendant's conduct in that case was allegedly unlawful and it's not here. I would think for standing purposes that that's more a merits consideration than a standing question. For standing purposes, it's really just a question of whether plaintiffs can establish injury that resulted from some conduct of the defendants, in other words, injury and causation. What does it matter if conduct is unlawful, unlawful, or not?

MR. SHUMATE: It matters, your Honor, because the test is that the injury must be fairly traceable to the government's conduct; not the independent actions of third parties. And it is not fair to attribute to the government the unlawful decisions of third parties not to respond to a lawful question.

You mentioned the Rothstein case. That case was

fundamentally different. That involved funding terror. That is fundamentally different than adding a question to the census questionnaire. And it's fair to assume that there would be a causal relationship between giving money to terrorists and the terrorists' acts themselves.

THE COURT: But the question is simply whether the independent acts of third parties intervening break the chain of causation such that it's no longer fairly traceable. I think in that -- just looking at it from that perspective, what does it matter whether the conduct on either side is legal or not legal? It's just a simple question of whether it causes injury and whether it's fairly traceable.

I mean, in other words where -- can you point me to any Supreme Court case or Second Circuit case that says that whether -- that the standing inquiry turns on whether the acts of either the defendant or the intervening third parties are lawful or unlawful?

MR. SHUMATE: There are cases. I believe it's the O'Shea case from the Supreme Court that says in the context of mootness, which is another related judicial review doctrine, that we assume that parties follow the law. And so here we should assume that individuals would respond to the census consistent with their legal duty.

Let me put it this way. If everybody in America responded to the census consistent with their legal duty, would

the plaintiffs have any reason to complain about the citizenship question? Of course not because there would be no undercount at all. Every person in America would be counted. They would have no reason to complain about the citizenship question or any fear of an undercount or loss of federal funding or apportionment.

Put it another way, as the Court did in Simon. If the Court were to strike the citizenship question from the census questionnaire, would that address or redress all the plaintiffs' fear of an injury? Probably not because, as they acknowledge, there's always an undercount in a census and individuals will not respond to the census questionnaire for a variety of reasons.

THE COURT: Well it would redress the injury to the extent that it is fairly traceable to the citizenship question.

MR. SHUMATE: But it is not fairly traceable to the citizen question. And the Simon Court talked about the chain, the speculative chain of inferences that you had to reach in that case to trace the injury from the government's action to the ultimate injury. And here there are at least three steps in the chain of causation. I've talked about them already. I don't need to repeat them.

THE COURT: Let me ask you one final question on that front and then I'll hear from the plaintiffs on standing.

You rely pretty heavily on the Supreme Court's

decision in Clapper and the chain of causation or the chain of inferences that the Court found inadequate there. Isn't there a fundamental difference between that setting and this in the sense that the plaintiffs there were individuals and essentially needed to prove that they themselves had been subjected to surveillance and it was that inquiry that required the multiple levels of inferences that the Court found inadequate?

Here, particularly in the states case where the plaintiffs are states and cities and counties and the like, we're talking about an aggregate plaintiff. So there is no need to prove that a particular person didn't respond or is not likely to respond to the census in light of question. The question is just, on an aggregate level, will it depress the rates and on that presumably one can look at the Census Bureau's own history and studies and the like. Why is that not fundamentally different and make it a different inquiry than the one that was made in Clapper?

MR. SHUMATE: Certainly the injuries alleged in Clapper and this case are different but the standing principles are not. They still have to allege an injury that is not speculative, that is concrete certainly, or at least substantial risk that that injury will occur. Now this arises in a different context, to be sure, but still they have alleged an injury that is speculative at this point, and it is not

fairly traceable to the government because of the independent action of the third parties that are necessary for that action to occur. As I said earlier, it's not fair to attribute to the government actions of third parties that violate a statute that the government is attempting to coerce people to respond to the census. So it is not fair to attribute to the government their failure to respond when the government is merely adding a question to the form itself.

THE COURT: Let me hear from the plaintiffs on the standing, please. If you could just for the record make sure your repeat your names.

MR. SAINI: Your Honor, Ajay Saini from the State of New York for the plaintiffs.

THE COURT: Proceed.

MR. SAINI: Your Honor, the plaintiffs intend to make two points here today. First, that the injuries that they have alleged are not speculative and, in fact, the plaintiffs' action here, the inclusion of citizenship question on the 2020 census, creates a substantial risk of an undercount and poses a serious threat to plaintiffs' funding levels as well as apportionment and representational interests; and our second point that the plaintiffs' injuries are in fact fairly traceable to the defendants' actions.

THE COURT: Does your argument depend on my accepting that the substantial risk standard is still alive and not

inconsistent with certainly impending.

MR. SAINI: No, your Honor. We believe that there are immediate injuries that have occurred here. We have alleged that at paragraph 53 and -- 52 and 53 in which we state that the announcement of the citizenship question has an immediate deterrent effect and is already causing individuals to choose not to, in anticipation of the census, not cooperate. But that said, the substantial risk standard was affirmed just two years ago in Susan B. Anthony List v. Driehaus and as a result -- by the Supreme Court, and as a result the substantial risk standard is available here.

Your Honor the plaintiffs' injuries here are not speculative. First and foremost, the plaintiffs have shown that there is a substantial risk that an undercount will occur and the statements by the defendants over the last 40 years, the repeated determination by the Census Bureau that a citizenship question will, in fact, increase nonresponse, and not only increase nonresponse, but those determinations also include in the statements that a citizenship question would deter cooperation with enumerators going door to door seeking to count nonresponsive households is sufficient to find that there is a substantial risk of undercounting here.

The defendants have mischaracterized paragraph 53 of our complaint. We have, in fact, alleged that typical forms of nonresponse follow-up will be ineffective at capturing

individuals who are intimidated by the citizenship question. And the typical form of nonresponse follow-up there is the use of enumerators going door to door. And, again, Census Bureau's longstanding determinations on this serve as sufficient proof to show that, in fact, the nonresponse follow-up operations -- that there is a substantial risk that they will be effective. In addition, your Honor this is -- we are still at the beginning stage of this litigation and to the extent that we need to determine whether or not some unspecified nonresponse follow-up operations will somehow reduce potential undercount, that would require further factual development at later stages of the litigation.

THE COURT: Your view is that, therefore, I cannot or should not consider the government's announced procedures and plans on that front?

MR. SAINI: You need not consider it, your Honor, but even if you were to consider it these unspecified allegations regarding nonresponse follow-up would not be enough to defeat the plaintiffs' claim that there is, in fact, a substantial risk of an undercount here.

THE COURT: What's your answer to the argument that there are multiple other steps in the chain of inferences that are required for you to intervene including, for example, that it will affect the counts in your geographic jurisdiction disproportionately given the complex formulas at issue here for

apportionment, for funding, etc., essentially it's too speculative to know whether and to what extent it will have an effect and that ultimately you also need to prove that it has a material effect on those?

MR. SAINI: Your Honor, first we would note that we are at the pleading stage here so we do not need to determine with certainty the exact level of injury that we expect to suffer, if we do intend to provide further factual development in the form of expert and fact discovery to help further elucidate the injuries that we expect to result.

But more importantly, your Honor, there is plenty of case law relating to -- from here in the Second Circuit relating to the viability of funding harms from undercounts such as in Carey v. Klutznick, for instance, the Court recognized that funding harms were sufficient to establish Article III standing on the basis of plaintiffs' State and City of New York's claims that an undercount would affect their federal formula grants. And, similarly, the Sixth Circuit found in the City of Detroit v. Franklin that undercounting would affect potential funding under the Community Development Block Grant Program which we also have alleged in our complaint.

The last thing to note here --

THE COURT: Can I ask you a question. Mr. Shumate's argument is that Carey is different because it's a post-census

case and not a pre-census case and in that regard it didn't involve the same degree of speculation with respect to there being an undercount. What's your answer to that?

MR. SAINI: Our answer to that, your Honor, is, again, plaintiffs here -- the defendants here have repeatedly recognized that a citizenship question will impair the accuracy of the census both by driving down response rates but also by deterring cooperation with enumerators. That specific fact of government acknowledgment that this causal connection exists and that there's a substantial likelihood that a citizenship question will result in undercounts is significant here.

In addition, we have also pointed to, in the complaint at paragraphs 50 and 51, the results of pretesting conducted by the Census Bureau which shows unprecedented levels of immigrant anxiety. That pretesting also reveals that immigrant households, noncitizen households are increasingly breaking off interviews with Census Bureau officials. The results of that pretesting show that not only is there a substantial likelihood of an undercount here but there's a substantial likelihood of a serious undercount here. That's more than enough for plaintiffs to meet their burden.

THE COURT: And presumably those allegations are relevant to the question of whether the in-person enumerator follow-up would suffice to address any disparity; is that correct?

MR. SAINI: Yes, your Honor.

THE COURT: Can you turn to the question of traceability and address that. The language in the cases suggest that the intervening acts of third parties don't necessarily break the chain of causation if there is a coercive or determinative effect. I think the government's argument here is that there is no coercive effect. In fact, to the extent that the government coerces anything, it coerces people to respond to the census because it's their lawful obligation to do so.

So why is that not compelling argument?

MR. SAINI: Your Honor, the courts have repeatedly acknowledged, including the Second Circuit just last week in NRDC v. NHTSA that the government's acknowledgment of a causal connection between their action and the plaintiffs' injury is sufficient to find that the defendants' injury -- the plaintiffs' injury is fairly traceable to the defendants' conduct and that case law is sufficient to address this particular point.

With respect to the illegality point that the defendants have brought up here, we would point first to Rothstein which shows that the illegal intervening actions of a third party do not break the line of causation.

In addition, your Honor, while we haven't cited this in our papers because this point was first brought up and

explored in a reply brief, there are a line of cases relating to data breaches, including in the D.C. Circuit, Attias v. CareFirst, in which plaintiffs' injuries related to identity theft, were fairly traceable to a company's lack of consumer information data security policies in spite of the intervening illegal action of the third parties, namely the hackers stealing that confidential information.

THE COURT: Can you give me that citation?

MR. SAINI: I can give that to you -- it's in my bag, so I will give that to you shortly. Apologize about that.

THE COURT: All right. Very good. Why don't you wrap up on standing and we'll turn to the political question and APA question.

MR. SAINI: One last note on standing, your Honor. The plaintiff need only show that one city, state, or county within their coalition has Article III standing to satisfy the Article III requirement for the entire coalition. As a result, it's more than plausible to include that at least one of the cities, states and counties that we have alleged harms for related to funding and apportionment are likely and substantial -- at a substantial risk of harm here.

THE COURT: All right. Thank you.

MR. SAINI: Thank you, your Honor.

THE COURT: Mr. Shumate, back to you. Mr. Saini can look for that cite in the meantime.

Talk to me about political question and the APA and, once again, my question to you is why are those arguments not foreclosed by Carey v. Klutznick?

MR. SHUMATE: Your Honor, even assuming the plaintiffs have standing the case is not reviewable for two reasons: One, the political question doctrine, the second --

THE COURT: You have to slow down a little bit.

MR. SHUMATE: The APA is not reviewable because this matter is committed to the agency's discretion.

With respect to Carey, again, that case did not involve the addition of the question on the census questionnaire. There was very little analysis of the political question doctrine in that case. So it's hard to view that case as foreclosing the arguments we're making here.

THE COURT: But I don't understand you to be arguing that the decision with respect to the questions on the questionnaire is a political question and other aspects of the census are not political questions, or is that your argument? And to the extent that is your argument, where do you find support for that in the text of the enumeration clause?

MR. SHUMATE: So our argument is that the manner of conducting the census is committed to Congress, and Congress has committed that to the Secretary of Commerce. So to be sure there have been cases reviewing census decisions but those have been decisions involving how to count, who to count, things

like that, should we use imputation --

THE COURT: Isn't that the manner in which the census is conducted?

MR. SHUMATE: No. Those go squarely to the question of whether there's going to be a person-by-person headcount of every individual in America. That is the actual enumeration. So in those cases there was law to apply. There was a meaningful standard. Is there going to be an actual enumeration?

This case is fundamentally different. This doesn't implicate those issues how to count, who to count. It implicates the Secretary's information gathering functions that are pre-census itself. And there is simply no case that addresses that question or decides -- or says that it's not a political question.

THE COURT: Can you cite any case that has projected challenges to the census on the political question grounds?

MR. SHUMATE: No, there haven't been any cases like this one where a plaintiff is challenging the addition of a question to the census questionnaire itself. There have been cases --

THE COURT: You're telling me in the two hundred plus years of the census and the pretty much every ten-year cycle of litigation arising over it there has never been a challenge to the manner in which the census has been conducted; this is the

first one?

MR. SHUMATE: There has never been a challenge like this one to the addition of a question on the census questionnaire.

THE COURT: So it is specific to the addition of a question then.

MR. SHUMATE: Right. Right. So there have been cases --

THE COURT: In other words, that's the level on which I should look at whether it's a political question and the question -- literally adding the question is itself a political question. That's your argument?

MR. SHUMATE: Right. You don't need to go any further than that. Because our argument is that the Secretary's choice, or Congress's choice of which questions to ask on the census questionnaire is a political question. It is a value judgment and a policy judgment about what statistical information the government should collect. And there are no judicially manageable standards that the court can apply to decide whether that's a reasonable choice or not.

THE COURT: Why isn't the standard, and this becomes relevant to the issues we'll discuss later, why isn't the standard the one from the Supreme Court's decision in Wisconsin v. City of New York that it has to be reasonably related to the accomplishment of an actual enumeration? Why is that not the

standard and why is that not judicially manageable?

MR. SHUMATE: Because that case implicated the actual enumeration question. So there is a standard as to decide whether the Secretary's actions are intended to count every person in America. But that's not this case.

THE COURT: Isn't that the ultimate purpose of the census?

MR. SHUMATE: That is the ultimate purpose of the census, but the manner of conducting the census itself, the information-gathering function in particular is a political question. There is simply no law that the Court can find in the Constitution to decide whether the government should collect this type of information or that type of information.

THE COURT: So is it your argument that if the Secretary decided to add a question to the questionnaire that asks who you voted for in the last presidential election, that that would be unreviewable by a court?

MR. SHUMATE: It would be reviewable by Congress but not a court. That demonstrates why this is a political question, because Congress has reserved for itself the right to review the questions.

Two years before the census the Secretary has to submit the questions to Congress. If Congress doesn't like the questions, the Congress can call the Secretary to the Hill and berate him over that; or they can pass a statute and say no,

we're going to ask these questions. That's how the census used to be conducted. It used to be that statutory decision about which questions to ask on the census. But Congress has now delegated that discretion to the Secretary. But ultimately it is still a political question about the manner of conducting the census that is committed to the political branches.

THE COURT: What if the Secretary added a question that was specifically designed to depress the count in states that -- we live in a world of red states and blue states. Let's assume for the sake of argument that the White House and Congress are both controlled by the same party. Let's call it blue for now. And let's assume that the Secretary adds a question that is intended to and will have the predictable effect of depressing the count in red states and red states only. Again, don't resist the hypothetical. Your argument is that that's reviewable only by Congress and even if Congress, even if there's a political breakdown and basically Congress is not prepared to do anything about that question, that question is not reviewable by a court?

MR. SHUMATE: Correct. Because it is a decision about which question to ask. It wouldn't matter what the intent was behind the addition of the question. It's fundamentally different than a question, like the courts have reviewed in other cases, about who to count, how to count, things like that, should we count overseas federal employees. That's a

judicially manageable question. We can decide whether those individuals should be counted or not. It's different than whether sampling procedures should be allowed because it implicates the count itself. This is the pre-count information-gathering function that is committed to the political branches.

THE COURT: A lot of your argument turns on accepting that the plaintiffs' challenges to the manner in which the census is conducted as opposed to the enumeration component of the clause. Isn't the gravamen of the plaintiffs' claim here that by virtue of adding the question it will depress the count and therefore interfere with the actual enumeration required by the clause?

MR. SHUMATE: They're trying to make an actual enumeration claim, but their factual allegations don't implicate that clause of the Constitution at all because what they're challenge is the manner in which the Secretary conducts the information-gathering function delegated to him by Congress.

So there is no allegation in the complaint, for example, that the Secretary had not put in place procedures to count every person in America. I think they would have to concede that the Secretary has those procedures in place and intends to count every person in America.

Now they argue that -- I will get to this later --

they argue that the question will depress the count itself. But that would lead down a road where they can -- plaintiffs could challenge the font of the form itself, the size of the form, whether it should be put on the internet, or the other questions on the form itself: Race, sex, Hispanic origin. These are matters that are committed to the Secretary's discretion for himself.

THE COURT: That may be committed to his discretion but that's a different question than whether they're completely unreviewable by a court, correct?

In other words, it may well be that there's a place for courts to review the decisions of the Secretary but giving appropriate deference to those decisions? Isn't that a fundamental distinction?

MR. SHUMATE: That is correct, your Honor. Even if you assume that it is not a political question, the court would still -- should grant significant deference to the Secretary if the court gets to the enumeration clause claim.

THE COURT: Let's talk about the APA argument and whether it's committed to the discretion of the agency by law.

Can you cite any authority for the proposition that a census decision is so committed or is your point that this case has never -- this is an issue of first impression effectively?

MR. SHUMATE: The later point, your Honor. This is a question of first impression. However, Webster v. Doe, a

Supreme Court case, involved similar statutory language. I'll read that language. It said --

THE COURT: How do you square that with Justice Stevens' concurring opinion in Franklin where he essentially distinguished Webster on several grounds?

MR. SHUMATE: He did not get a majority of the Court, your Honor, so it wouldn't be controlling.

THE COURT: I understand that. I'm not controlled by it. But on the merits, tell me why he is not right.

In other words, the language in Webster was deemed advisable. That's not the language here. The structure of the Act at issue in Webster and the purpose of the Act, namely national security, implicated fairly significant considerations that are absent here. Here, there's an interest in transparency and the like that was absent or the exact opposite in Webster.

MR. SHUMATE: I respectfully disagree. To be sure, Webster involved national security where the courts have historically deferred significantly to the political branches. But so have courts also deferred to political branches when it comes to the census. The Wisconsin case from the Supreme Court makes that quite clear.

THE COURT: But holds that it's reviewable.

MR. SHUMATE: A case involving the actual enumeration question, not a case involving the Secretary's

information-gathering function.

And I think we need to focus on the specific language of the statute itself, which was not involved -- not at issue in Franklin, did not involve a question about what questions to ask on the form.

The statute here says: Congress has delegated to the Commerce the responsibility to conduct a census, quote, in such form and content as he may determine.

THE COURT: Slow down.

MR. SHUMATE: Such form and content as he may determine. As he may determine. That is very similar to the language in Webster, that he deems advisable.

So there is simply nothing in the statute itself that a court can point to, to decide whether it's reasonable to ask one question or another because the statute says he has -- the Secretary himself has the discretion to decide the form and content of the census questionnaire itself.

THE COURT: I take it that language was added to the statute in 1976; is that right?

MR. SHUMATE: I'm sorry. I don't understand.

THE COURT: That language was added to the statute in 1976?

MR. SHUMATE: I think the statute I'm pointing to is a 1980 statute, Section 141 of the census, because it says the Secretary shall conduct the census in 1980 and years -- so

perhaps --

THE COURT: Probably passed before 1980.

MR. SHUMATE: Right. Right.

THE COURT: Is there anything in the legislative history that you're aware of that suggests that Congress intended to render the Secretary's decisions on that score totally unreviewable?

MR. SHUMATE: I'm not aware of any legislative history, your Honor, on this question about whether courts should be permitted to review the Secretary's choice of which questions to ask on the census.

THE COURT: All right. Very good. Anything else on these two points? Otherwise I'll hear from plaintiffs.

MR. SHUMATE: I don't think so, your Honor.

THE COURT: All right. Thank you.

Good morning.

MS. GOLDSTEIN: Good morning, your Honor.

Elena Goldstein for the plaintiffs. Before I begin, your Honor, I do have that citation that my colleague referenced. Attias v. CareFirst, Inc. That is 865 F.3d 620.

THE COURT: Thank you.

MS. GOLDSTEIN: That was from 2017.

THE COURT: You may proceed.

MS. GOLDSTEIN: Thank you, your Honor.

Before I get to the heart of defendants' arguments, I

want to address this decision that they've made to get very granular with respect to the question, with respect to the exact conduct of the Secretary here.

The defendants contend repeatedly that this is a case of first impression and that no case has ever challenged a question on the census. That fact highlights the extreme and outlandish nature of defendants' conduct here.

If you look at the wide number of census cases that are out there, that I know we've all been looking at, there's a common theme. And the common theme is that the Census Bureau and the Secretary aim for accuracy.

If you look at the Wisconsin case, there the Secretary determined not to adjust the census using a post-enumeration survey had some science on his side. The Court says the Secretary is trying to be more accurate, has some science, we will defer. Utah v. Evans is similar. The determination to use a type of statistic known as hot-deck imputation, the Secretary says we're trying to be more accurate, we will defer.

This case turns that factual predicate on its head and in a most unusual way. Instead of the Secretary aiming for accuracy, the Secretary here has acknowledged that he's actually moving in the opposite direction.

THE COURT: So let's say I agree with you. Why under the language of the clause and the language of the statute is that not a matter for Congress to deal with?

Congress has required the Secretary to report to Congress the questions that he intends to ask sufficiently in advance of the census that Congress could act, that the democratic process could run its course. Why is that not the answer instead of having a court intervene?

MS. GOLDSTEIN: Your Honor, defendants confuse the grant of authority to Congress for a grant of sole and unreviewable authority. They draw this -- there's a vast number of cases out there that are holding, as the Court has noted, that these census cases are not, in fact, political questions. So in order to distinguish between all of those cases and this one case that defendants argue is not justiciable defendants proffer this novel distinction between the manner of the headcount and the headcount itself. But that distinction is a false dichotomy that collapses on further review. In many cases, including this one, the manner of the headcount absolutely impacts the obligation to count to begin with. In this case plaintiffs have specifically alleged that defendants' decision to demand citizenship information from all persons will reduce the accuracy of the enumeration. That is, in defendant's effective parlance, a counting violating. And it's easy to think of many other examples in which the manner of the headcount is absolutely bound up in the headcount obligation itself. For example, the decision, as defendants point out, between Times New Roman and Garamond font, likely

within the government's discretion. But the decision to put the questionnaire in size two Garamond font that's unreadable, for example, on the questionnaire, that would be certainly a decision that would impact the accuracy of the enumeration. The decision to send out all the questionnaires in French would impact the accuracy of the enumeration.

THE COURT: Right. But not every problem warrants or even allows for a judicial solution, right. Indeed the Supreme Court said as much last week in some cases, like why is the remedy there not Congress stepping in and taking care of that problem, mandating that it be distributed in 17 languages instead of one, mandating that it be in twelve-point font, etc.

Why is a court to supervise, at that level of granularity, the Secretary's conduct that is committed to him by statute?

MS. GOLDSTEIN: Your Honor, defendants' political question argument depends on this manner versus headcount distinction. They acknowledge that everything else courts can review, not review on that granular level but review under Wisconsin to affirm that the Secretary's decision bears a reasonable relationship to the accomplishment of an enumeration.

Courts do not analyze cases in this fashion. The starting point, as the Court has recognized, is Carey. This is a case that is, I think by any fair reading, a manner case. It

involved the adequacy of address registers. It involved the adequacy of enumerators going out. The Court there holds squarely that this is not a political question.

And looking at even Wisconsin, your Honor, the Court there recognized that the Secretary's discretion to not adjust the census in that case arises out of the manner language of the statute.

Virtually every court to consider this issue has held the fact that Congress has authority over the census does not mean that that is sole or unreviewable authority.

THE COURT: What is the judicially manageable standard to use?

The defendants throw out some hypotheticals as to whether it would constitute a violation of the -- let me put it differently.

Is the standard the pursuing accuracy standard that you articulate in your brief and to some extent you've articulated here?

MS. GOLDSTEIN: Yes, your Honor.

I think that the baseline standard is the standard in Wisconsin, that defendants are obligated to take decisions that bear a reasonable relationship to the accomplishment of an actual enumeration, and accomplishing an actual enumeration means trying to get that count done, which means pursuing accuracy. Whatever the outer limits of that decision may be,

your Honor, it is not taking decisions that affirmatively undermine that enumeration.

THE COURT: So defendants cite a number of hypotheticals in their reply brief, for example, the question of whether to hire 550 as opposed to 600,000 in-person enumerators; the question of whether to put it in 12 languages versus 13 languages.

Is it your position that those aren't reviewable but presumably acceptable on the merits or -- I mean what's your position on those?

MS. GOLDSTEIN: Yes, your Honor.

The vast majority of those kinds of decisions made by the Secretary are well within the bound of the discretion that's laid out in Wisconsin. But as you push those examples further, the decision to send 500 enumerators versus 450, clearly within the Secretary's discretion. Both accomplish an actual enumeration and are calculated to do so.

But the decision to send no enumerators or no enumerators to a particular state, that begins to look more questionable as to whether or not that decision would bear a reasonable relationship to accomplish an enumeration and, under defendants', theory would be entirely unreviewable.

THE COURT: Turning to the APA question, I think you rely in part on the mandatory language in some places in the census act. There is no question that the Act mandates that

the Secretary do X, Y, and Z but the relevant clause here would seem to be the permissive one, namely, in such form and content as he may determine.

So why are the mandatory aspects of the Act even relevant to the question of whether it's committed to agency discretion?

MS. GOLDSTEIN: Your Honor, with respect to the plain language of the Census Act, I would argue that Section 5 which directs the Secretary to determine the question -- the mandatory language directs the Secretary to determine the questions and inquiries on the census is more specific than the form and content language that even arguably is permissive in Section 141.

In addition, as plaintiffs have noted in that their papers, there are multiple sources for law to apply in this case, both from those mandatory requirements of the Census Act from the constitutional purposes undergirding the census, the Constitution and the Census Act, and the wide array of administrative guidance out there dictating specifically how the Census Bureau has and does add questions to the decennial questionnaire. In light of that mosaic of law, there is no question that the vast majority of courts to consider this question have concluded that challenges to the census are reviewable, that there is law to apply.

THE COURT: And to the extent that you rely on the

Census Bureau's own guidance, don't those policy statements have to be binding in order to provide law to apply?

MS. GOLDSTEIN: No, your Honor. The starting point here -- so defendants are arguing that there is no law to apply at all. And the Second Circuit in the Salazar case makes very clear that the Court can look to informal agency guidance to determine whether or not there is law to apply.

In Salazar the Court was looking to dear-colleague letters that no one alleged gave rise to a finding of a private right of action. But at the same time those dear-colleague letters, in conjunction with other law out there, formed the basis for agency practices and procedures that departures therefrom could be judged to be arbitrary or capricious.

So, too, in this case. Plaintiffs have identified a wide arrange of policies and practices and procedural guidance dictating the many testing requirements that questions are typically held to and required to go through prior to being added to the decennial census the defendants have entirely ignored here. I'm happy to distinguish the cases that defendants have cited if the Court would like me to continue on this.

THE COURT: No. I think I'd like to turn to the enumeration clause issue at this point.

Mr. Shumate, you're back up.

MR. SHUMATE: Thank you, your Honor.

THE COURT: Do you agree that the relevant standard comes from Wisconsin is the reasonably related or reasonable relationship to the accomplishment of an actual enumeration that that is the guiding standard here?

MR. SHUMATE: I think that would be the guiding standard in a case involving a question over whether the Secretary has procedures in place to conduct an actual enumeration, but that is not this case. This is a case involving the information-gathering function that takes place during the census. And there is no standard to apply.

THE COURT: What is the authority -- Ms. Goldstein just argued that it's a false dichotomy and a false distinction that you're trying to draw between the manner and the enumeration. I mean it seems to me that there is some -- it's hard to draw that -- a clear distinction in the sense that clearly the manner in which the Secretary conducts the census will determine, in many instances, whether it actually is an accurate actual enumeration.

So are there cases that you can point to that draw that distinction and indicate that it is as bright line as you're suggesting?

MR. SHUMATE: I can't, your Honor, because frankly there hasn't been a case like this one involving the facial challenge to the addition of a question itself. But even assuming that is the standard, there's nothing in the

Constitution that forecloses the Secretary from asking this questions on the census questionnaire. There is no allegation that the Secretary doesn't have procedures in place to conduct person-by-person headcount in the United States. And as the Secretary said in his memo at pages one and eight, he intends, again, procedures in place to make every effort to conduct a complete and accurate census. So they're not challenging the procedures themselves. They're not challenging the follow-up operations. They're just challenging the addition of a question itself.

THE COURT: What about the hypothetical that the Secretary decides to send in-person enumerators only to states in certain regions of the country. Why would that not be a violation of the enumeration clause?

MR. SHUMATE: I think that would be, first of all, a very different case, but there may be a valid claim there if the Secretary had not put in place procedures to count every person in the United States.

THE COURT: Procedures sounds an awful lot like manner, no? In other words, why is that not a manner case as well that ultimately goes to the enumeration?

MR. SHUMATE: Because it implicates the count itself. It's not the questions on the form itself that are used to collect the information to count itself. So it's a fundamentally different situation.

But, again, they don't have those allegations in the complaint here that the number of enumerators are insufficient. The only challenge here is to the addition of a question itself.

We can't ignore the fact that this question has been asked repeatedly throughout our history, as early as 1820 and as most recently as the 2000 census. And as the Wisconsin Court made clear, history is fundamentally important in a census case because the government has been doing this since 1790.

THE COURT: I take it your view is I can consider that history on a 12(b)(6) motion because there are undisputed facts, essentially historical facts.

MR. SHUMATE: Historical facts that take judicial notice of the fact that the question has been asked repeatedly throughout history.

THE COURT: Why does history not cut in both directions in the sense that the question was abandoned from the short-form census since 1950; in other words, for the last 68 years it has not been a part of the census.

MR. SHUMATE: It has been part of the long-form census which went to one in six households, and those households didn't get the short form. So under their view it was unconstitutional for the government to send the long-form census to one in six houses, it was unconstitutional for the

government to ask this question in 1950 and in 1820, and that cannot possibly be right.

Let me address their point about the standard is accuracy, the Secretary has to do everything to pursue accuracy. That can't possibly be the standard. It's a made-up standard. It doesn't come from the cases. And it's simply unworkable.

On this question of the font on the form itself. There's nothing for the court to evaluate to decide whether that would be a permissible choice or not. It would give rise to courts second guessing everything that the Secretary does to collect the information for the census. And that's -- it's simply not a case where the allegations implicate the procedures that are in place to count every person in America; instead this is case implicating the information-gathering function.

THE COURT: Now in United States v. Rickenbacker, Justice Marshall, for whom this courthouse is named, wrote that, "The authority to gather reliable statistical data reasonably related to governmental purposes and functions is a necessity if modern government is to legislate intelligently and effectively. The questions contained in the household questionnaire related to important federal concerns such as housing, labor and health and were not unduly broad or sweeping in their scope."

Now admittedly that was in the context of a Fourth Amendment challenge to a criminal prosecution of someone who refused to respond to the census. But why is that not the relevant standard here?

It seems to me that the census's dual purpose, I think, has always been about getting an accurate count for purposes of allocating seats in the House of Representatives, but from time immemorial it seems that it also was used to collect data on those living in this country and that that has been deemed an acceptable, indeed, important function of it.

So why is that not a sensible standard to apply here?

MR. SHUMATE: Your Honor, it may be. But if that's the standard, there is no reason that the addition of a citizenship question would run afoul of that standard.

Again, the question has been asked repeatedly.

THE COURT: First of all, two questions. One is doesn't that provide a judicially manageable standard? Again, recognizing the deference of it to the Secretary on his judgments with respect to it, but at least it is a standard against which the Secretary's judgments can be measured, no?

MR. SHUMATE: I don't know where that standard comes from, your Honor. It certainly doesn't come from --

THE COURT: Thurgood Marshall.

MR. SHUMATE: That doesn't come from the Constitution, because the Constitution simply says the manner of conducting

the census. The plaintiffs are right. That's not the standard that the plaintiffs are pressing. They're pressing the standard that the Secretary has to do everything to pursue accuracy. And if that's right, then the plaintiff can claim that the questions about race and sex and Hispanic origin are also unconstitutional.

THE COURT: But you don't make the argument that that's the relevant standard to apply in your brief?

MR. SHUMATE: No, your Honor. The standard to apply, if there is one, is actual enumeration. And the plaintiffs haven't made any allegations that the Secretary does not have procedures in place to conduct an actual enumeration.

THE COURT: And the purposes for which the question was added, obviously in the Administrative Record the stated purpose was to enforce -- help enforce the Voting Rights Act. Are there additional purposes that would justify addition of the question and, relatedly, are those purposes somewhere in the record?

MR. SHUMATE: Your Honor, the standard rationale was the one provided by the Secretary in his memorandum. If we ever get to the APA claim, that would be the basis on which the Court would review the reasonableness of his decision.

But in terms of the constitutional claim, plaintiffs have to show, notwithstanding all the significant deference that the Secretary is entitled to, that the addition of this

question violates the Constitution. But, again, there is no suggestion here that the Secretary does not have procedures in place to count every person in America, and it can't be the standard that anything that might cause an undercount would be somehow unconstitutional, because that would call into question many other questions on the form, and it would ignore the long history that this question has been asked on the census.

THE COURT: And I guess -- what if the political climate in our country was such that the administration was thought to be very anti gun, let's say, and there were perceived threats to gun ownership, thoughts that the administration and the federal government would seize people's guns, and that administration proposed adding a question to the census about whether and how many guns people owned. Do you think that would not violate the enumeration clause?

MR. SHUMATE: It would not violate the clause, and Congress could provide a remedy and pass a statute and say this is not a question that should be asked on the census. It wouldn't be for a court to decide this question is bad, this one is good. That is something that is squarely committed to the political branches to decide.

THE COURT: Who is handling this for the plaintiffs?

Ms. Goldstein again. All right.

Tell me why the Thurgood Marshall standard shouldn't apply here.

MS. GOLDSTEIN: Your Honor, even if the Thurgood Marshall standard would apply, as I can address in a moment, this question would still violate it. But the Supreme Court in Wisconsin, a more recent case, has made clear the standards that the Court uses to assess the Secretary's decisionmaking authority with respect to the census and that is whether or not the Secretary's decisions bear a reasonable relationship to the accomplishment of an actual immigration keeping in mind the constitutional purposes of the census.

THE COURT: Tell me, measured against that standard, why asking any demographic questions on the census would pass muster, in other words, presumably asking about race, about sex, about all sorts of questions that have long been on the census, I mean they certainly don't -- they're not reasonably related to getting an accurate count because they don't do anything to advance that purpose and they presumably, to the extent they have any effect, it is to depress the count if only because people view filling out the form as more of a pain.

So how would any of those questions pass muster under that test?

MS. GOLDSTEIN: Your Honor, this is not an ordinary demographic question.

THE COURT: That's not my question though. In other words, based on the test that you are articulating wouldn't any demographic question on the questionnaire fail?

MS. GOLDSTEIN: Absolutely not, your Honor. Ordinary questions which are subject to extensive testing procedures that are precisely designed in order to assess and minimize and deal with any impacts to accuracy likely do, when they emerge from the end point of that testing, bear a reasonable relationship to the accomplishment of an actual enumeration. The Secretary is permitted under Wisconsin to privileged distributional accuracy over numerical accuracy. So if adding a gender question or a race question brings down the count a certain percent, there is no suggestion that that is disproportionately impacting certain groups as defendant Jarmin has acknowledged with respect to this situation.

THE COURT: What about sexuality? Could the Secretary ask about sexuality in the interests of getting public health information, perhaps?

MS. GOLDSTEIN: Your Honor, I think to answer that question we would need to wait and see the procedures that the Census Bureau puts that question to, for example, with respect to the race and ethnicity question that the Secretary looked at for nearly a decade subjecting it to focus group testing cognitive testing, all sorts of testing to assess the impact on accuracy.

Now to the extent that a sexuality question had a disproportionate impact that the Secretary acknowledged and recognized and decided to take an action to reduce the accuracy

of the census nonetheless, that may well state a claim. But the vast majority of decisions that the Secretary may make will not.

Now in this case -- there may be hard cases out there, your Honor, but this case is an easy case.

THE COURT: And is the standard an objective one, I assume? If one doesn't like at the intent of the Secretary or the government in adding the question, presumably it's an objective test of whether it's reasonably related to the goal of an actual enumeration.

MS. GOLDSTEIN: That is correct, your Honor.

However, defendants acknowledged recognition of the deterrent effect of this question certainly is good evidence that this will, in fact, undermine the enumeration and does not reasonably relate it to accomplishing enumeration.

THE COURT: But because it's objective evidence. In other words, let's assume for the sake of argument that the question was added by the Secretary to suppress the count in certain jurisdictions -- I'm not suggesting that that is the case but let's assume -- is that relevant to whether it states a claim under the enumeration clause.

MS. GOLDSTEIN: No, your Honor, but it may be well relevant to the claim under the APA.

THE COURT: Go back to the Thurgood Marshall standard and tell me why that should not be the relevant standard here.

It seems to me, as I mentioned to Mr. Shumate, that the census has long had essentially a dual purpose. On the one hand, it is intended to get an actual enumeration and count the number of people in our country for purposes of representation. On the other hand, it has long been accepted that it's a means by which the government can collect data on residents of the country. So why is -- it seems to me that the questions on the questionnaire are more tethered to that later purpose and if that's the case there is a little bit of a mismatch in measuring the acceptability of a question against whether it's reasonably related to the first goal.

MS. GOLDSTEIN: Your Honor, plaintiffs are to some extent hampered on this because defendants have not proffered the standard or argued it.

THE COURT: They say there is no standard which is why it's a political question.

MS. GOLDSTEIN: But the end of that sentence that you read by Justice Marshall made clear that even on that standard of gathering additional demographic data that there are questions that are unduly broad in scope.

Now here what we are alleging, that the Secretary of Commerce has made a decision that reverses decades of settled position that the Census Bureau recognizes that this specific question will reduce the accuracy of the enumeration; in their words from 1980, will inevitably jeopardize the accuracy of the

count, where defendants themselves have recognized that this may have, as defendant Jarmin indicated, important impacts in immigrant and Hispanic communities against this particular historical and cultural moment where this administration's anti immigration policy --

THE COURT: Let me ask you a question about that and try and get at what role that plays in the argument. Let's assume for the sake of that argument that the prior administration had added the citizenship question in a different climate. New administration comes in, whether it's this one or some other one, that is perceived to be very anti immigrant. Does the existence of the question suddenly become unconstitutional because the political climate has changed?

MS. GOLDSTEIN: I think that the starting point in this case is significant. The starting point is a reversal of decades of the settled position. The starting point is without a single test or even explanation as to why that position is being changed. The starting point is a recognition that it will impair accuracy. I think if this is a long-standing question, this has been on the census, that might be a different situation.

Just to address defendants' contention that the historical practice weighs in favor of them, I think setting aside that I do think that this is a merits question, this gets

the merits wrong. This question has not been asked of all respondents since 1950. It, instead, has been relegated to the longer form instrument where the citizenship demand is one of many questions. On the ACS it can be statistically adjusted. Failure to answer does not bring a federal employee to your door, knocking on it, demanding to know if you are a citizen.

THE COURT: How can it be constitutional to include it on a long-form questionnaire and not on a short-form questionnaire? In other words, how can the constitutionality of whether the question is proffered or asked turn on the length of the questionnaire?

MS. GOLDSTEIN: The question before the Court is whether or not the decision that was made several months ago to add this question to the long-form questionnaire that goes to all households, whether or not that question is constitutional. The question of whether or not it was constitutional in 1970 I believe when it was -- when the world was different, when it was originally on the long form is not before the court. The question has not been -- has been asked on the ACS since 2005.

Now defendants' allegations that the ACS is effectively the same thing as the census I think really belie or ignore the allegations in plaintiffs' complaint. The Census Bureau has for decades repeatedly resisted calls to move the question from the ACS to the census precisely because while the question may perform on the ACS it does not perform on the

census because it undermines the accuracy of that instrument.

THE COURT: Why, measured against the reasonable relation standard that you're pressing, would the mere use of the long-form questionnaire, why wouldn't that be unconstitutional?

In other words, I think that the response rate of those who receive the long-form questionnaire is significantly lower than the response rate of those who receive the short-form questionnaire. On your argument wouldn't that be unconstitutional under the enumeration clause?

MS. GOLDSTEIN: Your Honor, I think that just the lack of testing and the conduct with respect to this decision alone makes this decision distinguishable. With respect to the change in the long-form questionnaire, with respect to the ACS, with respect to those other demographic questions, they went through considered detailed procedures designed to assess and to minimize impacts on accuracy. Those tests, those procedures were entirely ignored here. And that alone distinguishes the Secretary's conduct.

THE COURT: All right. Thank you very much.

That concludes the argument on the motion to dismiss. Let me check with the court reporter whether we need a break or not.

She is willing to proceed so I am as well.

Why don't we hear from plaintiffs on discovery since

they're the moving parties on that front. I think the papers are fairly adequate for me to address most of the issues on this front. In that regard I don't intend to have a lengthy oral argument but I don't want to deprive you of your moment in the sun, Mr. Colangelo.

MR. COLANGELO: Thank you, your Honor.

Good morning. Matthew Colangelo from New York for the state and local government plaintiffs. I'll make two key points regarding the record. First is that the record the United States has prepared here is deficient on its face and should be completed. It deprives the Court of the opportunity to review the whole record as it's obligated to do under Section 706 of the APA. And the second broad argument I'll make is that the plaintiffs have, even once the record is completed, we anticipate the need for extra record discovery in light of the evidence of bad faith, the complicated issues involved in this case and, of course, the constitutional claim.

So turning to the first argument, as I've mentioned, the APA requires the Court to review the whole record. In Dopico v. Goldschmidt the Second Circuit --

THE COURT: Can I ask you a threshold question, which is why I shouldn't hold off until I've decided the motion to dismiss in light of the Supreme Court's decision in the DACA litigation arising out of California.

MR. COLANGELO: The circumstances in the DACA

litigation, your Honor, were extremely different and distinguishable from the circumstances here. The Court in that case pointed out that the United States had made an extremely strong showing of the overbroad nature of the discovery request. I believe the solicitor general's reply on cert to the Supreme Court mentioned that they would be obligated to review and produce 1.6 million records. So it was against the backdrop of that extremely broad production request that the Court said that it might make -- the Court directed the district court to stay its discovery order until it resolved the threshold questions. Nobody is requesting 1.6 million records here, your Honor.

THE COURT: How do I know that since the question of what you're requesting is not yet before me.

MR. COLANGELO: I think, among other reasons, your Honor, you know that because the United States hasn't made any contention at all that there's anything near the size of that record that's being withheld in this case as they did in the DACA litigation.

There are, to use the language from Dopico, there are a number of conspicuous absences from the record presented here and we would draw your attention to four in particular.

The first is that with the exception of background materials, there is essentially nothing in the record that predates the December 2017 request from the Justice Department.

There is no record at all of communications with other federal government components. The new supplemental memo that the Secretary added to the record just twelve days ago now discloses for the first time that over the course of 2017 the Secretary and his senior staff had a series of conversations with other federal government components. None of those records are anywhere in the Administrative Record that the United States produced.

Second, again with the exception of the December 2017 memo, the United States hasn't produced anything at all reflecting the Justice Department's decision where, as here, the heart of the Secretary's rationale for asking about citizenship, according to his March decision memo, was the supposed need to better enforce sections of the Voting Rights Act. It's just not reasonable to believe that there are no other records that he directly or indirectly considered in the course of reaching his decision. In fact, the Secretary testified to Congress under oath that we had a lot of conversations with the Justice Department. If that's the case, those conversations ought to be included in the record.

The third key category of materials that are conspicuously omitted include records of the stakeholder outreach that the Secretary did conduct over the course of -- earlier this year. The Secretary's decision memo says he reached out to about two dozen stakeholders. Other than what

appear to be undated, after-the-fact post hoc summaries that somebody somewhere prepared of those calls, there is no information at all about how those 24 stakeholders were selected; why, for example, was the National Association of Home Builders one of the stakeholders that the Secretary elected to reach out to here. The government has omitted the Secretary's briefing materials. All of these records are records that are necessary to help understand the government's decision.

And then the final category of materials conspicuously omitted are the materials that support Dr. Abowd's conclusion that adding this question would be costly and undermine the accuracy of the count. Dr. Abowd is the Census Bureau's chief scientist. Obviously materials that he relied on in reaching that adverse conclusion are materials that the Secretary indirectly considered and that body of evidence should be included in the record as well.

THE COURT: Why don't you briefly speak to the bad faith argument and then I want to address the question of scope and what should and shouldn't be permitted if I allow discovery. I don't know if that's you or Mr. Rios who is planning to address that.

MR. COLANGELO: I can address scope and then I will turn to Mr. Rios to address one aspect of our anticipated expert discovery, your Honor.

On bad faith, your Honor, we think there are at least five indicia of bad faith here, more than enough -- more than enough certainly singularly to justify expanding the record but in collection we think they make an overwhelming case.

THE COURT: List them quickly if you don't mind.

MR. COLANGELO: Why don't I focus on two. First is the tremendous political pressure that was brought to bear on the Commerce Department and the Census Bureau. The record that the Justice Department presented discloses what appear to be four telephone calls between Kris Kobach and the Commerce Secretary or his senior staff on this question at a time that the Commerce Secretary now admits he was considering how to proceed on this question. The Justice Department's only response in the paper they filed with the Court is that that appears to be isolated or unsolicited and quite frankly, your Honor, that's just not credible. The Commerce Secretary and the senior staff had four telephone calls with an adviser to the President and Vice-President on election law issues on the exact question that the Secretary now acknowledges he was then considering. Mr. Kobach presented to the Secretary proposed language to this question that matches nearly verbatim the language that the Secretary ultimately decided to add to the census questionnaire and yet the only conclusion one can draw is that it was isolated, incidental and immaterial contact. That's just not a reasonable position to take without exploring

more of the record.

The second argument that I'll mention briefly, that the shifting chronology here that the Commerce Department has presented we think also presents a strong case of bad faith. The March decision memo explicitly describes the Commerce Department's consideration of this question as being in response to the requests they received from the Justice Department. The Secretary's more or less contemporaneous sworn testimony to Congress repeats that point several times. In at least three different congressional hearings he uses language like we are responding only to the Justice Department; as you know, Congressperson, the Justice Department initiated this request; and then just twelve days ago the Commerce Secretary supplemented the record and disclosed that, in fact, the Commerce Department recruited the Justice Department to request this question, which certainly suggests that the Commerce Department knew where it wanted to go and was trying to build a record to support it. The rest of the arguments are set out in our papers, your Honor.

THE COURT: So talk to me about what the scope of discovery that you're seeking is and why I shouldn't, if I authorize it at all, severely constrain it.

MR. COLANGELO: Well, your Honor, I think we're actually looking for quite tailored discovery here and I think we can stagger it, I think as an initial --

THE COURT: It's grown from three or four depositions at the initial conference to twenty.

MR. COLANGELO: Fair enough, your Honor. But at the initial conference we didn't have the Administrative Record that disclosed the role of Mr. Kobach at the instruction of Steve Bannon. We didn't known that Wendy Teramoto, the Secretary's chief of staff, had a series of e-mails and several phonecalls with Mr. Kobach at the exact same time they were now considering this question.

So, respectfully, our blindfolded assessment of what we might need has expanded slightly, but I still think it's a reasonable and reasonably tailored request. And so I would say a couple of things.

First, I think the Justice Department ought to complete the record by including the materials that are conspicuously omitted and that they acknowledge exist and they ought to do that in short order and at the same time ought to present a privilege log so that we can assess, without guessing, what their claims of privilege are and why those claims are or are not defensible.

I think once we have completed the administrative record, I think there is additional discovery, particularly in the nature of testimonial evidence, some third-party discovery, of course, Mr. Kobach, the campaign, Mr. Bannon, potentially some others. I think it's critical that we get evidence from

the Department of Justice because the Department of Justice ostensibly was the basis for the Secretary's decision, and then expert testimony, which we can turn to in a moment.

THE COURT: And then talk to me about Mr. Kobach, Mr. Bannon. First of all, wouldn't it suffice, if I authorize discovery, to allow you to seek that discovery from the Commerce Department and/or the Justice Department alone? In other words, the relevance of whatever input they gave is what impact it had on the decision-makers at Commerce and that can be answered by discovery through Commerce alone. I'm not sure it warrants or necessitates expanding to third parties and then, second to that, Mr. Bannon is a former White House adviser and that implicates a whole set of separate and rather more significant issues, namely separation of powers issues, and executive privilege issues, and so forth. Why should I allow you to go there?

MR. COLANGELO: A couple of reasons, your Honor. First of all I do think we can table the question. I'm not prepared to concede that he we don't need third-party discovery. It may well be the only way that we can understand the basis for the Secretary's decision. But I do think we can table it to see, especially if we can do it quickly, what the actual completed record looks like and what other documents and potentially other testimonial evidence may disclose. And we certainly wouldn't be seeking to take third-party depositions

next week.

And I appreciate the concerns, obviously, about executive privilege. But we do have the separate -- two separate issues here. One is that the Secretary has testified to Congress that he was not aware at all of any communications from anyone in the White House to anyone on his team. So if it now turns out that that congressional testimony may have omitted input from Mr. Bannon, I think we would want to discuss the opportunity to seek further explication of what exactly happened.

And then the final reason why I'm not prepared to concede that this additional evidence may not be necessary is the involvement of political access here is problematic for the Commerce Department's decision in a way that might not arise in an ordinary policy judgment case for two reasons. First, it's not consistent with the Secretary's presentation of his decision in his decision memo; but second, the Census Bureau is a statistical agency that is governed by the White House's own procedures that govern how statistical agencies ought to operate and among the core tenets of those procedures is independence and autonomy from political actors. So to the extent that there was undue political involvement in the decision here, we think that it probably does bear somewhat heavily on the Court's ability to assess the record.

But I don't disagree that we can stagger it. I'm just

not prepared to concede now that we won't need it.

THE COURT: Let me hear from Mr. Rios briefly and then I'll here from Mr. Shumate -- excuse me, not Mr. Shumate.

Go ahead.

MR. RIOS: May it please the Court, your Honor, Rolando Rios on behalf of the plaintiffs. My brief comments, your Honor, are addressed to the need for discovery on an Article I claim. My clients, Hidalgo and Cameron Counties, are on the southernmost Texas border between Mexico and the United States. It is the epicenter of the hysterical anti immigrant rhetoric from the federal government. McAllen and Brownsville are the county seats. It is a microcosm, your Honor, of what is going on across the country in the Latino community. Quite frankly, the minority community across the country is traumatized by the federal government's actions.

THE COURT: Mr. Rios, I don't mean to cut you off but if you could get to the expert discovery point that you want to make.

MR. RIOS: Yes, your Honor. The general comments that I have is that based on their own expert's testimony that the citizenship question will increase the nonresponsiveness I feel it's important that expert testimony to update that data based on the present environment is essential. Your Honor, the importance of census data is lost sometimes here. I've been practicing voting rights law for 30 years. And, quite frankly,

census data is the gold standard that the federal courts use to adjudicate the allocation of judicial power -- I mean electorial power and political power and federal resources. So this citizenship question is designed to tarnish that gold standard and basically deny our clients the political power that they're entitled to and also federal funds.

THE COURT: Thank you very much. Let me hear from Ms. Vargas I think it is.

MR. FREEDMAN: Your Honor, do you want to hear from us before the defendants or --

THE COURT: I didn't realize that you wished to have a word.

MR. FREEDMAN: Sorry, your Honor.

THE COURT: Sure. That makes more sense, that order. Go ahead.

MR. FREEDMAN: Your Honor, John Freedman for the NYIC plaintiffs. I could add additional points to what the state did on why the record needs to be supplemented. I could point to additional gaps. A lot of those are covered in our letter. I could point to additional evidence why expansion of the record is appropriate and layout bad faith. But I think, again, I think that's covered in the letter.

THE COURT: OK.

MR. FREEDMAN: I do think it is worth emphasizing that we have an additional constitutional claim, equal protection

claim, that we believe entitles us to discovery. The basis for that is Rule 26 to start with, which says that we have the right to conduct discovery to any issue that's relevant. Certainly, the equal protection claim has elements that are not and do not overlap with the APA claim, including intent and impact and the history into the decision. We think that under the Supreme Court precedence, Webster v. Doe, we are entitled to conduct discovery and that there is a parallel APA claim.

THE COURT: It strikes me that the Supreme Court's decision In re United States, the DACA litigation, counsel is cautioned in allowing discovery before a court has considered threshold issues. I think the state's case is a little different in the sense that I have heard oral argument and have already gotten full briefing on those issues and in that regard can weigh that in the balance. But obviously the motion in your case is not yet fully submitted.

MR. FREEDMAN: It will be soon.

THE COURT: It will be soon. That is true.

MR. FREEDMAN: I think with respect to our case we can argue it now, you can take it under advisement until there is a ruling. I also think there's an important distinction in the way the DACA case was handled in terms of supplementing the administrative record and that can be going on while the government has already put forward a record that is manifestly deficient. Their work you can provide guidance to them to how

they supplement it while the motion is under consideration. I think that that's permitted under how the Supreme Court ruled in the DACA case.

THE COURT: Anything else?

MR. FREEDMAN: I do want -- just on scope. Obviously, you were asking questions about scope and how to control it. I think that the constitutional precedence we would cite Webster v. Doe on intent of decision-makers. All counsel have active involvement of the court in making sure discovery is tailored. We do have tailored discovery in mind. We weren't here at the May 4 conference obviously. We've always been approaching this as, because we have additional elements on our intentional discrimination claim, that we have additional things that we'd like to be able to prove, that under Arlington Heights we are entitled to prove. That's part of the reason why the deposition list is a little bit longer.

I also do think it would be helpful to get guidance from the Court on the question of the supplementation of Administrative Record. In particular, we cited cases in our letter spelling out that it's the obligation of the Agency, not just merely the Secretary, to produce records that are under consideration. We think that the Court should provide guidance that the whole record should include materials prior to December 12 and the pre-decisional determination to reach out to other agencies and have them sponsor the question. In many

ways looking at that prehistory, there's a parallel between this case and what happened in Overton Park which is the seminal Supreme Court case here where the Court was hamstrung by its ability to review the case because all that the Department of Transportation had produced was effectively a post-litigation record. And I think you could look at what the Department has done here as a similar or analogous circumstance that they made a decision that they wanted to have this question. They had a response, then they said we're now on the clock, it's now time to start building our record, and that's what we're going to produce, and we don't have the real record before us.

THE COURT: Thank you.

Let me hear from Ms. Vargas and then we'll proceed.

Ms. Vargas, tell me why the supplemental memo or addition to the Administrative Record alone doesn't give rise to the need for discovery here. It seems that the ground has shifted quite dramatically; that initially in both the Administrative Record and in testimony the Secretary's position was that this was requested by the Department of Justice and lo and behold in a supplemental memo of half a page without explanation it turns out that that's not entirely the case. So doesn't that point to the need for discovery?

MS. VARGAS: Your Honor, there is nothing inconsistent between the supplemental memo and the original memo. The

original memo addresses a particular point in time. There is a receipt of the DOJ letter. It's uncontested that it was received on a particular date. At that point, as the Secretary said in his original memo, we gave a hard look, after we received the formal request from the Department of Justice, and then he details the procedures and the analysis that he started at that point in time.

THE COURT: First of all, isn't it material to know that that letter was generated by a request from the Secretary himself as opposed to at least the misleading suggestion that it was from the Department of Justice without invitation?

MS. VARGAS: Your Honor, I resist the suggestion that it was misleading as an initial matter.

THE COURT: That's my question. Isn't it misleading or at least isn't there a basis to conclude that it's misleading and therefore an entitlement for the plaintiffs to probe that?

MS. VARGAS: No, your Honor. It's not misleading. It simply starts at a particular point in time and it goes forward. It doesn't speak whatsoever to the process that preceded the receipt of the DOJ memo and that's because the Administrative Record does not include internal deliberations, the consultative process, or the internal discussions that happen inter-agency or intra-agency. That's very settled law. It's black letter administrative law that what is put on the

administrative record is the decisional document and the informational basis for that decision but not the discussions that precede that or that go along with it. That has been the decisions of the Second Circuit, the D.C. Circuit en banc in San Luis Obispo. All of those courts speak to the fact that the internal conversations, the process documents, are not part of the administrative record and so, therefore, they wouldn't normally be disclosed. All the things that precede a decision internally, the processes, the discussions, none of that would normally be part of an administrative record and it wouldn't normally be part of a decisional document. Normally when an agency issues a decision it doesn't go through: And then we had this discussion, and then there was this discussion and they arrive at --

THE COURT: But it does include the underlying data that the decision-maker considered or that those advising the decision-maker considered and how can it possibly be that the Secretary began conversations about this shortly after he was confirmed and there is literally virtually nothing in the record between that date and December 12 or whatever the date is that the letter arrives from the Department of Justice? It just -- doesn't that --

MS. VARGAS: Data is a different matter, your Honor. The underlying information and data we believe is included and there is -- there is some allegation that the data that the

Census Bureau relied upon in generating analyses of the DOJ request was not included in the Administrative Record.

Now the summary of that analysis, in fact, is included in the Administrative Record. It is in the Abowd -- two different Abowd memos that are part of the Administrative Record.

Raw data itself, the raw census data from which that analysis is generated is protected by law. It's confidential --

THE COURT: I don't mean the data but the analyses of those who are advising the Secretary on whether this is a good idea or bad idea.

MS. VARGAS: Well to the extent they are discussing pros and cons, analysis, recommendations, all of that would fall within the deliberative process privilege.

THE COURT: Why should that not be on a privilege log?

MS. VARGAS: Because, your Honor, courts have routinely held that privilege logs are not required in APA cases precisely because these documents are not part --

THE COURT: Didn't the Second Circuit say exactly the opposite in the DACA litigation out of the Eastern District?

MS. VARGAS: Respectfully no, your Honor, it did not. I believe you're talking about the Nielsen slip order in which they denied a writ of mandamus. So, first of all, we're talking about a denial of a writ of mandamus which, of course,

is reviewing the district court decision under an exceedingly high standard, whether or not there are extreme circumstances warranting overturning the district court's decision. Obviously, of course, it's also not a published opinion but an order of the court, it's nonbinding. But on the merits I do not believe that the Second Circuit stated that privilege logs are required. If you look at the district court order that's being reviewed in that case, the District Court had decided that on the facts of that case a privilege log was required because it had found that the government had acted in bad faith. So there was -- it wasn't binding that in every APA case privilege logs are required. The District Court had said that in constructing the administrative record the agency had not included all of the documents that were directly or indirectly before the decision-maker. And in that specific circumstance where there had been that history, it said that we are not affording the normal presumption of regularity to the government and it was going to require a privilege log. And the Second Circuit did not grant writ of mandamus to overturn that decision.

But it doesn't stand for a broader proposition that in all APA cases privilege logs are required. The vast weight of authority is, in fact, to the contrary. Because these documents are not part of an administrative record in the first place, you don't log them; just as in civil discovery, if a

document is not responsive to a document request, you don't put it on a privilege log. The same principle applies in this case.

THE COURT: All right. Anything else you want to say?

MS. VARGAS: Yes, your Honor. I did want to address a couple of points on the scope of discovery, particularly expert discovery. They are trying to take advantage of an exception that doesn't really apply to have broad expert discovery in a case when the Second Circuit in Sierra Club has specifically said it is error for a district court in an APA case to allow experts to opine and to challenge the propriety of an agency decision.

THE COURT: Well, the way I read Sierra Club it doesn't speak to whether expert discovery should be authorized in the first instance. It speaks to the deference owed to the agency and whether a court can rely on an expert -- expert evidence in order to supplant or disregard the agency's opinion. But that's a merits question. It's not a question pertaining to discovery.

MS. VARGAS: I disagree, your Honor. I think what the Second Circuit said is that expert discovery -- extra record, expert discovery for the purposes of challenging the agency's expert analysis is absolutely error and should not be allowed because of the fact that record review in an APA case under Supreme Court precedent, Camp v. Pitts, it must be confined to

the record.

THE COURT: What if the bad faith exception applies?

MS. VARGAS: Well the bad faith exception, of course, is a separate exception. Specific to the expert point.

THE COURT: But my question is that if I find that the presumption of regularity has been rebutted and the bad faith exception applies, does that not open the door to expert discovery, putting aside the ultimate question of whether and to what extent I could rely on that expert discovery or evidence in terms of evaluating the Secretary's decision?

MS. VARGAS: No, your Honor. Because the exceptions for the record review rule are to be narrowly construed. So to the extent that your Honor found that there was bad faith, which we obviously contest and don't believe extra record discovery is appropriate here, but if the Court were to find that, then the discovery had to be narrowly tailored to the points on which you found that there was some allegation of bad faith. So, for example, if there was a very specific issue that your Honor thought needed to be developed that perhaps could be ordered but it wouldn't open the door up to make this just a regular civil litigation under Rule 26 with broad discovery allowed on all claims on all issues and any expert discovery they wanted. It doesn't open the door that wide. It just has to be narrowed to the specific point on which you find. But, of course, the government does not concede, it does

not believe that discovery would be appropriate in this case.

THE COURT: I understand.

MS. VARGAS: Thank you, your Honor.

THE COURT: All right. I was largely prepared to rule on the discovery question based on the papers and nothing I've heard from counsel has altered my view so I am prepared to give you my ruling on that front.

In doing so, I am of course mindful of the Supreme Court's decision In re United States, 138 S. Ct. 443 (2017) (per curiam), holding in connection with lawsuits challenging the rescission of DACA that the district court should have resolved the government's threshold arguments before deciding whether to authorize discovery -- on the theory that the threshold arguments, "if accepted, likely would eliminate the need for the district court to examine a complete Administrative Record." That is from page 445 of that decision. I do not read that decision, however, to deprive me of the broad discretion that district courts usually have in deciding whether and when to authorize discovery despite a pending motion to dismiss; indeed, the Supreme Court's decision was expressly limited to "the specific facts" of the case before it. That's from the same page. More to the point, several considerations warrant a different approach here. First, unlike the DACA litigation, this case does not arise in the immigration and national security context, where the

Executive Branch enjoys broad, indeed arguably broadest authority. Second, time is of the essence here given that the clock is running on census preparations. If this case is to be resolved with enough time to seek appellate review, whether interlocutory or otherwise, it is essential to proceed on parallel tracks. Third, and most substantially, unlike the DACA litigation, defendants' threshold argument here are fully briefed, at least in the states' case. See Regents of University of California v. U.S. Department of Homeland Security, 279 F.Supp. 3d 1011, at 1028 (N.D. Cal. 2018) discussing the procedural history of the DACA litigation and making clear that the motion to dismiss was not filed at the time that discovery was authorized. Although I reserve judgment on those threshold arguments, and I should make clear that I am reserving judgment on the motion to dismiss at this time, I am sufficiently confident, having read the parties' briefs and heard the oral argument today that the state and city plaintiffs' claims will survive, at least in part, to warrant proceeding on the discovery front. Moreover, I hope to issue a decision on the threshold issues in short order. So in the unlikely event that I do end up dismissing plaintiffs' case in its entirety, it is unlikely that defendants will have been heavily burdened in the interim.

With that, let me turn to the three broad categories of additional discovery that plaintiffs in the two cases have

sought in their letters of June 26, namely, a privilege log for all materials withheld from the record on the basis of privilege; completion of the previously filed Administrative Record; and extra record discovery. See docket no. 193 in the states' case, that is plaintiffs' letter in that case. For reasons I will explain, I find that plaintiffs have the better of the argument on all three fronts. I will address each in turn and then turn to the scope and timing of discovery that I will allow.

The first issue whether defendants need to produce a privilege log is easily resolved. Put simply, defendants' arguments are, in my view, squarely foreclosed by the Second Circuit's December 17, 2017 rejection of similar arguments In re Nielsen. That is docket no. 17-3345 (2d Cir. December 27 or 17, I think, 2017). That is the DACA litigation pending in the Eastern District of New York. I recognize, of course, that that was -- it arises in a mandamus petition and it is unpublished, but I think the reasons articulated by the Court of Appeals counsel for the production of a privilege log here. If anything, the justifications for requiring production of a privilege log are stronger here as the underlying documents do not implicate matters of immigration or national security and the burdens would appear to be substantially less significant or at least defendants have not articulated a particularly onerous burden. Moreover, whereas the defendants in Nielsen

had at least identified some basis for asserting privilege, namely the deliberative process privilege, defendants here, at least until the argument a moment ago, did not provide any such basis. See the states' letter at page two, note three. Accordingly, defendants must produce a privilege log identifying with specificity the documents that have been withheld from the Administrative Record and, for each document, the asserted privilege or privileges.

Second, plaintiffs seek an order directing the government to complete the Administrative Record. Although an agency's designation of the Administrative Record is generally afforded a presumption of regularity, that presumption can be rebutted where the seeking party shows that "materials exist that were actually considered by the agency decision-makers but are not in the record as filed." Comprehensive Community Development Corp. v. Sebelius, 890 F.Supp. 2d 305, 309 (S.D.N.Y. 2012). Plaintiffs have done precisely that here.

In his March 2018 decision memorandum produced in the Administrative Record at page 1313, Secretary Ross stated that he "set out to take a hard look" at adding the citizenship question "following receipt" of a request from the Department of Justice on December 12, 2017. Additionally, in sworn testimony before the House Ways and Means Committee, of which I can take judicial notice, see, for example, Ault v. J. M. Smucker Company, 2014 WL 1998235 at page 2 (S.D.N.Y. May 15,

2014), Secretary Ross testified under oath that the Department of Justice had "initiated the request for inclusion of the citizenship question." See the states' letter at page four. It now appears that those statements were potentially untrue. On June 21, this year, without explanation, defendants filed a supplement to the Administrative Record, namely a half-page memorandum from Secretary Ross, also dated June 21, 2018. That appears at docket no. 189 in the states' case. In this memorandum, Secretary Ross stated that "soon after" his appointment as Secretary, which occurred in February of 2017, almost ten months before the request from the Department of Justice, he "began considering" whether to add the citizenship question and that "as part of that deliberative process," he and his staff "inquired whether the department of justice would support, and if so would request, inclusion of a citizenship question." In other words, it now appears that the idea of adding the citizenship question originated with Secretary Ross, not the Department of Justice and that its origins long predated the December 2017 letter from the Justice Department. Even without that significant change in the timeline, the absence of virtually any documents predating DOJ's December 2017 letter was hard to fathom. But with it, it is inconceivable to me that there aren't additional documents from earlier in 2017 that should be made part of the Administrative Record.

That alone would warrant an order to complete the Administrative Record. But, compounding matters, the current record expressly references documents that Secretary Ross claims to have considered but which are not themselves a part of the Administrative Record. For example, Secretary Ross claims that "additional empirical evidence about the impact of sensitive questions on the survey response rates came from the Senior Vice-President of Data Science at Nielsen." That's page 1318 of the record. But the record contains no empirical evidence from Nielsen. Additionally, the record does not include documents relied upon by subordinates, upon whose advice Secretary Ross plainly relied in turn. For example, Secretary Ross's memo references "the department's review" of inclusion of the citizenship question, and advice of "Census Bureau staff." That's pages 1314, 1317, and 1319. Yet the record is nearly devoid of materials from key personnel at the Census Bureau or Department of Commerce -- apart from two memoranda from the Census Bureau's chief scientist which strongly recommend that the Secretary not add a citizenship question. Pages 1277 and 1308. The Administrative Record is supposed to include "materials that the agency decision-maker indirectly or constructively considered." Batalla Vidal v. Duke, 2017 WL 4737280 at page 5 (E.D.N.Y. October 19, 2017).

Here, for the reasons that I've stated, I conclude that the current Administrative Record does not include the

full scope of such materials. Accordingly, plaintiffs' request for an order directing defendants to complete the Administrative Record is well founded.

Finally, I agree with the plaintiffs that there is a solid basis to permit discovery of extra-record evidence in this case. To the extent relevant here, a court may allow discovery beyond the record where "there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decision-makers." National Audubon Society v. Hoffman, 132 F.3d 7, 14 (2d Cir. 1997). Without intimating any view on the ultimate issues in this case, I conclude that plaintiffs have made such a showing here for several reasons.

First, Secretary Ross's supplemental memorandum of June 21, which I've already discussed, could be read to suggest that the Secretary had already decided to add the citizenship question before he reached out to the Justice Department; that is, that the decision preceded the stated rationale. See, for example, Tummino v. von Eschenbach, 427 F.Supp. 2d 212, 233 (E.D.N.Y. 2006) authorizing extra-record discovery where there was evidence that the agency decision-makers had made a decision and, only thereafter took steps "to find acceptable rationales for the decision." Second, the Administrative Record reveals that Secretary Ross overruled senior Census Bureau career staff, who had concluded -- and this is at page

1277 of the record -- that reinstating the citizenship question would be "very costly" and "harm the quality of the census count." Once again, see Tummino, 427 F.Supp. 2d at 231-32, holding that the plaintiffs had made a sufficient showing of bad faith where "senior level personnel overruled the professional staff." Third, plaintiffs' allegations suggest that defendants deviated significantly from standard operating procedures in adding the citizenship question. Specifically, plaintiffs allege that, before adopting changes to the questionnaire, the Census Bureau typically spends considerable resources and time -- in some instances up to ten years -- testing the proposed changes. See the amended complaint which is docket no. 85 in the states' case at paragraph 59. Here, by defendants' own admission -- see the amended complaint at paragraph 62 and page 1313 of the Administrative Record -- defendants added an entirely new question after substantially less consideration and without any testing at all. Yet again Tummino is instructive. See 427 F.Supp. 2d at 233, citing an "unusual" decision-making process as a basis for extra-record discovery.

Finally, plaintiffs have made at least a prima facie showing that Secretary Ross's stated justification for reinstating the citizenship question -- namely, that it is necessary to enforce Section 2 of the Voting Rights Act -- was pretextual. To my knowledge, the Department of Justice and

civil rights groups have never, in 53 years of enforcing Section 2, suggested that citizenship data collected as part of the decennial census, data that is by definition quickly out of date, would be helpful let alone necessary to litigating such claims. See the states case docket no. 187-1 at 14; see also paragraph 97 of the amended complaint. On top of that, plaintiffs' allegations that the current Department of Justice has shown little interest in enforcing the Voting Rights Act casts further doubt on the stated rationale. See paragraph 184 of the complaint which is docket no. 1 in the Immigration Coalition case. Defendants may well be right that those allegations are "meaningless absent a comparison of the frequency with which past actions have been brought or data on the number of investigations currently being undertaken," and that plaintiffs may fail "to recognize the possibility that the DOJ's voting-rights investigations might be hindered by a lack of citizenship data." That is page 5 of the government's letter which is docket no. 194 in the states case. But those arguments merely point to and underscore the need to look beyond the Administrative Record.

To be clear, I am not today making a finding that Secretary Ross's stated rationale was pretextual -- whether it was or wasn't is a question that I may have to answer if or when I reach the ultimate merits of the issues in these cases. Instead, the question at this stage is merely whether --

assuming the truth of the allegations in their complaints -- plaintiffs have made a strong preliminary or prima facie showing that they will find material beyond the Administrative Record indicative of bad faith. See, for example, Ali v. Pompeo, 2018 WL 2058152 at page 4 (E.D.N.Y. May 2, 2018). For the reasons I've just summarized, I conclude that the plaintiffs have done so.

That brings me to the question of scope. On that score, I am mindful that discovery in an APA action, when permitted, "should not transform the litigation into one involving all the liberal discovery available under the federal rules. Rather, the Court must permit only that discovery necessary to effectuate the Court's judicial review; i.e., review the decision of the agency under Section 706." That is from Ali v. Pompeo at page 4, citing cases. I recognize, of course, that plaintiffs argue that they are independently entitled to discovery in connection with their constitutional claims. I'm inclined to disagree given that the APA itself provides for judicial review of agency action that is "contrary to" the Constitution. See, for example, Chang v. USCIS, 254 F.Supp. 3d 160 at 161-62 (D.D.C. 2017). But, even if plaintiffs are correct on that score, it is well within my authority under Rule 26 to limit the scope of discovery.

Mindful of those admonitions, not to mention the separation of powers principles at stake here, I am not

inclined to allows as much or as broad discovery as the plaintiffs seek, at least in the first instance. First, absent agreement of defendants or leave of Court, of me, I will limit plaintiffs to ten fact depositions. To the extent that plaintiffs seek to take more than that, they will have to make a detailed showing in the form of a letter motion, after conferring with defendants, that the additional deposition or depositions are necessary. Second, again absent agreement of the defendants or leave of Court, I will limit discovery to the Departments of Commerce and Justice. As defendants' own arguments make clear, materials from the Department of Justice are likely to shed light on the motivations for Secretary Ross's decision -- and were arguably constructively considered by him insofar as he has cited the December 2017 letter as the basis for his decision. At this stage, however, I am not persuaded that discovery from other third parties would be necessary or appropriate; to the extent that third parties may have influenced Secretary Ross's decision, one would assume that that influence would be evidenced in Commerce Department materials and witnesses themselves. Further, to the extent that plaintiffs would seek discovery from the White House, including from current and former White House officials, it would create "possible separation of powers issues." That is from page 4 of the slip opinion in the Nielsen order. Third, although I suspect there will be a strong case for allowing a

deposition of Secretary Ross himself, I will defer that question to another day. For one thing, I think it should be the subject of briefing in and of itself. It raises a number of thorny issues. For another, I'm inclined to think that plaintiffs should take other depositions before deciding whether they need or want to go down that road and bite off that issue recognizing, among other things, that defendants have raised the specter of appellate review in the event that I did allow it. At the same time, I want to make sure that I have enough time to decide the issue and to allow for the possibility of appellate review without interfering with an expeditious schedule. So on that issue I'd like you to meet and confer with one another and discuss a timeline and a way of raising the issue, that is to say, when it is both ripe but also timely and would allow for an orderly resolution.

So with those limitations, I will allow plaintiffs to engage in discovery beyond the record. Further, I will allow for expert discovery. Expert testimony would seem to be commonplace in cases of this sort. See, for example, Cuomo v. Baldrige, 674 F.Supp. 1089 (S.D.N.Y. 1987). And as I indicated in my colloquy with Ms. Vargas, I do not read Sierra v. United States Army Corps of Engineers, 772 F.2d 1043 (2d Cir. 1985), to "prohibit" expert discovery as defendants suggestion. That case, in my view, speaks the deference that a court ultimately owes the agency's own expert analyses, but it does not speak to

the propriety of expert discovery, let alone clearly prohibit such discovery, let alone do so in a case where, as I have just done so, a finding of bad faith and a rebuttal of the presumption of regularity are at issue.

That leaves only the question of timing. I recognize that you proposed schedules without knowing the scope of discovery that I would permit. I would like to set a schedule today. In that regard, would briefly hear from both sides with respect to the schedule. Alternatively, I could allow you to meet and confer and propose a schedule in writing if you think that that would be more helpful. Let me facilitate the discussion by throwing out a proposed schedule which is based in part on your letters and modifications that I've made to the scope of discovery.

First, by July 16, I think defendants should produce the complete record as well as a privilege log and initial disclosures. I recognize that Rule 26(a)(1)(B)(i) exempts from initial disclosure "an action for review on an administrative record" but in light of my decision allowing extra-record discovery I do not read that exception to apply.

Then I would propose that by September 7, plaintiffs will disclose their expert reports.

By September 21, defendants will disclose their expert reports, if any.

By October 1, plaintiffs will disclose any rebuttal

expert reports.

And fact an expert discovery would close by October 12, 2018.

Plaintiffs also propose that the parties would then be ready for trial on October 31. My view is it's premature to talk about having a trial. For one thing, it may well end up making sense to proceed by way of summary judgment rather than trial. For another thing, I don't know if we need to build in time for Daubert motions or other pretrial motions that would require more than 19 days to brief and for me to decide. I would be inclined, instead, to schedule a status conference for sometime in September to check in on where things stand, making sure that things are proceeding apace and get a sense of what is coming down the pike and decide how best to proceed. Having said that, I think it would make sense for you guys to block time in late October and November in the event that I do decide a trial is warranted. Again, I am mindful that my word is not likely to be the final one here and I want to make sure that all sides have an adequate opportunity to seek whatever review they would need to seek after a final decision.

So that's my ruling. You can respond to my proposed schedule. I'd be inclined to set it today but if you think you need additional time.

MR. FREEDMAN: Your Honor, John Freedman. Just one clarification. I think it was clear from what you said but in

terms of the number of depositions you meant ten collectively between the two cases, not ten per case?

THE COURT: Correct. And they would be cross-designated or cross-referenced in both cases. Correct.

MR. FREEDMAN: Understood, your Honor.

THE COURT: And, again, I don't mean to suggest that you will get more, but that's not -- I did invite you to make a showing with specificity for why additional depositions would be needed. If it turns out that it is warranted, I'm prepared to allow it but, mindful of the various principles at stake and the limited scope of review under the APA, I think that it makes sense to rein discovery in in a way that it wouldn't be a standard civil action.

So, thoughts?

MR. COLANGELO: Your Honor, for the state and local government plaintiffs, we have no concerns at all.

THE COURT: Microphone, please.

MR. COLANGELO: For the state and local government plaintiffs, we have no concerns at all with the various deadlines that the Court has set out. Thank you.

MR. FREEDMAN: Your Honor, for the NYIC plaintiffs we concur. We think that it sets an appropriately expedited schedule that will resolve the issues in time and we appreciate the expedited consideration.

THE COURT: All right. Defendants.

MS. BAILEY: Your Honor, I have a couple clarifying questions. As far as the proposed July 16 deadline, you say completing the record would that be the same deadline you envision for the privilege log?

THE COURT: Yes.

MS. BAILEY: We would ask that the schedule we have already set in other actions, that we have a little bit more time for that initial deadline. We have a number of briefs and an argument coming up that same week. Could we push that back until a bit later in July?

THE COURT: And when you say "that," meaning the deadline for initial disclosures, completing the record, and the log or only a part of those?

MS. BAILEY: Yes, your Honor. All -- it would make sense I think to do them all together. But it would -- we'd like to move that a little later in July.

THE COURT: Well I don't want to move it too much later in July because it will backup everything else. Why don't I give you until July 23. I would imagine that that would not materially affect the remainder of the schedule and would give you an extra week. Next.

MS. BAILEY: Thank you, your Honor.

One other point. In the conference before Judge Seeborg, Judge Seeborg, as your Honor is aware, he reserved the issue of deciding whether discovery was warranted. But as I

understand it, he strongly indicated that he thought that -- if discovery is warranted in different actions, that the plaintiffs should coordinate between those actions and asked for the views of the parties on how that coordination should take place. So he didn't ultimately rule on that but we agree that coordinate between parties, if discovery is ordered in the other cases, is warranted.

THE COURT: I agree wholeheartedly. And Judge Seeborg knows as well, I did talk to him, as I mentioned. He indicated that he had reserved judgment but indicated that he, I think, would probably be ruling on or before August 10, I think; and that it was his view that if discovery were to go forward, it should be coordinated with discovery here if I were to allow it.

I agree. Ultimately I don't see why any of the folks who would be subjected to a deposition should be deposed twice in multiple actions. How to accomplish that, I don't have a settled idea on at the moment, but I would think that either you all should go back to Judge Seeborg and say in light of Judge Furman's decision we're prepared to proceed here or at least enter some sort of stipulation in that action that would allow for participation of counsel in the depositions -- I'm open to suggestions. I mean I think that counsel in all of these cases having a conversation and figuring out an orderly way to proceed is probably sensible. I will call Judge Hazel

but I imagine that all of the judges involved will be of the view that depositions should only be taken once and certainly if they are depositions of upper level officials those are definitely only going to happen once. So I think coordination is going to be necessary.

Another component of that is that I imagine there may be discovery disputes in this case, and I don't have a brilliant idea for how those get resolved, whether they get resolved by me, by Judge Seeborg, or by Judge Hazel if discovery is allowed there. I think for now they should come to me because I'm the one and only judge who has ruled on the issue. But in the event that the other judges do authorize discovery, we probably need an orderly system to resolve those issues. I don't want it to be like a child who goes to mom and doesn't get the answer that he wants and then goes to dad for reconsideration. So I think you all should give some thought to that. Again, I don't think it needs to be resolved right now because Judge Seeborg has reserved judgment on it, but I will give it some thought, as I imagine he will, and we'll talk about it.

Anything you all want to say on that score?

MR. COLANGELO: Your Honor, for the state and local government plaintiffs, I would just add that we have no objection to coordinating with plaintiffs in other cases on the timing of depositions or on their participation, if warranted.

Our key concern was in not having the latest decided case be the right limiting step. We think the appropriate course is the one you've taken. So assuming it's on the schedule that your Honor has proposed, we have no objection to other -- to coordinating with other plaintiffs on deposition schedules in particular.

THE COURT: I don't intend to wait for the other courts. I'm sure that they will be proceeding expeditiously in their own cases, but I am trying to get this case resolved in a timely fashion and in that regard don't plan to wait. So it behooves all of you to get on the phone with one another and figure out some sort of means of coordinating. You can look -- I have a coordination order in the GM MDL that might provide a model and that allows for counsel in different cases to participation in depositions. This is not an MDL but there are some similarities. You may want to consider that. I'm sure there are other contexts in which these issues have arisen and you may want to look at models.

What I propose is why don't you submit a joint letter to me from all counsel in these cases, let's say within two weeks after you've had an opportunity to both confer with one another and confer with counsel in the other cases, and submit a joint letter to me with some sort of proposal. And if you can agree upon an order that would apply and ensure smooth coordination, all the better; and if not, you can tell me what

your counterproposals are and I'll consider it at that time. All right.

MS. BAILEY: Thank you, your Honor.

THE COURT: Very good. Anything else?

MR. COLANGELO: Nothing for us, your Honor.

THE COURT: I wanted to just give you one heads-up. I noted from the states and local governments' letter there is an attachment which is a letter with respect to the Touhy issues in the case. As it happens, I have another case where that or some of the issues raised in that letter are actually fully submitted before me in an APA action case called Koopman v. U.S. Department of Transportation, 18 CV 3460. That matter is fully submitted. I can't and won't make any promises to you with respect to when I will issue a decision in it but it may speak to some of the issues raised in the states and local governments' letter. So you may want to keep an eye out for it.

With that --

MS. VARGAS: Your Honor, I do believe that we have -- we are not going to be resting on a former employee issue which I believe is the issue in the Koopman litigation. So I don't believe that will implicate the issues that are at play in that case.

THE COURT: Good. Good to know. Thank you for letting me know. Then you don't need to look for it unless you

have some strange desire to read Judge Furman decisions.

On that score let me say I will try to issue a decision on the motion to dismiss in short order. I don't want to give myself a deadline. That's one prerogative of being in my job. But I do hope that I'll get it out in the next couple weeks. And it's been very helpful, the argument this morning was very helpful, and counsel did an excellent job and your briefing is quite good as well as the amicus briefing. So I appreciate that. I will reserve judgment. I wish everybody a very happy Fourth of July. We are adjourned.

(Adjourned)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al., Plaintiff, -v- UNITED STATES DEPARTMENT OF COMMERCE, et al., Defendants.	18-CV-2921 (JMF)
NEW YORK IMMIGRATION COALITION, et al., Plaintiff, -v- UNITED STATES DEPARTMENT OF COMMERCE, et al., Defendants.	18-CV-5025 (JMF) OPINION AND ORDER

JESSE M. FURMAN, United States District Judge:

INTRODUCTION

The Fourteenth Amendment to the Constitution provides that "Representatives shall be apportioned among the several States according to their respective Numbers, counting the whole number of persons in each State." U.S. CONST. amend. XIV, § 2. Article I of the Constitution provides, in turn, that the number of persons in each state is to be calculated by means of an "actual Enumeration" — known as the census — every ten years "in such Manner as [Congress] shall by Law direct." *Id.* art. I, § 2, cl. 3. Since 1790, the government has conducted that "actual Enumeration" through questions — initially asked in person and, later, by means of written questionnaire — about both the number and demographic backgrounds of those living in each American household. Beginning in 1820, one such question concerned (in one form or another) citizenship status. The government ceased asking that question of everyone nationwide in 1960. Earlier this year, however, Secretary of Commerce Wilbur L. Ross, Jr., exercising authority delegated by Congress over the census, announced that he was reinstating the citizenship question on the 2020 census questionnaire. Secretary Ross explained that reinstatement of the citizenship question is necessary for the Department of Justice to enforce, and courts to adjudicate, violations of Section 2 of the Voting Rights Act of 1965, codified at 52 U.S.C. § 10301.

Plaintiffs in these two related cases (which have been informally consolidated for purposes of scheduling and discovery) contend that Secretary Ross's decision to reinstate the citizenship question on the 2020 census questionnaire violates both the Constitution and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq*. In 18-CV-2921, Plaintiffs are eighteen states and the District of Columbia, as well as various cities, counties, and mayors; they challenge the Secretary's decision under both Article I's Enumeration Clause and the APA. (Docket No. 214 ("SAC"), ¶¶ 178-97). In 18-CV-5025, Plaintiffs are five nongovernmental organizations, four suing on behalf of themselves and their members and one suing only on its own behalf; they challenge the Secretary's decision on the same grounds and also as a violation of equal protection, as embodied in the Due Process Clause of the Fifth Amendment. (18-CV-5025, Docket No. 1 ("NGO Compl."), ¶¶ 193-212).[1] On May 25, 2018, Defendants — the United States Department of Commerce; Secretary Ross (the "Secretary"); the Bureau of the Census (the "Census Bureau"); and Acting Director of the Census Bureau, Ron Jarmin — moved, pursuant to Rule 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure, to dismiss the First Amended Complaint in 18-CV-2921. (Docket No. 154).[2] On June 29, 2018, Defendants moved to dismiss the Complaint in 18-CV-5025. (18-CV-5025, Docket No. 38).

[1] Unless otherwise noted, docket references are to 18-CV-2921. Additionally, "Plaintiffs" refers to the plaintiffs in both cases, "Government Plaintiffs" refers to the plaintiffs in 18-CV-2921, and "NGO Plaintiffs" refer to the plaintiffs in 18-CV-5025.

[2] On July 23, 2018, Plaintiffs in 18-CV-2921 filed a Second Amended Complaint, which adds the City of Phoenix as a plaintiff and includes allegations relating to Phoenix, but "otherwise does not substantively alter" the First Amended Complaint that Defendants had originally moved to dismiss. (Docket No. 210-1; *see* Docket No. 214 (refiling the Second Amended Complaint due to a filing error)). By Order entered on July 24, 2018, the Court indicated that it would treat Defendants' previously filed motion to dismiss "as applying to the Second Amended Complaint." (Docket No. 213).

The Court held oral argument on the first motion on July 3, 2018. (*See* July 3, 2018 Transcript, Docket No. 207 ("Oral Arg. Tr.")).

Broadly speaking, in this Opinion, the Court reaches three conclusions with respect to Defendants' motions. *First*, the Court categorically rejects Defendants' efforts to insulate Secretary Ross's decision to reinstate the citizenship question on the 2020 census from judicial review. Contending that Plaintiffs cannot prove they have been or will be injured by the decision, and citing the degree of discretion afforded to Congress by the Enumeration Clause and to the Secretary by statute, Defendants insist that this Court lacks jurisdiction even to consider Plaintiffs' claims. As the Court will explain, however, that contention flies in the face of decades of precedent from the Supreme Court, the Second Circuit, and other courts. That precedent makes clear that, while deference is certainly owed to the Secretary's decisions, courts have a critical role to play in entertaining challenges like those raised by Plaintiffs here.

Second, the Court concludes that the citizenship question is a permissible — but by no means mandated — exercise of the broad power granted to Congress (and, in turn, to the Secretary) in the Enumeration Clause of the Constitution. That conclusion is compelled not only by the text of the Clause, which vests Congress with virtually unlimited discretion in conducting the census, but also by historical practice. The historical practice reveals that, since the very first census in 1790, the federal government has consistently used the decennial exercise not only to obtain a strict headcount in fulfillment of the constitutional mandate to conduct an "actual Enumeration," but also to gather demographic data about the population on matters such as race, sex, occupation, and, even citizenship. Moreover, it reveals that all three branches of the government — including the Supreme Court and lower courts — have blessed this dual use of the census, if not a citizenship question itself. In the face of that history and the broad

constitutional grant of power to Congress, the Court cannot conclude that the Secretary lacks power under the Enumeration Clause to ask a question about citizenship on the census.

Third, although the Secretary has *authority* under the Enumeration Clause to direct the inclusion of a citizenship question on the census, the Court concludes that the particular *exercise* of that authority by Secretary Ross may have violated NGO Plaintiffs' rights to equal protection of the laws under the Due Process Clause of the Fifth Amendment. That is, assuming the truth of NGO Plaintiffs' allegations and drawing all reasonable inferences in their favor — as the Court must at this stage of the proceedings — they plausibly allege that Secretary Ross's decision to reinstate the citizenship question on the 2020 census was motivated by discriminatory animus and that its application will result in a discriminatory effect. As discussed below, that conclusion is supported by indications that Defendants deviated from their standard procedures in hastily adding the citizenship question; by evidence suggesting that Secretary Ross's stated rationale for adding the question is pretextual; and by contemporary statements of decisionmakers, including statements by the President, whose reelection campaign credited him with "officially" mandating Secretary Ross's decision to add the question right after it was announced.

The net effect of these conclusions is that Defendants' motions to dismiss are granted in part and denied in part. In particular, Plaintiffs' claims under the Enumeration Clause — which turn on Secretary Ross's power rather than his purposes — must be and are dismissed. By contrast, their claims under the APA (which Defendants seek to dismiss solely on jurisdictional and justiciability grounds) and the Due Process Clause — which turn at least in part on Secretary Ross's purposes and not merely on his power — may proceed.

BACKGROUND

As noted, the Constitution requires an "actual Enumeration" of "the whole number of persons in each State" every ten years, and grants to Congress authority to conduct that enumeration — commonly known as the census — "in such Manner as [Congress] shall by Law direct." U.S. CONST. art. 1, § 2, cl. 3 & amend. XIV. The modern census is governed by the Census Act, which was enacted in 1976. *See* 13 U.S.C. §§ 1 *et seq.* The Act delegates to the Secretary of Commerce the duty to "take a decennial census of population as of the first day of April of such year . . . in such form and content as he may determine." 13 U.S.C. § 141(a). It further provides that "[t]he Secretary shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in [the Act]." *Id.* § 5. The Secretary is required to submit "a report containing [his] determination of the questions proposed to be included" in the census "not later than 2 years before the appropriate census date." *Id.* § 141(f)(2). After the census is taken, the President is tasked with transmitting to Congress "a statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population, and the number of Representatives to which each State" is "entitled." 2 U.S.C. § 2a(a).

Significantly, consistent with the constitutional text, the decennial census endeavors to count *all* residents of the United States, regardless of their legal status. *See Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C. 1980) (three-judge court) ("The language of the Constitution is not ambiguous. It requires the counting of the 'whole number of persons' for apportionment purposes, and while illegal aliens were not a component of the population at the time the Constitution was adopted, they are clearly 'persons.'"). The federal government, however, has long used the decennial census to do more than take a mere headcount

of the population for purposes of apportioning Representatives. It has also used the census as a means to collect data — demographic and otherwise — on the population of the United States. *See generally* U.S. CENSUS BUREAU, MEASURING AMERICA: THE DECENNIAL CENSUSES FROM 1790 TO 2000 ("MEASURING AMERICA") (2002), *available at* http://www2.census.gov/library/publications/2002/dec/pol_02-ma.pdf. Notably, that practice began with the nation's very first census, taken in 1790, which was conducted by United States Marshals. *See* Act of March 1, 1790 ("1790 Census Act"), 1 Stat. 101, 101-02 (1790).[3] Congress directed the Marshals to ask each household, among other things, about "the sexes and colours of free persons" as well the age of residents, *id.* at 101, in order to "assess the countries [*sic*] industrial and military potential," MEASURING AMERICA 5. As a history of the census prepared in 1900 for the Senate Committee on the Census described the first census: "Instead of providing simply for an enumeration of the population in 1790 . . . which would have answered all the requirements of the Constitution," Congress "called for [more information] . . . thus recognizing at the very outset the desirability of using the census as a means of securing data beyond the mere statement of population needed for apportionment purposes." CARROLL D. WRIGHT, THE HISTORY AND GROWTH OF THE UNITED STATES CENSUS ("HISTORY AND GROWTH"), S. Doc. No. 194, at 89 (1st Sess., 1900).

The inquiries on the second and third censuses were largely the same as the first. *See* MEASURING AMERICA 6; *see also* Act of Feb. 28, 1800 ("1800 Census Act"), 2 Stat. 11 (1800); Act of March 26, 1810, 2 Stat. 564 (1810). Unlike the first census, however, the second census also included a question about the town or city in which persons resided. *See* 1800 Census Act,

[3] The Court may and does take judicial notice of undisputed historical facts. *See Effie Film, LLC v. Pomerance*, 909 F. Supp. 2d 273, 298-300 (S.D.N.Y. 2012) (noting that courts may take judicial notice of historical facts contained in undisputed, authoritative writings).

2 Stat. at 11-12. The third census, taken in 1810, also required the Marshals to give "an account of the several manufacturing establishments . . . within their several districts." Act of May 1, 1810, 2 Stat. 605, 605 (1810). Interestingly, civic groups — including the American Philosophical Society, led by Thomas Jefferson — encouraged Congress to add questions regarding citizenship (and other topics) as early as the second census, but those proposals were rejected at that point without debate. *See* WRIGHT, HISTORY AND GROWTH 19-20. For reasons that are not clear, however, Congress did add a question about citizenship to the fourth census in 1820, directing enumerators to tally the number of "Foreigners not naturalized." Act of March 14, 1820 ("1820 Census Act"), 3 Stat. 548, 550 (1820).

The fifth census in 1830 — which was the first to rely on standardized, pre-printed forms — tallied all "white persons" who were "ALIENS – Foreigners not naturalized." Act of March 23, 1830 ("1830 Census Act"), 4 Stat. 383, 389 (1830). For unknown reasons, the sixth census in 1840 did not ask about citizenship or birthplace, although it did include nearly every other question that had been asked in the fifth census, including questions regarding occupation, mental illness, and military service. *See* WRIGHT, HISTORY AND GROWTH 142-43 (reprinting the inquiries on the sixth census). The scope of the census then expanded materially in 1850, when it was overseen, for the first time, by a "census board" composed of "the Secretary of State, the Attorney-General, and the Postmaster-General." *Id.* at 40. The census board prepared six "schedules" of inquiries, relating to "(1) free inhabitants, (2) slave inhabitants, (3) mortality, (4) productions of agriculture, (5) products of industry, and (6) social statistics." *Id.* at 44-45. All "free inhabitants" were required to state their place of birth ("State, Territory, or country"), as well as the "[v]alue of real estate owned" and whether they were "deaf and dumb, blind, insane, idiotic, pauper, or convict." *See* Act of May 15, 1850 ("1850 Census Act"), 9 Stat. 428,

433 (1850). Although the 1850 census required inhabitants to state their place of birth, it did not explicitly ask about citizenship.

The questions in 1860 and 1870 were largely the same as those in 1850, although the 1870 census also included a question about whether the respondent's father or mother was "of foreign birth" and an explicit inquiry (no doubt prompted by the Civil War and ratification of the Fourteenth Amendment) as to "[m]ale [c]itizens of U.S. of 21 years of age and upwards, whose right to vote is denied or abridged on other grounds than rebellion or other crime." *See* MEASURING AMERICA 13. The 1880 census asked for the birthplaces of the respondent and of each respondent's parents ("naming the State or Territory of the United States, or the Country, if of foreign birth"). *See id.* at 17. The 1880 census was also the first to be conducted by a newly established census office, led by the Superintendent of the Census and lodged in the Department of the Interior. *See* WRIGHT, HISTORY AND GROWTH 58-59. The census office prescribed similar questions for the 1890 census, asking for the respondent's and his or her parents' places of birth and, additionally, whether the respondent was naturalized and whether "naturalization papers have been taken out." MEASURING AMERICA 22.

In the early 20th century, the federal government continued to use the census to gather data regarding citizenship and other topics.[4] The 1900, 1910, 1920, and 1930 censuses, in keeping with their immediate predecessors, asked about birthplace and parental birthplace; they also asked immigrant residents their year of immigration and whether they were naturalized. *Id.*

[4] In between the 1900 and 1910 censuses, Congress created a permanent Census Office within the Department of Interior; the Census Office moved to the Department of Commerce and Labor the following year. *See* U.S. CENSUS BUREAU, FACTFINDER FOR THE NATION: HISTORY AND ORGANIZATION 2 (2000), *available at* https://www.census.gov/history/pdf/cff4.pdf. When the Department of Commerce and Labor split into two departments in 1913, the Census Office — renamed the Census Bureau — was placed in the Department of Commerce. *Id.*

at 34, 45-46, 58, 59. The 1940 census asked for residents' birthplace and for "[c]itizenship of the foreign born." *Id.* at 62. The 1940 census was also the first to include supplemental questions that went to only a sample fraction of the population; on the 1940 census, these supplemental inquiries included a question about parental birthplace. *Id.* at 63. The 1950 census also asked all respondents for their birthplace and whether foreign-born residents were naturalized, and asked a sample of the population supplemental questions about, among other things, parental birthplace. *Id.* at 66-68.

The 1960 census marked a departure from previous censuses in several respects. *See generally* MARGO J. ANDERSON, THE AMERICAN CENSUS: A SOCIAL HISTORY 201-06 (1988). For one, it was the first census to rely principally on the mail to distribute and collect questionnaires. U.S. BUREAU OF THE CENSUS, 1960 CENSUSES OF POPULATION AND HOUSING: PROCEDURAL HISTORY ("1960 CENSUSES OF POPULATION AND HOUSING") 1 (1966), *available at* http://www2.census.gov/prod2/decennial/documents/1960/proceduralHistory/1960proceduralhistory.zip. It was also the first census to pose the majority of questions to only a fraction of the population: The census posed only five questions to all respondents, with more detailed questions going to twenty-five percent of the population. MEASURING AMERICA 72. The five universal questions included the respondent's relationship to the head of household, sex, color or race, marital status, and month and year of birth. *See* 1960 CENSUSES OF POPULATION AND HOUSING 364. The lengthier questionnaire that went to a sample of the population included questions regarding respondents' and parental birthplace, highest level of education attained, salary earned, and how many working television sets a household had. *Id.* at 73-75.

Notably, the 1960 census was the first since 1840 not to include a question about citizenship (or birthplace) for all residents. It did, however, ask all residents of New York and

Puerto Rico about citizenship — the former "at the expense of the State, to meet State constitutional requirements for State legislative apportionment" and the latter, at the request of a census advisory committee, "to permit detailed studies of migration." 1960 CENSUSES OF POPULATION AND HOUSING 10, 130. In a review of the census, the Census Bureau explained the decision not to ask all respondents about citizenship as follows: "It was felt that general census information on citizenship had become of less importance compared with other possible questions to be included in the census, particularly in view of the recent statutory requirement for annual alien registration which could provide the Immigration and Naturalization Service, the principal user of such data, with the information it needed." *Id.* at 194.

Between 1970 and 2000, the census continued to feature a short questionnaire distributed to the vast majority of the population (known as the "short-form census") and a longer questionnaire, which included both the inquiries on the shorter questionnaire as well as additional questions, distributed to a sample of the population (known as the "long-form census"). During that time, none of the short-form questionnaires included a question about citizenship or birthplace. *See* MEASURING AMERICA 77 (1970), 84 (1980), 91 (1990), 100 (2000). But each long-form census, which went to approximately one sixth of households, did. *See id.* at 78 (1970), 85 (1980), 92 (1990), 101 (2000). In 2010, the Census Bureau dropped the long-form questionnaire altogether, a change that was precipitated by the introduction, in 2005, of the American Community Survey ("ACS"). *See* JENNIFER D. WILLIAMS, THE 2010 DECENNIAL CENSUS: BACKGROUND AND ISSUES 3 (2011), *available at* https://www.census.gov/history/pdf/2010-background-crs.pdf. Unlike the decennial census, the ACS is conducted annually and is not used to obtain an "actual Enumeration" of the population for purposes of apportionment; instead, it is given each year to only about 3.5 million households — roughly one

in every thirty-eight households in the country — for the sole purpose of collecting demographic data on the population. (SAC ¶¶ 74, 98 n.43). The ACS "requires citizens to disclose whether they were born in 'United States territories,' whether they were born 'abroad' to U.S. parents, or if and when they were 'naturalized.'" (*Id.* ¶ 76).[5] The 2010 census asked about "the age, sex, race, and ethnicity (Hispanic or non-Hispanic) of each person in a household," as well as "whether the housing unit was rented or owned by a member of the household." WILLIAMS, THE 2010 DECENNIAL CENSUS: BACKGROUND AND ISSUES 3. It did not ask about citizenship.

Thus, the last time that the census asked *every* respondent about citizenship was sixty-eight years ago, in 1950. Notably, since then, the Census Bureau and former Bureau officials have opposed periodic efforts to reinstate a citizenship question on a universal basis. In 1980, for example, several plaintiffs (including the Federation for American Immigration Reform, which appears here as *amicus curiae* in support of Defendants) sued the Census Bureau, contending that the census was constitutionally required to count only citizens. *Fed'n for Am. Immigration Reform*, 486 F. Supp. at 565. In that litigation, the Census Bureau argued that reinstating a citizenship question for all respondents would "inevitably jeopardize the overall accuracy of the population count" because noncitizens would be reluctant to participate, for fear "of the information being used against them." *Id.* at 568. Likewise, in Congressional testimony prior to the 1990 census, Census Bureau officials opposed reinstating a citizenship question for all respondents, opining that it could cause people to "misunderstand or mistrust the census and fail or refuse to respond." *Exclude Undocumented Residents from Census Counts Used for Apportionment: Hearing on H.R. 3639, H.R. 3814, and H.R. 4234 Before the Subcomm. on*

[5] A recipient of the ACS is required, under threat of fine, to respond — just as recipients of the census are. *See* 13 U.S.C. § 221(a).

Census & Population of the H. Comm. on Post Office & Civil Serv., 100th Cong. 50-51 (1988) (statement of John G. Keane, Director, Bureau of the Census); *see also Census Equity Act: Hearings on H.R. 2661 Before the Subcomm. on Census & Population of the H. Comm. on Post Office & Civ. Serv.*, 101st Cong. 42-44 (1989) (statement of C. Louis Kincannon, Deputy Director, Bureau of the Census). Before the 2010 census, former Bureau Director Kenneth Prewitt testified before Congress to the same effect. *See Counting the Vote: Should Only U.S. Citizens Be Included in Apportioning Our Elected Representatives?: Hearing Before the Subcomm. on Federalism & the Census of the H. Comm. on Gov't Reform*, 109th Cong. 73 (2005) (statement of Kenneth Prewitt). And finally, just two years ago, several former Bureau Directors wrote in an *amicus curiae* brief to the Supreme Court (in a case about the use of total population in intrastate redistricting) that a "citizenship inquiry would invariably lead to a lower response rate to the Census." Brief of Former Directors of the U.S. Census Bureau as *Amici Curiae* in Support of Appellees at 25, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

Earlier this year, however, the Census Bureau reversed course. Specifically, on March 26, 2018, Secretary Ross issued a memorandum directing the Census Bureau to reinstate the citizenship question on the 2020 decennial census. (SAC ¶ 3; *see also* Docket No. 173 ("Admin. Record"), at 1313-20 ("Ross Mem.")).[6] Secretary Ross asserted that he included the citizenship question in response to a letter from the Department of Justice ("DOJ") dated December 12, 2017. (SAC ¶ 94). The DOJ letter, in turn, requested the question's reinstatement on the grounds that more granular citizenship data was necessary to enforce Section 2 of the Voting

[6] Given the volume of the Administrative Record, Defendants did not file it directly on the docket. Instead, they made it publicly available at http://www.osec.doc.gov/opog/FOIA/Documents/AR%20-%20FINAL%20FILED%20-%20ALL%20DOCS%20%5b CERTIFICATION-INDEX-DOCUMENTS%5d%206.8.18.pdf.

Rights Act, which prohibits discriminatory voting laws. (*Id.* ¶ 95). After considering several options — including maintaining the *status quo* and using "administrative records to calculate citizenship data," (*id.* ¶ 81 (internal quotation marks omitted)) — the Secretary concluded that the "value of more complete citizenship data outweighed concerns regarding non-response." (*Id.* ¶ 82). Two days later, President Trump's campaign sent an e-mail to supporters stating that "President Trump has officially mandated that the 2020 United States Census ask people living in America whether or not they are citizens." (NGO Compl. ¶ 178).

These lawsuits (and others, elsewhere) followed.

LEGAL STANDARDS

Defendants move to dismiss pursuant to Rules 12(b)(1) and 12(b)(6). A Rule 12(b)(1) motion challenges the court's subject-matter jurisdiction to hear the case. "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "In resolving a motion to dismiss under Rule 12(b)(1), the district court must take all uncontroverted facts in the complaint (or petition) as true, and draw all reasonable inferences in favor of the party asserting jurisdiction." *Fountain v. Karim*, 838 F.3d 129, 134 (2d Cir. 2016) (quoting *Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 243 (2d Cir. 2014)). Additionally, a court "may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue, but [the Court] may not rely on conclusory or hearsay statements contained in the affidavits." *J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 110 (2d Cir. 2004). Ultimately, "[t]he plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence." *Aurecchione v. Schoolman Transp. Sys., Inc.*, 426 F.3d 635, 638 (2d Cir. 2005).

By contrast, a Rule 12(b)(6) motion tests the legal sufficiency of a complaint and requires a court to determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). When ruling on a Rule 12(b)(6) motion, a court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *See, e.g.*, *Holmes v. Grubman*, 568 F.3d 329, 335 (2d Cir. 2009). To survive such a motion, however, the plaintiff must plead sufficient facts "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556); *see also Twombly*, 550 U.S. at 570 (noting that a claim must be dismissed if the plaintiffs "have not nudged their claims across the line from conceivable to plausible").

DISCUSSION

Defendants make four arguments with respect to the operative complaints in both cases, and one argument unique to NGO Plaintiffs' Complaint in 18-CV-5025. First, they contend that Plaintiffs in both cases lack Article III standing because Plaintiffs do not allege an injury-in-fact that is fairly traceable to Defendants' conduct. (*See* Docket No. 155 ("Defs.' Br."), at 13-21). Second, they assert that all of the claims pressed by Plaintiffs are barred by the political question doctrine. (*See id.* at 21-26). Third, they insist that the decision as to what questions should be included in the census questionnaire is committed by law to agency discretion and, thus, that Secretary Ross's decision is not subject to judicial review under the APA. (*See id.* at 26-30). Fourth, they aver that Plaintiffs fail to state a claim under the Enumeration Clause. (*See id.* at 30-35). And finally, they argue that NGO Plaintiffs fail to state an equal protection claim under

the Due Process Clause. (*See* 18-CV-5025, Docket No. 39 ("Defs.' NGO Br."), at 16-19). The Court will address each of those arguments in turn.

A. Standing

Article III of the Constitution restricts the "judicial Power" of the United States to "Cases" and "Controversies." U.S. CONST. art. III, § 2. In light of that restriction, a party invoking the court's jurisdiction — the plaintiff — must have "standing" to sue. *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). To have standing, a plaintiff must establish three elements. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Specifically, a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan*, 504 U.S. at 560-61). Significantly, each element "must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. At the pleading stage, a plaintiff need only "clearly . . . allege facts demonstrating" each element. *Warth v. Seldin*, 422 U.S. 490, 518 (1975); *see also John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732, 736 (2d Cir. 2017) ("[B]ecause [the defendant] mounts only a 'facial' challenge to [the plaintiff's] allegations of standing, [the plaintiff] bears no evidentiary burden at the pleading stage."); *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016) ("When the Rule 12(b)(1) motion is facial, . . . [t]he task of the district court is to determine whether the Pleading allege[s] facts that affirmatively and plausibly suggest that [the plaintiff] has standing to sue." (second and third alterations in original) (internal quotation marks omitted)). Further, where there are multiple plaintiffs, as here, only one must establish the elements of standing for the case

to proceed. *See, e.g.*, *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 109 (2d Cir. 2017).

In this case, Defendants contend that Plaintiffs fail to establish that they have been injured in fact and that any injury is traceable to the challenged conduct. (*See* Defs.' Br. 13-14). Additionally, they make a handful of arguments specific to whether NGO Plaintiffs have standing. (*See* Defs.' NGO Br. 4-15). The Court will address the common arguments first.

1. Injury-in-Fact

The injury-in-fact requirement is meant to "ensure that the plaintiff has a 'personal stake in the outcome of the controversy.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Warth*, 422 U.S. at 498). To establish injury-in-fact, a plaintiff must demonstrate an injury that is "concrete, particularized, and actual or imminent." *Clapper*, 568 U.S. at 409. "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative . . . ." *Id.* Nevertheless, a plaintiff may allege a "future injury" if he or she shows that "the threatened injury is 'certainly impending,' *or* there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List*, 134 S. Ct. at 2341 (emphasis added) (quoting *Clapper*, 568 U.S. at 409, 414 n.5 (2013)).[7] Plaintiffs easily meet their burden at this stage of the proceedings.

Plaintiffs' theory of injury proceeds in two steps, each of which is amply supported by allegations in their operative complaints — allegations that the Court must assume are true in

[7] Defendants suggest that the "substantial risk" formulation applies only in food and drug cases (*see* Docket No. 190 ("Defs.' Reply Br."), at 4-5), but that suggestion is supported by neither logic nor law. Indeed, it is belied by both *Clapper*, in which the Supreme Court cited to non-food and drug cases, *see* 568 U.S. at 414 n.5 (citing *Blum v. Yaretsky*, 457 U.S. 991 (1982)), and *Susan B. Anthony List*, another non-food and drug case in which the Supreme Court expressly reaffirmed the "substantial risk" formulation. *See* 134 S. Ct. at 2341; *accord Chevron Corp. v. Donziger*, 833 F.3d 74, 121 (2d Cir. 2016).

deciding this motion. First, Plaintiffs contend that Defendants' inclusion of a citizenship question on the census will "drive down response rates and seriously impair the accuracy of the decennial population count." (SAC ¶ 39; *accord* NGO Compl. ¶ 4). In support of that assertion, Plaintiffs proffer an array of evidence — much of it from Defendants themselves. For instance, Plaintiffs cite the Census Bureau's own argument in 1980 that "any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count" because "[q]uestions as to citizenship are particularly sensitive in minority communities and would inevitable trigger . . . refusal to cooperate." (SAC ¶ 40 (quoting *Fed'n for Am. Immigration Reform*, 486 F. Supp. at 568); *accord* NGO Compl. ¶ 84). Plaintiffs also cite testimony, interviews, and an *amicus* brief filed by former Directors of the Census Bureau, arguing in sum and substance that the "citizenship inquiry would invariably lead to a lower response rate to the Census in general." (SAC ¶¶ 39-47; *accord* NGO Compl. ¶¶ 81-90). Moreover, Plaintiffs plausibly allege that this risk is "heightened in the current political climate because of President Trump's anti-immigrant rhetoric." (SAC ¶ 48; *accord* NGO Compl. ¶¶ 113-26, 140-46). Accordingly, Plaintiffs claim, Defendants' actions "will add to this unprecedented level of anxiety in immigrant communities," leading to "nonresponse and lower participation by many immigrants." (SAC ¶ 53; *accord* NGO Compl. ¶¶ 141-46).

The second step in Plaintiffs' argument is that this "undercounting" will result in various concrete harms to them and their constituents or members. (*See, e.g.*, SAC ¶ 105 ("[I]n 2014, New York State had the fourth largest population of undocumented residents in the nation."); *see id.* ¶¶ 104-38; *see also, e.g.*, NGO Compl. ¶ 52 ("Make the Road New York members . . . will be deprived of political influence and funding . . . ."). For example, Plaintiffs identify various federal programs, including "the Highway Trust Fund program, the Urbanized Area Formula

Funding program, the Metropolitan Planning program, and the Community Highway Safety Grant program," which "distribute funds based, at least in part, on population figures collected through the decennial census." (SAC ¶ 140 (citing 23 U.S.C. § 104(d)(3); 49 U.S.C. §§ 5305, 5307, 5340; 23 U.S.C. § 402); *see id.* ¶ 145 ("Plaintiffs will lose millions of dollars in [Medicaid] reimbursement as a result of even a 1% undercount."); *see also* NGO Compl. ¶ 197 (identifying the Federal Medical Assistance Percentage, the Highway Trust Fund program, and other programs that rely on population figures from the census)). Additionally, they note that the Department of Education relies on census data to determine certain funding for schools in their jurisdictions. (*See, e.g.*, SAC ¶ 143(a)-(v)). Citing these programs, they plausibly allege that an undercount in their jurisdictions will "depriv[e] them of their statutory fair share of federal funding, and remov[e] crucial resources for important government services." (*Id.* ¶ 139; *accord* NGO Compl. ¶ 52). That alone is sufficient to confer standing. *See, e.g.*, *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (*per curiam*) (holding that New York City, New York State, and several individual voters had standing to challenge "a census undercount" by alleging harm "in the form of dilution of [the individual plaintiffs'] votes," and, for the government plaintiffs, "as recipients of federal funds"). But on top of that, Government Plaintiffs also plausibly allege that an undercount "will lead to loss of representation in Rhode Island" — which is apparently teetering on the edge of losing one of its two Representatives already — and will the "harm representational interests" of local government Plaintiffs "within their states." (SAC ¶¶ 160-63). That, too, is sufficient. *See, e.g.*, *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331 (1999) (observing that the "expected loss of a Representative to the United States Congress undoubtedly satisfies the injury-in-fact requirement" of standing).

In response, Defendants contend that Plaintiffs' allegations are "too speculative" because they rely on a highly attenuated chain of inferences. (Defs.' Br. 14). That may ultimately prove to be the case, but Defendants' contentions are misplaced at this stage in the litigation, when Plaintiffs "bear[] no evidentiary burden." *John*, 858 F.3d at 736. Citing a memorandum authored by Secretary Ross, for example, Defendants claim that "there is little 'definitive, empirical' evidence regarding the effect of adding a citizenship question." (Defs.' Br. 15). But Plaintiffs allege otherwise, citing ample evidence — spanning decades and much of it from the Census Bureau itself — in support of the proposition that including a citizenship question will cause an undercount. (*See* SAC ¶¶ 39-47; *accord* NGO Compl. ¶¶ 81-90). Moreover, Plaintiffs cite testing that the Census Bureau conducted in 2017 that tended to show that "fears, particularly among immigrant respondents, have increased markedly this year." (SAC ¶ 51; *accord* NGO Compl. ¶¶ 113-26). These findings, the Census Bureau explained, "have implications for data quality and nonresponse." (SAC ¶ 52; *accord* NGO Compl. ¶ 127). For the time being, those allegations are sufficient to establish Plaintiffs' point. *See, e.g.*, *Bennett v. Spear*, 520 U.S. 154, 168 (1997) ("[W]hile a plaintiff must set forth by affidavit or other evidence specific facts to survive a motion for summary judgment, and must ultimately support any contested facts with evidence adduced at trial, at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." (internal quotation marks, brackets, and citation omitted)). Defendants' reliance on contrary evidence merely raises disputes of fact that the Court may not resolve on a motion to dismiss. *See, e.g.*, *Lujan*, 504 U.S. at 561.

Next, Defendants claim that the Census Bureau "has extensive procedures in place to address non-response and to obtain accurate data for those households that decline to respond." (Defs.' Br. 15). Defendants repackaged this argument slightly in their reply brief, (Defs.' Reply Br. 4), and at oral argument, (Oral Arg. Tr. 12), claiming that Plaintiffs fail to distinguish between the *initial* "self-response" to the written census form, and the "non-response followup" employed by the Census Bureau to reach initial non-responders. As Defendants see it, Plaintiffs allege only that the initial self-response rate will decrease; they fail to consider that the non-response followup could cure any diminished self-response. (Defs.' Reply Br. 4). However packaged, though, those arguments are also factual and thus premature. Moreover, they ignore well-pleaded allegations in Plaintiffs' complaints. Plaintiffs allege broadly that adding the citizenship question will "significantly deter[] *participation*" in the census. (SAC ¶ 5 (emphasis added); *accord* NGO Compl. ¶ 141 (alleging that "adding the citizenship question" will "reduc[e] participation by Latinos and Immigrants of color")). And Plaintiffs support that assertion with concrete allegations, citing, for example, reports from the Census Bureau that census respondents "sought to break off interviews" because of "concerns about data confidentiality and the government's negative attitudes toward immigrants." (SAC ¶ 51; *accord* NGO Compl. ¶¶ 133-37). In other words, Plaintiffs plausibly allege that the addition of the citizenship question will affect not only the initial response rate to the questionnaire itself, but also cooperation with the in-person followup.

Finally, Defendants claim that Plaintiffs' allegations regarding loss of representation and federal funding are "too speculative" because apportionment and the allocation of funds are both "complex" and could be affected by, among other things, "potential undercounting in other

states." (Defs.' Br. 16-18).[8] But that argument is squarely foreclosed by *Carey*, in which the Second Circuit held that New York City and New York State had standing to challenge the Census Bureau's conduct during the 1980 census because they had "made a showing . . . that Census Bureau actions in New York State have caused a disproportionate undercount which will result in loss of representation" and "decreased federal funds . . . under revenue sharing." 637 F.2d at 838; *see also, e.g.*, *City of Detroit v. Franklin*, 4 F.3d 1367, 1374 (6th Cir. 1993) ("Plaintiffs . . . have standing to challenge the [Secretary's] actions based upon their claim that the census undercount will result in a loss of federal funds to the City of Detroit.").[9] Defendants try to distinguish *Carey* on the ground that it "did not involve allegations of injuries from the mere inclusion of a question," (Defs.' Br. 17 n.8), but that consideration is irrelevant to the standing inquiry. Equally irrelevant is the fact that the Second Circuit "cited New York City's 'present financial condition' in finding that the city and the state had standing as recipients of federal funds." (*Id.*). The loss of federal funds constitutes injury whether or not a jurisdiction is in sound fiscal shape, and nothing in *Carey* suggests that the Court's passing reference to the financial condition of New York City (not the State) was essential to its holding. Finally, the

[8] Defendants also complain that Government Plaintiffs "do not explain" how the states at issue might lose representation in Congress. (Defs.' Br. 18). At this stage, however, the Court "presum[es] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561. Government Plaintiffs allege that if Rhode Island's population count drops by a mere 157 people, it will result in the loss of a Representative, and they explicitly allege that "an undercount resulting from Defendants' decision to add a citizenship demand will lead to loss of representation" in the state. (SAC ¶ 160; *see also id.* ¶ 162 ("An undercount of immigrant communities in [New York and Illinois] will result in losses of these seats . . . .")).

[9] Defendants seize on the *Carey* Court's use of the word "showing," (Defs.' Br. 16), but it merely reflects the procedural posture of the case — namely, an appeal from the grant of a preliminary injunction. Plaintiffs here have made the requisite "showing" by way of the allegations in their Second Amended Complaint, which the Court must assume to be true.

fact that *Carey* analyzed standing after preliminary results from the census had been tabulated — a point that Defendants pressed at oral argument, (*see* Oral Arg. Tr. 8-9) — is merely a difference in degree. Put simply, the Circuit did not demand the kind of rigorous proof that an undercount would result in the loss of representation and federal funds that Defendants here demand. *See also U.S. House of Representatives*, 525 U.S. at 332 (finding standing to bring a challenge in advance of the census based on "the threat of vote dilution" and noting that "it is certainly not necessary . . . to wait until the census has been conducted to consider the issues presented here, because such a pause would result in extreme — possibly irremediable — hardship").

In short, taking Plaintiffs' allegations as true, the Court concludes that they establish a "substantial risk" of harm and thus satisfy the injury-in-fact requirement.

2. Traceability

As noted, to establish Article III standing, a plaintiff must also demonstrate that his or her injury is "fairly traceable" to the challenged actions of the defendant. *Lujan*, 504 U.S. at 561 (ellipsis and brackets omitted). In other words, a plaintiff "must demonstrate a causal nexus between the defendant's conduct and the injury." *Chevron Corp.*, 833 F.3d at 121. On a motion to dismiss, plaintiffs have only a "relatively modest" burden to allege that "their injury is 'fairly traceable'" to the defendant's conduct. *Bennett*, 520 U.S. at 171. But that burden is harder to carry where, as here, traceability "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Lujan*, 504 U.S. at 562. In such a case, "it becomes the burden of the plaintiff to adduce facts showing that" the choices of these independent actors "have been or will be made in such manner as to produce causation and permit redressability of

injury." *Id.*; *see also, e.g.*, *Bennett*, 520 U.S. at 169 (holding that a plaintiff may meet the traceability requirement by alleging that a defendant's conduct has a "determinative or coercive effect upon the action of someone else"). At the same time, "it is well-settled that for standing purposes, [plaintiffs] need not prove a cause-and-effect relationship with absolute certainty; substantial likelihood of the alleged causality meets the test. This is true even in cases where the injury hinges on the reactions of the third parties . . . to the agency's conduct." *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.* ("*NRDC*"), 894 F.3d 95, 104 (2d Cir. 2018). Thus, the "fact that the defendant's conduct may be only an 'indirect[]' cause is 'not necessarily fatal to standing.'" *Chevron Corp.*, 833 F.3d at 121 (alteration in original) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976)).

The Second Circuit's recent decision in *NRDC* is instructive. In that case, the petitioners — five states and three nonprofit organizations — claimed that the National Highway Traffic Safety Administration ("NHTSA") violated the APA when it indefinitely delayed the effective date of a rule that would have increased penalties for violations of certain vehicle environmental standards. *NRDC*, 894 F.3d at 100. The petitioners claimed environmental injuries stemming from the indefinite delay of the rule. *Id.* at 103-04. NHTSA argued, *inter alia*, that the petitioners' injuries were "too indirect to establish causation and redressability" because they relied on the uncertain reactions of third parties — namely, vehicle manufacturers — to the increased penalties. *Id.* at 104. The Second Circuit rejected NHTSA's argument, finding that the petitioners had demonstrated "the required nexus between inappropriately low penalties and harm to Petitioners." *Id.* Citing "the agency's own pronouncements," as well as "[c]ommon sense and basic economics," the Court concluded that "the increased penalty has the potential to affect automakers' business decisions and compliance approaches" in a manner that would harm

the petitioners. *Id.* at 105 (alteration in original). Specifically, the Court noted that "NHTSA itself has concluded that emissions reductions from compliance with higher fuel economy standards would result in significant declines in the adverse health effects that result from population exposure to these pollutants." *Id.* (internal quotation marks and citation omitted).

Applying those standards to Defendants' motions to dismiss, Plaintiffs meet their traceability burden. Plaintiffs allege that reinstating the citizenship question "will lead to nonresponse and lower participation" in the census, which will, in turn, cause financial and representational injuries to Plaintiffs. (SAC ¶ 53; *see id.* ¶ 159 (alleging that adding a citizenship question will "depress[] participation in the decennial census within Plaintiffs' diverse naturalized, documented, and undocumented immigrant populations"); *see also* NGO Compl. ¶¶ 4-5). Plaintiffs further allege that "immigrant respondents are . . . increasingly concerned about confidentiality and data sharing in light of the current anti-immigrant rhetoric," and "may seek to protect their own privacy or the privacy of their household" by not responding to the census. (SAC ¶¶ 50, 53; *accord* NGO Compl. ¶ 127). Moreover, like the petitioners in *NRDC*, Plaintiffs support these allegations with evidence from Defendants themselves. (*See, e.g.*, SAC ¶ 51 ("Census Bureau officials have noted that in routine pretests conducted from February 2017 to September 2017, 'fears, particularly among immigrant respondents, have increased markedly this year.'"); *id.* ¶ 52 (quoting the Census Bureau's conclusion that their findings after a census pretest were "particularly troubling given that they impact hard-to-count populations disproportionately, and have implications for data quality and nonresponse"); NGO Compl. ¶¶ 81-90). Plaintiffs thus plead a "substantial likelihood of the alleged causality." *NRDC*, 894 F.3d at 104.

Relying heavily on the Supreme Court's decisions in *Clapper* and *Simon*, Defendants contend that "the intervening acts of third parties" — namely, those who refuse to comply with their legal duty to respond to the census questionnaire — break the chain of causation in these cases for purposes of standing. (Defs.' Br. 19-20). But that argument "wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." *Bennett*, 520 U.S. at 168-69. Moreover, *Clapper* and *Simon* are distinguishable. For one, both of those cases were decided on summary judgment, at which point the plaintiffs could "no longer rest on . . . mere allegations, but" had to "set forth by affidavit or other evidence specific facts." *Clapper*, 568 U.S. at 412 (alteration in original) (internal quotation marks omitted); *see Simon*, 426 U.S. at 35.[10] Further, the chains of causation in *Clapper* and *Simon* were significantly more attenuated than the one here. In *Clapper*, the plaintiffs' theory of injury depended on a chain of causation with five discrete links, each of which "rest[ed] on [the plaintiffs'] highly speculative fear that" governmental actors or courts would exercise their nearly unfettered discretion in a particular way. 568 U.S. at 410-14. And in *Simon*, the Court found that it was "purely speculative" to attribute the choice of hospitals to deny the indigent plaintiffs services to decisions of the Treasury Department, as opposed to "decisions made by the hospitals without regard to the tax implications." 426 U.S. at 41-43. The chain of causation here — that Defendants' actions will increase non-response rates of certain populations and that the resulting undercount, in turn, will cause harm — is neither as long nor as speculative as the chains in *Clapper* and *Simon*.[11]

[10] Additionally, the standing inquiry in *Clapper* was "especially rigorous" because it involved the "review [of] actions of the political branches in the fields of intelligence gathering and foreign affairs." 568 U.S. at 408-09.

[11] With respect to the local government Plaintiffs who allege injury stemming from intra-state redistricting based on census data, Defendants note that "states are not required to use

The injuries alleged in *Clapper* and *Simon* also differ in an important respect from the injuries alleged in the instant cases. In those two cases, the plaintiffs' standing turned on their ability to prove that the defendants' conduct would cause injury to *particular* individuals. That is, in *Clapper*, each plaintiff had to show that his or her own communications would likely be intercepted by surveillance conducted pursuant to the provisions at issue. *See* 568 U.S. at 410-12. And in *Simon*, the plaintiffs had to show that particular indigent individuals were denied service at a hospital on account of the defendants' conduct. *See* 426 U.S. at 40. The plaintiffs in those cases could not make a showing at that level of specificity. In these cases, by contrast, the alleged injuries are aggregate or communal in nature. That is, Plaintiffs do not need to show that a particular person will be deterred by Defendant's conduct from responding to the census; instead, their ability to prove injury that is fairly traceable to Defendants' actions turns on whether they can show that Defendants' conduct is likely to result in an undercount at the aggregate level, something that can presumably be done through surveys or other statistical proof. Plaintiffs may or may not be able to make that showing when the time comes, but that is a question for another day. Given the allegations in Plaintiffs' operative complaints, including those based on Defendants' own evidence, they have done enough to survive the present motions.[12]

unadjusted census figures in such actions." (Defs.' Br. 21). The contention that this breaks the chain of causation for traceability purposes is foreclosed by *U.S. House of Representatives*, in which the Supreme Court held that the plaintiffs "established standing on the basis of the expected effects of the use of sampling in the 2000 census on intrastate redistricting." 525 U.S. at 332. There, as here, (*see* SAC ¶ 164), the plaintiffs alleged that "several of the States in which these counties [in which the plaintiffs resided] are located require use of federal decennial census population numbers for their state legislative redistricting." *Id.* at 333.

[12] For similar reasons, there is no merit to Defendants' contention that "it likely would be impossible to isolate and quantify the number of individuals who would have responded but for addition of the citizenship question." (Defs.' Br. 20). Given that Plaintiffs allege injuries

Finally, Defendants make much of the fact that the actions of the intervening third parties — namely, residents who fail to respond to the census — would be illegal. (Defs.' Br. 20; 18-CV-5025, Docket No. 58 ("Defs.' NGO Reply Br."), at 2-3).[13] That is true, *see* 13 U.S.C. § 221(a) (establishing a fine for persons who do not respond to the census), but irrelevant to the question of standing, which turns only on whether the actions of the defendant can fairly be said to cause injury to the plaintiff. The D.C. Circuit's decision in *Attias v. CareFirst, Inc.*, 865 F.3d 620 (D.C. Cir. 2017), is on point. In that case, the plaintiffs brought breach of contract, negligence, and consumer-protection law claims against CareFirst following a breach of CareFirst's computer systems, including a database containing its customers' personal information. *Id.* at 623. The plaintiffs alleged that they faced an increased risk of identity theft as a result of the defendant's negligence. The Court recognized standing in spite of the fact that the plaintiffs' ability to prove injury depended upon a showing that intervening third parties — data hackers — would break the law. *Id.* at 629. The Court explained that, while "the thief would be the most immediate cause of plaintiffs' injuries, . . . Article III standing does not require that the defendant be the most immediate cause, or even a proximate cause, of the plaintiffs' injuries; it requires only that those injuries be 'fairly traceable' to the defendant." *Id.* So too here: Plaintiffs plausibly allege that adding the citizenship question will result in a

stemming from the aggregate effect of adding the citizenship question, they do not need to identify who would have answered the census but for the inclusion of the citizenship question.

[13] In support of that argument, Defendants cite *United States v. Sanchez-Gomez*, 138 S. Ct. 1532 (2018), for the proposition that "courts 'have consistently refused to conclude that the case-or-controversy requirement is satisfied by the possibility that a party will . . . violat[e] valid criminal laws.'" (Defs.' NGO Reply Br. 2 (quoting *Sanchez-Gomez*, 138 S. Ct. at 1541). But *Sanchez-Gomez* concerned mootness and whether a plaintiff could invoke the capable-of-repetition-but-evading-review exception based on the possibility that he or she would violate the law in the future; the case has nothing to do with the traceability requirement for standing purposes.

disproportionate number of people not responding to the census in their jurisdictions and that this non-response, in turn, will cause them injury. That is a sufficient showing of traceability at this stage of the proceedings and, thus, sufficient to show standing.[14]

3. NGO Plaintiffs' Standing

As noted, Defendants make a handful of additional arguments with respect to the standing of NGO Plaintiffs — namely, that they lack standing to sue on their own behalf, that they lack standing to sue on behalf of their members, and that they lack "third-party" standing to assert the constitutional rights of their members. (*See* Defs.' NGO Br. 4-15). For an organization to establish standing to bring suit on behalf of its members — known as "associational standing" — the organization must show that: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

Here, at least one NGO Plaintiff — namely, Make the Road New York ("Make the Road") — plainly satisfies those requirements. Make the Road "has more than 22,000 members

[14] In addition to arguing that Plaintiffs lack Article III standing, Defendants contend that Plaintiffs lack "prudential standing" because their alleged injuries are not "within the zone of interests protected by the Constitution's Enumeration Clause." (Defs.' Br. 17). Whether a "plaintiff [comes] within the zone of interests for which [a] cause of action [is] available . . . . has nothing to do with whether there is a case or controversy under Article III." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 (1998); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.4 (2014) ("[T]he absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case."). Given that, and the Court's conclusion that Plaintiffs fail to state a claim under the Enumeration Clause, the Court need not and does not address Defendants' zone-of-interests argument.

who reside in New York City, Long Island and Westchester County." (NGO Compl. ¶ 50). Its "mission is to build the power of immigrant and working class communities to achieve dignity and justice." (*Id.* ¶ 49). The Complaint alleges that the organization's members reside in communities where "Latino immigrant populations . . . exceed the national and state averages." (*Id.* ¶ 51). It further alleges that New York State and its subdivisions use census data to draw congressional, state legislative, and municipal legislative districts. (*Id.* ¶¶ 72-73). Consequently, the Complaint alleges, the undercount likely caused by including the citizenship question "will reduce" both "the amount of federal funds" distributed to the communities in which Make the Road members live and their "political power." (*Id.* ¶ 52; *see also id.* ¶ 73 ("[W]hen a local community in any of these [jurisdictions] is disproportionately undercounted in the Decennial Census, the community will be placed in a malapportioned legislative district that has greater population that other legislative districts in the same state.")). Notably, the Complaint specifically identifies one such member, Perla Lopez of Queens County, which has a large population of Latino and immigrant residents. (*Id.* ¶ 53). Affidavits — which the Court may consider, *see Thompson v. Cty. of Franklin*, 15 F.3d 245, 249 (2d Cir. 1994) — identify others, including a resident of Nassau County, where the "number of Latino and immigrant residents . . . far exceed[s] the New York state average." (18-CV-5025, Docket No. 49 ("NGO Pls.' Br."), Ex. 3, ¶ 21).

These allegations suffice to establish that Make the Road has associational standing. As discussed above, the Second Circuit and Supreme Court have made clear that both fiscal and representational injuries resulting from an alleged undercount are sufficient to support standing. *See Carey*, 637 F.2d at 838 ("[C]itizens who challenge a census undercount on the basis, *inter alia*, that improper enumeration will result in loss of funds to their city have established both an

injury fairly traceable to the Census Bureau and a substantial probability that court intervention will remedy the plaintiffs' injury."); *U.S. House of Representatives*, 525 U.S. at 332 ("[T]he threat of vote dilution . . . is concrete and actual or imminent, not conjectural or hypothetical." (internal quotation marks omitted)). Further, these cases stand for the proposition that individuals, like Ms. Lopez, have standing to raise fiscal and representational injuries. *See Carey*, 637 F.2d at 838 ("The individual plaintiffs in this case have alleged concrete harm in the form of dilution of their votes and decreased federal funds flowing to their city and state, thus establishing their standing."); *see also City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980) (holding that residents of Philadelphia had standing to challenge alleged undercount because "[e]ven if none of the named plaintiffs personally receives a dollar of state or federal aid, all enjoy the benefits yielded when the City is enabled to improve quality of life through the receipt of this money"). Nothing more is required at this stage of the proceedings.

Defendants also contend that NGO Plaintiffs lack standing to bring their equal protection claim because they fail to "satisfy the third-party standing exception to the general rule against asserting the rights of others." (Defs.' NGO Br. 13-15). Defendants' invocation of the third-party standing doctrine is inapt, however, as Make the Road plainly has associational standing to bring an equal protection claim, and thus need not rely on the third-party standing doctrine. That NGO Plaintiffs' claim sounds in equal protection is of no moment for the associational standing inquiry. *See, e.g.*, *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 9 (1988) (holding that an association had standing to bring a constitutional claim on behalf of its members because the members "would have standing to bring this same suit"); *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 669 n.6 (1993) (holding that, on "the current state of the record," an association of contractors had standing to bring an Equal

Protection Clause challenge on behalf of its members); *Thomas v. City of N.Y.*, 143 F.3d 31, 36 n.9 (2d Cir. 1998) (finding that associations of livery car drivers had standing to bring an Equal Protection Clause challenge on behalf of their members). Notably, the Second Circuit has held that in cases such as this one, where plaintiffs seek declaratory and injunctive relief only, the third prong of the associational standing inquiry — whether the relief requested requires the participation of individual members in the lawsuit — is likely to be satisfied. *See, e.g.*, *Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 150 (2d Cir. 2006) ("[W]here the organization seeks a purely legal ruling without requesting that the federal court award individualized relief to its members, the *Hunt* test may be satisfied." (quoting *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004)).

In sum, the Court concludes that Make the Road has associational standing. Accordingly, it need not and does not address the standing of the other NGO Plaintiffs or Defendants' other arguments. *See, e.g.*, *Centro de la Comunidad Hispana de Locust Valley*, 868 F.3d at 109 ("It is well settled that where, as here, multiple parties seek the same relief, 'the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.'" (quoting *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006))).

B. The Political Question Doctrine

Next, Defendants contend that all of Plaintiffs' claims should be dismissed on the basis of the political question doctrine. (Defs.' Br. 21-26). Although a court generally has "a responsibility to decide cases properly before it," there is a well-established but "narrow exception to that rule, known as the political question doctrine." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194-95 (2012) (internal quotation marks omitted). That doctrine "excludes from judicial review those controversies which revolve around policy choices and

value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (internal quotation marks omitted). More specifically, a case "involves a political question . . . where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky*, 566 U.S. at 195 (ellipsis in original) (internal quotation marks omitted). Citing the language in the Enumeration Clause providing that the "actual Enumeration shall be made . . . *in such Manner as* [*Congress*] *shall by Law direct*," U.S. CONST., art. I, § 2, cl. 3 (emphasis added), Defendants contend that this is such a case. (Defs.' Br. 23). It follows, they argue, that courts have no role whatsoever to play in reviewing decisions of the Secretary, to whom Congress has delegated its authority over the census.

Defendants have a tough sell because courts, including the Supreme Court and the Second Circuit, have entertained challenges to the conduct of the census for decades and, more to the point, have consistently rejected application of the political question doctrine in such cases. *See, e.g.*, *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 459 (1992); *Utah v. Evans*, 536 U.S. 452 (2002); *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Wisconsin v. City of N.Y.*, 517 U.S. 1 (1996); *Carey*, 637 F.2d at 838; *Young v. Klutznick*, 497 F. Supp. 1318, 1326 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981); *City of Philadelphia*, 503 F. Supp. at 674; *Texas v. Mosbacher*, 783 F. Supp. 308, 312 (S.D. Tex. 1992); *District of Columbia v. U.S. Dep't of Commerce*, 789 F. Supp. 1179, 1185 (D.D.C. 1992); *City of N.Y. v. U.S. Dep't of Commerce*, 739 F. Supp. 761, 764 (E.D.N.Y. 1990); *U.S. House of Representatives v. U.S. Dep't*

of Commerce, 11 F. Supp. 2d 76, 95 (D.D.C. 1998) (three-judge court), *aff'd*, 525 U.S. 316; *Prieto v. Stans*, 321 F. Supp. 420 (N.D. Cal. 1970); *see also Morales v. Daley*, 116 F. Supp. 2d 801 (S.D. Tex. 2000), *aff'd sub nom. Morales v. Evans*, 275 F.3d 45 (5th Cir. 2001) (unpublished). *But cf. Tucker v. U.S. Dep't of Commerce*, 958 F.2d 1411, 1417 (7th Cir. 1992) ("So nondirective are the relevant statutes that it is arguable that there is no law for a court to apply in a case like this . . . ."). Those courts have acknowledged that "[t]he text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration.'" *Wisconsin*, 517 U.S. at 19 (quoting U.S. CONST., art. I, § 2, cl. 3). Yet, time and again, they have recognized that the judiciary has at least some role to play in reviewing the conduct of the political branches with respect to the decennial census.[15]

Defendants contend that those cases are all distinguishable because they challenged whether the government had conducted an "actual Enumeration," while the instant case challenges the "manner" in which the census was conducted. (Defs.' Reply Br. 7-8). But that is not true. In fact, at least two of the cases involved challenges to the census questionnaire itself — precisely the kind of challenge brought here. *See Morales*, 116 F. Supp. 2d at 809; *Prieto*, 321 F. Supp. at 421-22. And in *Carey* — which is binding on this Court — the Second Circuit explicitly described the plaintiffs' suit as a challenge to "the *manner* in which the Census Bureau conducted the 1980 census in the State of New York," 637 F.2d at 836 (emphasis added); *see also id.* ("[Plaintiffs'] basic complaint is that the census was conducted in a *manner* that will

[15] Admittedly, the Supreme Court did not explicitly address the political question doctrine in either *Evans* or *Wisconsin*. Nevertheless, there is authority for the proposition that the political question doctrine is a "jurisdictional limitation," *Hourani v. Mirtchev*, 796 F.3d 1, 12 (D.C. Cir. 2015); *see also Franklin*, 505 U.S. at 801 n.2 (plurality opinion) (citing *Montana* in dismissing the argument "that the courts have no subject-matter jurisdiction over this case because it involves a 'political question'") — in which case, the Court would have had an obligation to raise it "*sua sponte*," *Steel Co.*, 523 U.S. at 93.

inevitably result in an undercount . . . .” (emphasis added)), yet rejected the defendants’ invocation of the political question doctrine, *see id.* at 838.

Relying on *Steel Company*, Defendants try to dismiss the analysis in *Carey* on the ground that it was so “scant . . . as to constitute the type of ‘drive-by jurisdictional ruling[]’ that ‘ha[s] no precedential effect.’” (Defs.’ Br. 26 n.14 (alterations in original) (quoting *Steel Co.*, 523 U.S. at 91)). But Defendants’ reliance on *Steel Company* is badly misplaced, as that decision (and the quoted passage in particular) was concerned with courts’ “mischaracteriz[ing] claim-processing rules or elements of a cause of action as jurisdictional limitations.” *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010); *see also Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (describing *Steel Co.*’s reference to “drive-by jurisdictional rulings” as concerning opinions where the court states that it “is dismissing ‘for lack of jurisdiction’ when some threshold fact has not been established”). The Second Circuit did no such thing in *Carey*: Rather than dismissing a case on non-jurisdictional grounds while calling them jurisdictional, the Court *rejected* the defendants’ argument for dismissal on a ground that plainly is jurisdictional in nature. *See* 637 F.2d at 838. Defendants also contend that *Carey* is distinguishable because it concerned “*procedures* put in place to conduct the actual count — not the form of the questionnaire itself.” (Defs.’ Br. 26 n.14). But the political question doctrine does not operate at that level of specificity. *Carey* stands for the proposition that the “manner” in which the political branches conduct the census is not immune from judicial review. That alone compels rejection of Defendants’ political-question arguments.

More broadly, the distinction upon which Defendants’ argument rests — between “enumeration” cases and “manner” cases — is ultimately a false one. Defendants try to explain away the Supreme Court’s repeated review of how the Secretary has conducted the census on the

ground that its cases "[a]ll have concerned calculation methodologies, not pre-count information-gathering functions or content determinations." (Defs.' Br. 25 (citing cases)). But — Defendants' *ipse dixit* aside — challenges to "calculation methodologies," whether they be to "hot-deck imputation" (a process whereby the Census Bureau fills in certain missing information about an address by relying on other information in the Bureau's possession), *Evans*, 536 U.S. at 457-58; statistical sampling, *see U.S. House of Representatives*, 525 U.S. at 322-27; the use of post-enumeration surveys, *see Wisconsin*, 517 U.S. at 8-11; or the methods used to count federal employees serving overseas, *see Franklin*, 505 U.S. at 792-95, are no less challenges to the "manner" in which the "enumeration" is conducted than are the challenges in the present cases. In fact, *every* challenge to the conduct of the census is, in some sense, a challenge to the "manner" in which the government conducts the "actual Enumeration." And these cases are no different. At bottom, Plaintiffs' claim under the Enumeration Clause is that Defendants plan to conduct the census in a manner that does not satisfy the constitutional command to conduct an "actual Enumeration." (*See* SAC ¶¶ 178-82 (claiming that adding the citizenship question will "cause an undercount that impedes the 'actual Enumeration' required by the Constitution"); NGO Compl. ¶ 206 (alleging that adding the "citizenship question will in fact harm the accomplishment of an actual enumeration of the population")). That may or may not be the case, but "the political question doctrine does not place" the matter "outside the proper domain of the Judiciary." *Montana*, 503 U.S. at 459.

Defendants are on even shakier ground to the extent that they invoke the political question doctrine to seek dismissal of NGO Plaintiffs' equal protection claim. (Defs.' NGO Br. 15). Defendants do not specifically argue that the political question doctrine should bar that claim; instead, they merely incorporate the arguments they make in connection with Government

Plaintiffs' claims by reference. Regardless, any such arguments would be fruitless, as the Supreme Court made plain in *Baker v. Carr*, 369 U.S. 186 (1962), that "[j]udicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action." *Id.* at 226. Additionally, courts in this Circuit have noted more broadly that "[i]f a litigant claims that an individual right has been invaded, the lawsuit by definition does not involve a political question." *Stokes v. City of Mount Vernon*, No. 11-CV-7675 (VB), 2015 WL 4710259, at *5 (S.D.N.Y. Aug. 4, 2015) (citing authorities); *In re "Agent Orange" Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 67 (E.D.N.Y. 2005) (same), *aff'd sub nom. Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008). Finally, courts have entertained equal protection challenges to the census before, with no suggestion that doing so would run afoul of the political question doctrine. *See Morales*, 116 F. Supp. 2d 801; *Prieto*, 321 F. Supp. 420.

In short, Defendants' sweeping argument that the federal courts have no role to play in adjudicating the parties' disputes in these cases is squarely foreclosed by precedent. To be sure, the Constitution "vests Congress with wide discretion over . . . the conduct of the census." *Wisconsin*, 517 U.S. at 15. And Congress has, in turn, delegated broad authority to the Secretary. *See id.* at 19 (citing 13 U.S.C. § 141(a)). As discussed below, that undoubtedly mandates substantial "deference" to the decisions of the political branches in the conduct of the census. *See id.* at 23. But it does not follow that the Constitution commits the issue solely to the political branches or (as the discussion of the Enumeration Clause below makes clear) that the textual command for an "actual Enumeration," combined with the historical practice, does not yield "judicially discoverable and manageable standards for resolving" the parties' dispute.

Zivotofsky, 566 U.S. at 195; *see Evans*, 536 U.S. at 474-79 (looking to history in assessing an Enumeration Clause claim); *Wisconsin*, 517 U.S. at 21 (same); *Franklin*, 505 U.S. at 803-06 (same); *see also, e.g.*, *Nixon v. United States*, 506 U.S. 224, 233-36 (1993) (looking to the history of the Impeachment Trial Clause in deciding whether the political question doctrine applied); *Powell v. McCormack*, 395 U.S. 486, 520-48 (1969) (similar). The need for judicial deference does not justify judicial abdication.

C. The Administrative Procedure Act

Defendants' third argument is specific to Plaintiffs' APA claims. (Defs.' Br. 26-30). The "generous review provisions" of the APA provide for judicial review of "'final agency action for which there is no other adequate remedy in a court.'" *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967) (quoting 5 U.S.C. § 704). More specifically, the APA authorizes a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary [or] capricious," "contrary to constitutional right," "in excess of statutory jurisdiction," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A)-(D). The "presumption favoring judicial review of administrative action" under these provisions is "strong," but it is "not absolute." *Salazar v. King*, 822 F.3d 61, 75-76 (2d Cir. 2016); *accord Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). As relevant here, it is subject to a "very narrow exception," codified in Section 701(a)(2) of the APA, for "agency action" that "is committed to agency discretion by law." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

Pursuant to Section 701(a)(2), "'review is not to be had' in those rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)

(quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)); *accord Webster v. Doe*, 486 U.S. 592, 599-600 (1988). The bar is even higher when, as here, a plaintiff brings a constitutional challenge to final agency action: In such a case, a defendant must produce clear and convincing evidence that Congress intended not only to bar judicial review generally, but that Congress also intended to bar judicial review of constitutional challenges specifically. *See Webster*, 486 U.S. at 603 ("We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."); *see also Weinberger v. Salfi*, 422 U.S. 749, 762 (1975). To determine if a statute falls within Section 701(a)(2)'s narrow exception to judicial review, a court must analyze "the specific statutory provisions involved." *Briscoe v. Bell*, 432 U.S. 404, 413-14 (1977). More broadly, "courts look to the statutory text, the agency's regulations, and informal agency guidance that govern the agency's challenged action." *Salazar*, 822 F.3d at 76. As the Second Circuit has explained, "[a]gency regulations and guidance can provide a court with law to apply because . . . where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Id.* (internal quotation marks omitted).

Defendants contend that this is one of the rare circumstances in which Congress clearly intended to preclude judicial review of agency action. (Defs.' Br. 26-30). They base that contention primarily on the language of the Census Act, which — as amended in 1976 — provides that the Secretary "shall . . . every 10 years . . . take a decennial census of population . . . *in such form and content as he may determine*, including the use of sampling procedures and special surveys." 13 U.S.C. § 141(a) (emphasis added). Further, the Act "authorize[s]" the Secretary when conducting the decennial census "to obtain such other census information *as*

necessary." *Id.* (emphasis added). "This plain language," Defendants contend, "confers discretion as broad as that granted by the statute at issue in *Webster*, which allowed the CIA Director to terminate an employee whenever he 'shall deem such termination necessary or advisable in the interests of the United States.'" (Defs.' Br. 27 (citation omitted)). "The language of § 141(a)," they continue, "contains similar 'deeming' language — the census is to be conducted as the Secretary 'may determine.' And, just as the CIA Director's decision that terminating an employee is 'necessary or advisable' is immune from judicial review, so too is the Secretary's decision to collect information through the decennial census 'as necessary' and 'in such form and content as he may determine.'" (*Id.* at 27-28).

This argument falls short for at least four independent reasons. First, as with Defendants' standing and political question doctrine arguments, it is foreclosed by *Carey*, in which the "Second Circuit explicitly rejected the contention that a federal court is precluded by operation of § 701(a)(2) from reviewing the Secretary's action." *City of N.Y. v. U.S. Dep't of Commerce*, 713 F. Supp. 48, 53 (E.D.N.Y. 1989) (citing *Carey*, 637 F.2d at 838-39). The *Carey* Court held that "allegations as to mismanagement of the census . . . . [are] not one of those 'rare instances' where [the committed-to-agency-discretion-by-law] exception may be invoked." 637 F.2d at 838 (quoting *Overton Park*, 401 U.S. at 410). The Court noted that the plaintiffs in that case "allege[d] an impairment of their right to vote free of arbitrary impairment, a matter which cannot, of course, be foreclosed by operation of the [APA]." *Id.* (internal quotation marks omitted). Here, too, Plaintiffs claim that the Secretary's decision to include a citizenship question "may systemically dilute the voting power of persons living in communities with immigrant populations, and impair their right to equal representation in congressional, state, and local legislative districts." (SAC ¶ 157; *see also id.* ¶ 101 ("A person-by-person citizenship

demand that leads to a systematic undercount of minority populations across the United States will impair fair representation of those groups and the states in which they live."); NGO Compl. ¶ 5 ("[R]educed census participation by members of immigrant communities of color will result in these communities losing government funding as well as political power and representation in the United States Congress, the Electoral College, and state legislatures.")).[16] By itself, *Carey* compels the rejection of Defendants' argument.

Second, Defendants' argument is flawed because, in contrast to the statute at issue in *Webster*, the language of the Census Act as a whole does not "fairly exude[] deference" to the agency. 486 U.S. at 600. Defendants' argument focuses myopically on the phrase "in such form and content as he may determine" in Section 141(a), but that phrase is nestled in a clause that uses the word "shall" to curtail the Secretary's discretion: "The Secretary *shall* . . . take a decennial census of population . . . in such form and content as he may determine . . . ." 13 U.S.C. § 141(a) (emphasis added). As the Seventh Circuit explained in a like case, where a statute begins with a mandatory clause ("[t]he Secretary *shall provide*…") and contains a discretionary clause ("as the Secretary *deems appropriate*"), the statute is "unfortunately ambiguous," and a court should look to the structure of the act as a whole to determine whether Congress intended to preclude review. *Bd. of Trs. of Knox Cty. (Ind.) Hosp. v. Sullivan*, 965 F.2d 558, 562 (7th Cir. 1992). In that case, the Seventh Circuit examined the Medicare Act as a

[16] The plaintiffs in *Carey* included several individual voters who alleged that that their votes would be diluted "vis-a-vis those of other residents of the state." 637 F.2d at 836. Here, Government Plaintiffs do not include individual voters, but rather various states, cities, and counties alleging that a census undercount "will impair the right to equal representation." (SAC ¶ 155). But this is no basis upon which to distinguish *Carey*, because that decision also held that "the State of New York has standing in its capacity as *parens patriae*." 637 F.2d at 838 (citing *Missouri v. Illinois*, 180 U.S. 208, 241 (1901)). Moreover, NGO Plaintiffs include groups representing individual voters, and the Complaint alleges that they will suffer "reduce[d] . . . political representation" in Congress and state legislatures. (NGO Compl. ¶ 146).

whole, concluding that it "imposes a number of mandatory duties upon the [agency]." *Id.* at 563; *see also Bennett*, 520 U.S. at 175 (examining "the statutory scheme" to determine whether Congress intended to commit action to agency discretion by law).

So too here, the Census Act imposes any number of mandatory duties upon the Secretary. *See, e.g.*, 13 U.S.C. § 5 ("The Secretary shall prepare questionnaires, and shall determine the inquiries . . . provided for in this title."); *id.* § 141(a) ("The secretary shall . . . take a decennial census . . . ."); *id.* § 141(b) ("The tabulation . . . shall be completed within 9 months . . . ."); *id.* § 141(c) ("[The Secretary] shall furnish [the census plan] to such officers or public bodies not later than April 1 of the fourth year preceding the decennial census date."). That is strong evidence that Congress did not intend to preclude judicial review of the Secretary's actions. *See Salazar*, 822 F.3d at 77 ("This mandatory, non-discretionary language creates boundaries and requirements for agency action and shows that Congress has not left the decision [at issue] to the discretion of the agency."). At a minimum, it demands even clearer evidence that Congress intended to shield the Secretary's actions from judicial review. The single use of the word "may" is not enough. *See Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1401 (D.C. Cir. 1995) ("When a statute uses a permissive term such as 'may' rather than a mandatory term such as 'shall,' this choice of language suggests that Congress intends to confer some discretion on the agency, and that courts should accordingly show *deference* to the agency's determination. However, such language does not mean the matter is *committed* exclusively to agency discretion.").

Third, and relatedly, Defendants' argument fails substantially for the reasons set forth in Justice Stevens's persuasive concurring opinion in *Franklin*, which was joined by three other Justices. *See* 505 U.S. at 816-20 (Stevens, J., concurring in part and concurring in the

judgment).[17] As he explained, Defendants' assertion that the discretion afforded by the Census Act "is at least as broad as that allowed the Director of Central Intelligence" in the statute at issue in *Webster* "cannot withstand scrutiny" for several reasons. *Id.* at 817. First and foremost, "[n]o language equivalent to 'deem . . . advisable' exists in the census statute. There is no indication that Congress intended the Secretary's own mental processes, rather than other more objective factors, to provide the standard for gauging the Secretary's exercise of discretion." *Id.* (ellipsis in original). Second, "it is difficult to imagine two statutory schemes more dissimilar than the National Security Act and the Census Act." *Id.* at 817-18. The former governs "the operations of a secret intelligence agency" and involves national security, where the mandate for judicial deference is at its strongest. *See id.* at 818 & n.17. By contrast, "[t]he reviewability of decisions relating to the conduct of the census bolsters public confidence in the integrity of the process and helps strengthen this mainstay of our democracy." *Id.* at 818 & n.18. Third, and "[m]ore generally," the Supreme Court "has limited the exception" set forth in Section 701(a)(2) to "areas in which courts have long been hesitant to intrude," such as "cases involving national security" or "those seeking review of refusal to pursue enforcement actions." *Id.* at 818 (citing *Webster*, 486 U.S. 592, and *Heckler*, 470 U.S. 821); *see also Lincoln*, 508 U.S. at 191-92 (identifying "categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion'"). "The taking of the census is not such an area of traditional

[17] The other five Justices in *Franklin* concluded that the action at issue did not constitute "final agency action." *See* 505 U.S. at 796-801. Accordingly, they held that it was not reviewable under the APA for *that* reason and did not reach the question of whether the conduct of the census is "committed to agency discretion by law."

deference." *Franklin*, 505 U.S. at 819 (Stevens, J., concurring in part and concurring in the judgment).[18]

Finally, as Justice Stevens and many other courts have made clear, there are in fact judicially manageable standards with which courts can review the Secretary's decisions. *See id.* at 819-20 & n.19 (citing cases); *City of Philadelphia*, 503 F. Supp. at 677-79; *Utah v. Evans*, 182 F. Supp. 2d 1165, 1178-80 (D. Utah 2001) (three-judge court), *aff'd*, 536 U.S. 452; *Willacoochee v. Baldrige*, 556 F. Supp. 551, 555 (S.D. Ga. 1983); *Texas*, 783 F. Supp. at 311-12. *But see Tucker*, 958 F.2d at 1417-18 ("So nondirective are the relevant statutes that it is arguable that there is no law for a court to apply in a case like this — that you might as well turn it over to a panel of statisticians and political scientists and let them make the decision, for all that a court could do to add to its rationality or fairness." (citations omitted)). That is, "the overall statutory scheme and the Census Bureau's consistently followed policy provide[] law to apply in

[18] The Court departs from Justice Stevens's concurrence in one narrow respect, although it ultimately does not matter for purposes of this case. Assessing the legislative history of the 1976 statute amending the Census Act to include the language "in such form and content as he may determine," Justice Stevens concluded that "[t]he legislative history [of that statute] evidences no intention to expand the scope of the Secretary's discretion." *Franklin*, 505 U.S. at 816 n.16 (Stevens, J., concurring in part and concurring in the judgment). But the 1976 statute replaced a version of Section 141(a) requiring the Secretary to "take a census of population, *unemployment, and housing (including utilities and equipment)*." *See* H.R. Rep. No. 92-1288, at 23 (emphasis added) (comparing the old statutory language and the proposed amended language). Moreover, the House Committee on Post Office and Civil Service explained that the purpose of replacing "unemployment, and housing (including utilities and equipment)" with the present language — "in such form and content as he may determine" — was "not intended to deny to the Secretary the authority to ask questions on [unemployment and housing] in the decennial censuses. Rather it is directed towards permitting the Secretary *greater discretion* in the determination of the extent to which questions on unemployment and housing are to be included." *Id.* at 12 (emphasis added). Thus, the legislative history could be read to suggest that Congress sought to expand the scope of the Secretary's discretion. That said, the legislative history cannot be read to mean that Congress "intended to effect a new, unreviewable commitment to agency discretion," particularly given the language and structure of the Act itself. *Franklin*, 505 U.S. at 816 n.16 (Stevens, J., concurring in part and concurring in the judgment).

reviewing the Secretary's exercise of discretion." *Franklin*, 505 U.S. at 819 (Stevens, J., concurring in part and concurring in the judgment). For instance, "the relationship of the census provision contained in 13 U.S.C. § 141 and the apportionment provision contained in 2 U.S.C. § 2a demonstrates that the Secretary's discretion is constrained by the requirement that she produce a tabulation of the 'whole number of persons in each State.'" *Id.* (quoting 2 U.S.C. § 2a(a)).

Additionally, the "statutory command . . . embodies a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment." *Id.* at 819-20; *see also Willacoochee*, 556 F. Supp. at 555 ("Necessarily implicit in the Census Act is the command that the census be accurate. . . . At the very least, the Census Act requires that the defendants' decisions not be arbitrary or capricious."). The Census Bureau's own regulations may also provide law to apply. *See* 15 C.F.R. § 90.2 ("It is the policy of the Census Bureau to provide the most accurate population estimates possible given the constraints of time, money, and available statistical techniques . . . [and] to provide governmental units the opportunity to seek a review and provide additional data to these estimates and to present evidence relating to the accuracy of the estimates.").[19] And, of course, the Secretary is

[19] As Government Plaintiffs note, (Docket No. 182 ("Pls.' Br."), at 29), "the Census Bureau's own administrative guidance" may also provide a judicially manageable standard against which to measure the Secretary's actions. *See Salazar*, 822 F.3d at 76 (noting that a court may look to "informal agency guidance" to determine if there is law to be applied). Whether the particular administrative guidance identified by Government Plaintiffs can be considered "law to apply," however, is a close call. Internal agency policy statements or guidance create "judicially manageable standards" when they provide "meaningful standards [to] constrain[]" agency discretion. *Id.* at 80; *see also Pearl River Union Free Sch. Dist. v. King*, 214 F. Supp. 3d 241, 257 (S.D.N.Y. 2016) (finding that agency guidance was "law to apply" where it "look[ed] to have create[d] binding norms" (second alteration in original) (internal quotation marks omitted)). The Information Quality Act and Office of Management and Budget protocols, cited by Government Plaintiffs, (Pls.' Br. 28-29), do not "'provide judicially manageable standards' because they vest agencies with *unfettered discretion* to determine 'when correction

plainly constrained by other provisions of the Constitution — including the Due Process Clause of the Fifth Amendment, which is invoked by NGO Plaintiffs here — in exercising his wide discretion under the Act.

In short, "the statutory framework and the long-held administrative tradition provide a judicially administrable standard of review." *Franklin*, 505 U.S. at 820 (Stevens, J., concurring in part and concurring in the judgment); *cf., e.g.*, *Nat'l Treasury Emps. Union v. Horner*, 854 F.2d 490, 495-98 (D.C. Cir. 1988) (finding judicially manageable standards in a statutory scheme allowing the Office of Personnel Management to depart from competitive civil service only when "necessary" for "conditions of good administration"). Accordingly, the Court concludes that it has jurisdiction to entertain Plaintiffs' APA claims.

D. The Enumeration Clause

Although all of Plaintiffs' claims are justiciable, that does not mean that they are valid. Defendants do not make other arguments to dismiss Plaintiffs' APA claims at this stage, but they do contend that Plaintiffs failure to state claims under the Constitution. (*See* Defs.' Br. 30-35; Defs.' NGO Br. 16-19). The Court turns, then, to Plaintiffs' claims under the Enumeration

of information contained in informal agency statements is warranted.'" *Styrene Info. & Research Ctr., Inc. v. Sebelius*, 944 F. Supp. 2d 71, 82 (D.D.C. 2013) (emphasis added) (quoting *Salt Inst. v. Thompson*, 345 F. Supp. 2d 589, 602-03 (E.D. Va. 2004), *aff'd sub nom. on other grounds*, *Salt Inst. v. Leavitt*, 440 F.3d 156 (4th Cir. 2006)). But the Census Bureau's "Statistical Quality Standards," also cited by Government Plaintiffs, (Pls.' Br. 29-30), may count as "law to apply." For one, the preface to those Standards provides that "[a]ll Census Bureau employees . . . *must comply*" with them. U.S. Census Bureau, *Statistical Quality Standards* ii (July 2013) (emphasis added), https://www.census.gov/content/dam/Census/about/about-the-bureau/policies_and_notices/quality/statistical-quality-standards/Quality_Standards.pdf; *see also Salazar*, 822 F.3d at 77 (concluding that internal agency guidance, under which the agency "*must* consider" certain factors, provided sufficient law to apply (emphasis added)). They also provide standards that meaningfully constrain Census Bureau discretion. *See, e.g.*, *Statistical Quality Standards* 4 (listing factors to be included in a preliminary survey design for "sample survey and census programs" that the Census Bureau "must . . . develop[]").

Clause, which provides in relevant part that an "actual Enumeration shall be made" every ten years "in such Manner as [Congress] shall by Law direct." U.S. CONST. art. 1, § 2, cl. 3. Plaintiffs' claims fail, Defendants argue, because "[t]here is no allegation that the Secretary is estimating rather than counting the population, nor any allegation that he has failed to establish procedures for counting every resident of the United States. . . . Moreover, the Secretary's decision to reinstate a citizenship question is consistent with historical practice dating back to the founding era." (Defs.' Br. 30). Plaintiffs counter that the "substantial discretion" of Congress and the Secretary in conducting the census "is not unlimited; it does not include a decision to altogether abandon the pursuit of accuracy or to privilege other, non-constitutional values above it." (Pls.' Br. 32). Relying on language from the Supreme Court's decision in *Wisconsin*, they contend that reinstating the citizenship question violates the Enumeration Clause because it "does not bear 'a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census'" to aid in the apportionment of Representatives. (*Id.* (quoting *Wisconsin*, 517 U.S. at 19-20)).

The Court's analysis of Plaintiffs' claims under the Enumeration Clause is guided by three background considerations. First, the "text" of the Clause itself "vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration.'" *Wisconsin*, 517 U.S. at 19; *see also id.* at 17 (noting that the Clause grants to Congress "broad authority over the census"); *Evans*, 536 U.S. at 474 (stating that the Clause, in providing "that the 'actual Enumeration' shall take place 'in such Manner as' Congress itself 'shall by Law direct,' . . . suggest[s] the breadth of congressional methodological authority, rather than its limitation"); *Baldrige v. Shapiro*, 455 U.S. 345, 361 (1982) (finding that Congress properly exercised its discretion to preclude disclosure of census data because "Congress is vested by the Constitution

with authority to conduct the census 'as they shall by Law direct'"). Indeed, the Supreme Court has noted that "there is no basis for thinking that Congress' discretion is more limited than the text of the Constitution provides." *Wisconsin*, 517 U.S. at 19. And Congress has fully delegated its "broad authority over the census to the Secretary" through the Census Act. *Id.* (citing 13 U.S.C. § 141(a)). "[T]he wide discretion bestowed by the Constitution upon Congress, and by Congress upon the Secretary" demands a high degree of "judicial deference" to the Secretary's decisions concerning the conduct of the census. *Id.* at 22-23.

Second, as Plaintiffs conceded at oral argument, the inquiry with respect to the Enumeration Clause is an "objective" one. (*See* Oral Arg. Tr. 51). That is, there is nothing in either the text of the Enumeration Clause itself or judicial precedent construing the Clause to suggest that the relevant analysis turns on the subjective intent of either Congress or the Secretary. The Clause calls for an "actual Enumeration," and the census either satisfies that standard or it does not; whether Congress or the Secretary intended to satisfy it is of no moment. Thus, as in other areas where Congress is permitted wide latitude to legislate, if there "are plausible reasons" for the actions of Congress or the Secretary, judicial inquiry under the Enumeration Clause "is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision' . . . ." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (quoting *Flemming v. Nestor*, 363 U.S. 603, 612 (1960)). In that regard, Plaintiffs' claims under the Enumeration Clause are critically different from their APA and equal protection claims. The Secretary's intent in reinstating the citizenship question is highly relevant to the question of whether Defendants' conduct violated the APA and the Due Process Clause. *See, e.g.*, *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 276 (1979) (Equal Protection Clause);

Nat'l Audubon Soc'y. v. Hoffman, 132 F.3d 7, 14 (2d Cir. 1997) (APA). It is not a relevant consideration under the Enumeration Clause itself.

Third, in interpreting the Enumeration Clause, the Court "put[s] significant weight upon historical practice." *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (emphasis omitted). As a general matter, the Supreme Court and lower courts have long looked to historical practice to "guide [their] interpretation of an ambiguous constitutional provision." *Id.* at 2594 (Scalia, J., concurring in the judgment) (citing cases); *see generally* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012). Notably, they have done so not only when adjudicating disputes between the political branches, *see Noel Canning*, 134 S. Ct. at 2559; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring), but also when probing the limits of Congressional authority under Article I, *see, e.g.*, *Golan v. Holder*, 565 U.S. 302, 322-23 (2012) (examining the "unchallenged" actions by Congress in the nineteenth and twentieth centuries to interpret Congress's authority under the Copyright Clause), and the limits of executive authority under Article II, *see, e.g.*, *Schick v. Reed*, 419 U.S. 256, 266 (1974) (relying on the long and "unchallenged" history of presidential pardons in interpreting the Pardon Clause). More to the point for present purposes, the Supreme Court has stressed "the importance of historical practice" in determining the metes and bounds of the Enumeration Clause itself. *Wisconsin*, 517 U.S. at 21; *see also Franklin*, 505 U.S. at 803-06 (noting the importance of historical experience in conducting the census); *Montana*, 503 U.S. at 447-56 (considering the history of apportionment under Article I, Section 2). It follows that "the longstanding 'practice of the government'" in conducting the census "can inform our determination of 'what the law is'" for purposes of the Enumeration Clause. *Noel Canning*, 134 S. Ct. at 2560 (quoting *McCulloch v.*

Maryland, 4 Wheat. 316, 401 (1819), and *Marbury v. Madison*, 1 Cranch 137, 177 (1803)); *see, e.g.*, *Schick*, 419 U.S. at 266 ("[A]s observed by Mr. Justice Holmes: 'If a thing has been practiced for two hundred years by common consent, it will need a strong case' to overturn it." (quoting *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922)); *The Pocket Veto Case*, 279 U.S. 655, 690 (1929) ("[A] practice of at least twenty years duration 'on the part of the executive department, acquiesced in by the legislative department . . . is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.'" (citation omitted)).

In light of those considerations, the Court is compelled to conclude that the citizenship question is a permissible — but by no means mandated — exercise of the broad power granted to Congress and, in turn, the Secretary pursuant to the Enumeration Clause of the Constitution. The Court is particularly compelled to reach that conclusion by historical practice, which demonstrates that the census has been consistently used — since the Founding era — for an end unrelated to the "actual Enumeration" textually contemplated by the Enumeration Clause: to collect data on residents of the United States. For example, the nation's first census, taken in 1790, included information about age and sex, in order to "assess the countries [*sic*] industrial and military potential." MEASURING AMERICA 5; *see* 1790 Census Act § 1, 1 Stat. 101. Over the course of the nineteenth century, the demographic questions on the census expanded to include all manner of questions unrelated to the goal of a simple headcount, from questions about the number of persons "engaged in agriculture, commerce, and manufactures," 1820 Census Act, 3 Stat. at 549; to whether members of a household were "deaf," "dumb," or "blind," 1830 Census Act, 4 Stat. at 383; to the "[p]rofession, occupation, or trade of each male person over 15 years of age," the "value of real estate owned," and whether persons over age twenty could read and

write, 1850 Census Act, 9 Stat. at 433; to respondents' marital status, *see Morales*, 116 F. Supp. 2d at 805 ("A question on marital status has been asked in the census since 1880."). Of course, "the mere fact that these inquiries were not challenged at the time does not prove" that they were consistent with the Enumeration Clause, *id.*, but it does confirm that Congress has held the view since the very first census in 1790 that it was proper to use the census for more than a mere headcount.

In fact, the longstanding practice of asking questions about the populace of the United States without a direct relationship to the constitutional goal of an "actual Enumeration" has been blessed by all three branches of the federal government. Until the 1930 census, Congress itself "specified minutely" the "details of the questions" on the census. U.S. GENERAL ACCOUNTING OFFICE, DECENNIAL CENSUS: OVERVIEW OF HISTORICAL CENSUS ISSUES 22 (1998), *available at* https://www.gao.gov/pdfs/GGD-98-103; *see also, e.g.*, 1820 Census Act, 3 Stat. at 550 (listing inquiries required on the fourth decennial census); 1830 Census Act, 4 Stat. at 389 (listing inquiries required on the fifth decennial census). Since 1930, Congress has delegated more authority to the executive branch, but has continued to play a role in determining what questions must be asked. *See, e.g.*, Act of June 18, 1929, 46 Stat. 21, 22 (1929) (providing that "the fifteenth and subsequent censuses shall be restricted to inquiries relating to population, to agriculture, to irrigation, [etc.]"). The modern Census Act, enacted in 1976, for example, expressly "authorize[s]" the Secretary to obtain information beyond that necessary for a mere headcount, 13 U.S.C. § 141(a), and provides that he "shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title," *id.* § 5. But even now, Congress retains both oversight and the ultimate word: The Secretary must submit a report to Congress at least two

years prior to the census "containing the Secretary's determination of the questions proposed to be included." *Id.* § 141(f)(2); *see also* H.R. Rep. No. 92-1288, 92d Cong., at 3-4 (1972) (explaining that the provisions of the Census Act requiring the Secretary to submit proposed questions to Congress in advance of the census were meant to strengthen Congress's "oversight capacity" by enacting "a more formal review of the questions proposed" and to preserve Congress's traditional role in "reviewing the operational aspects of census and survey[] procedures and tabulations"). Thus, *both* political branches have long endorsed the understanding that the census may be used to gather data unrelated to the constitutionally mandated "actual Enumeration."

The Supreme Court and lower courts have long and consistently blessed the practice as well. As far back as 1871, for example, the Supreme Court took as a given that Congress could use the census to gather statistical information beyond that required for an "actual Enumeration":

> Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power. . . . An[] illustration of this may be found in connection with the provisions respecting a census. The Constitution orders an enumeration of free persons in the different States every ten years. The direction extends no further. Yet Congress has repeatedly directed an enumeration not only of free persons in the States but of free persons in the Territories, and not only an enumeration of persons but the collection of statistics respecting age, sex, and production. Who questions the power to do this?

Legal Tender Cases, 79 U.S. (12 Wall) 457, 535-36 (1870), *abrogated on other grounds by Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002). And the Supreme Court has reaffirmed the dual role of the census in more recent cases. In *Baldrige*, for example, the Court acknowledged that while the "initial constitutional purpose" of the census had been to "provide a basis for apportioning representatives among the states in the Congress," it has long "fulfill[ed] many important and valuable functions for the benefit of the country," including "in the allocation of federal grants to states" and in "provid[ing] important data for

Congress and ultimately for the private sector." 455 U.S. at 353 & n.9; *see also Dep't of Commerce*, 525 U.S. at 341 (noting that "the decennial census is not *only used* for apportionment purposes" and that it "now serves as a linchpin of the federal statistical system by collecting data on the characteristics of individuals, households, and housing units throughout the country" (internal quotation marks omitted)).

Admittedly, the Supreme Court has never confronted a direct challenge to the questions posed on the census. But a handful of lower courts, including the Second Circuit and this Court, have — and have universally rejected such challenges as meritless. *See United States v. Rickenbacker*, 309 F.2d 462, 463 (2d Cir. 1962) (Thurgood Marshall, J.); *Morales*, 116 F. Supp. 2d at 803-20; *United States v. Little*, 321 F. Supp. 388, 392 (D. Del. 1971); *United States v. Moriarity*, 106 F. 886, 891 (C.C.S.D.N.Y. 1901); *see also Prieto*, 321 F. Supp. at 421-23 (denying a preliminary injunction based in part on the claim that, because "the standard 'short form' census" did not allow a respondent to identify as "Mexican-American," it would "result in a serious underestimation of what is America's second-largest minority group"); *United States v. Mitchell*, 58 F. 993, 999 (N.D. Ohio 1893) (stating, in *dicta*, that "[c]ertain kinds of information valuable to the public, and useful to the legislative branches of the government as the basis for proper laws, . . . may properly be required from the citizen" on the decennial census). As a judge on this Court put it more than a century ago, the fact that Article I mandates only "a census of the population . . . does not prohibit the gathering of other statistics, if 'necessary and proper,' for the intelligent exercise of other powers enumerated in the constitution, and in such case there could be no objection to acquiring this information through the same machinery by which the population is enumerated." *Moriarity*, 106 F. at 891 (citing *McCulloch*, 4 Wheat. at 416); *accord*

Morales, 116 F. Supp. 2d at 809 (citing *Moriarity*, *McCulloch*, and the *Legal Tender Cases* in affirming that the census may be used to conduct more than "a mere headcount").

By itself, the foregoing history makes it difficult to maintain that asking about citizenship on the census would constitute a violation of the Enumeration Clause. Taking that position becomes untenable altogether in light of the undeniable fact that citizenship status has been a subject of the census for most of the last two hundred years. Congress itself first included a question about citizenship on the fourth census, in 1820. *See* MEASURING AMERICA 6 (noting that the 1820 census included questions "to ascertain the number of foreigners not naturalized"); *see* 1820 Census Act, 3 Stat. at 550. And with one exception (in 1840), *every* decennial census thereafter until 1950 asked a question related to citizenship or birthplace in one form or another. *See id.* at 34-71. In 1960, the Secretary ceased asking *all* respondents about citizenship. *See id.* at 73. Notably, however, the 1960 census *did* include a citizenship question for residents of New York and Puerto Rico, and it *did* ask a sample of respondents to provide where they were born, the language they spoke before coming to the United States, and their parents' birthplaces. *See id.* at 72-76; *see also id.* at 124 n.4 (confirming that these questions were asked on a "sample basis generally" and that "[c]itizenship was asked only in New York and Puerto Rico, where it was a 100-percent item"). From 1970, the first year in which a longer census questionnaire was sent to a segment of the population, to 2000, the last year in which such a long-form questionnaire was used, the subject of citizenship remained on the census, albeit only for some respondents — namely, the one-sixth or so of households that received the "long-form" questionnaire. *See id.* at 78, 91-92. In 2010, when the long-form questionnaire was deemed unnecessary in light of the annual ACS, the census did not ask about citizenship at all. But there is no indication that the decision to drop the question from the 2010 census was made because

Congress or the Secretary had come to believe that asking about citizenship was beyond the broad authority granted to Congress and, in turn, the Secretary by the Enumeration Clause.

Thus, for two centuries, there has been a nearly unbroken practice of Congress either expressly including a question concerning citizenship on the census or authorizing (through delegation of its power and its non-intervention) the executive branch to do so. This history is significant for two reasons. First, as noted, the Supreme Court has made clear that "[l]ong settled and established practice" can be given "great weight" in construing constitutional provisions that define the scope of the political branches' powers. *Noel Canning*, 134 S. Ct. at 2559 (internal quotation marks omitted). For nearly two hundred years, all three branches have agreed that the census may be used to collect demographic information unrelated to the goal of an "actual Enumeration," and two of the three branches have explicitly approved the inclusion of questions about citizenship status. That is plainly "long enough to entitle a practice to 'great weight in a proper interpretation' of the constitutional provision." *Id.* at 2564 (quoting *The Pocket Veto Case*, 279 U.S. at 689). Second, in assessing the meaning of the Enumeration Clause's broad grant of power, there is independent significance to the fact that demographic questions appeared on the very first census and that citizenship appeared on the census as early as 1820, little more than three decades after the Founding. As the Supreme Court explained nearly 150 years ago, "[t]he construction placed upon the constitution by the [earliest acts of Congress], by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive." *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884); *see also J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 412 (1928) ("This

Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our government and framers of our Constitution were actively participating in public affairs long acquiesced in fixes the construction to be given its provisions.").

In short, the "virtually unlimited discretion" granted to Congress by the text of the Constitution, *Wisconsin*, 517 U.S. at 19, and the longstanding historical practice of asking demographic questions generally and asking questions about citizenship specifically, compel the conclusion that asking about citizenship status on the census is not an impermissible exercise of the powers granted by the Enumeration Clause to Congress (and delegated by Congress to the Secretary). In arguing otherwise, Plaintiffs make two principal arguments. First, they rely heavily on *Wisconsin*, in which the Supreme Court rejected a challenge to the Secretary's decision not to apply a post-census statistical adjustment. (Pls.' Br. 32-35). In doing so, the Court stated that, "[i]n light of the Constitution's broad grant of authority to Congress, the Secretary's decision not to adjust [the census] need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census." 517 U.S. at 19. Arguing that the sole constitutional purpose of the census is "accuracy in the count," Plaintiffs contend that that standard should be applied here and that reintroduction of a citizenship question is impermissible because it does not bear a "reasonable relationship" to the accomplishment of an actual enumeration. (Pls.' Br. 35). Second, relying on history themselves, Plaintiffs place great weight on the fact that the Census Bureau has not included citizenship on the universal census form since 1950 and, in the years since, has repeatedly reaffirmed that doing so would harm the accuracy of the count. (*Id.* at 32).

Neither argument is persuasive. First, *Wisconsin* cannot be read to suggest, let alone hold, that each and every question on the census must bear a "reasonable relationship" to the goal of an actual enumeration. Doing so would contravene the Supreme Court's own acknowledgement that the census "fulfills many important and valuable functions," including "in the allocation of federal grants to states based on population" and in "provid[ing] important data for Congress and ultimately for the private sector." *Baldrige*, 455 U.S. at 353. And doing so would also fly in the face of the history discussed above, which makes clear that all three branches have long blessed, and certainly tolerated, the practice of asking sensitive demographic questions on the census. Indeed, taken to its logical conclusion, application of the *Wisconsin* "reasonable relationship" standard to every decision concerning the census would lead to the conclusion that it is unconstitutional to ask *any* demographic question on the census. After all, asking such questions bears no relationship whatsoever to the goal of an accurate headcount. Far from it: Common sense and basic human psychology dictate that including *any* additional questions on the census — particularly questions on sensitive topics such as race, sex, employment, or health — can serve only to reduce response rates, as both the transaction costs of compliance and the likely concerns about intrusiveness increase. *See, e.g.*, *Rickenbacker*, 309 F.2d at 463 (noting that the defendant had refused to answer census questions based on the view that they were an "unnecessary invasion" into his privacy); *Morales*, 116 F. Supp. 2d at 809-12 (similar); *Mitchell*, 58 F. at 999-1000 (similar).[20] Yet, as noted, the census takers have, with the

[20] Data support this common-sense conclusion. In 2000, for instance, the mail-back response rate for the long-form questionnaire was 9.6% lower than the response rate for the short-form. *See* U.S. CENSUS BUREAU, CENSUS 2000 TOPIC REPORT NO. 11: RESPONSE RATES AND BEHAVIOR ANALYSIS 9 (2004), *available at* https://www.census.gov/pred/www/rpts/TR11.pdf.

blessing of all three branches, asked such questions of respondents since the very first census in 1790.

To read *Wisconsin* as Plaintiffs suggest would, therefore, lead ineluctably to the conclusion that each and every census — from the Founding through the present — has been conducted in violation of the Enumeration Clause. That would, of course, be absurd, and leads the Court to conclude instead that the *Wisconsin* standard applies only to decisions that bear directly on the actual population count. Notably, the Supreme Court's own language supports that limitation, as it held only that "the Secretary's decision *not to adjust*" the census count "need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population." 517 U.S. at 20 (emphasis added). That is, the Court did not purport to announce a standard that would apply to a case such as this one. *Cf. Rickenbacker*, 309 F.2d at 463 (holding, in a criminal prosecution for failure to respond to the census, that the questionnaire did not violate the Fourth Amendment because "[t]he authority to gather reliable statistical data reasonably related to governmental purposes and functions is a necessity if modern government is to legislate intelligently and effectively" and the questions at issue "related to important federal concerns . . . and were not unduly broad or sweeping in their scope").

Plaintiffs' second argument — based on the conduct of the Census Bureau since 1960 — is also unpersuasive. That history may support the contention that reintroducing the citizenship question is a bad decision — and that, in turn, may be relevant to whether Plaintiffs can establish a violation of the APA or the Due Process Clause, both of which invite examination into the Secretary's bases for making that decision. But nothing in the history of the census, recent or otherwise, plausibly suggests that asking a citizenship question is beyond the scope of Congress's broad *power* under the Enumeration Clause — which is the sole relevant question for

purposes of Plaintiffs' Enumeration Clause claims. Moreover, Plaintiffs' argument from recent history ignores the fact that citizenship *did* appear on all but one of the censuses since 1960. To be sure, it did so for only a portion of the population, but that fact alone has no constitutional significance. If Congress and the Secretary lack authority under the Enumeration Clause to ask about citizenship on the census, they could not ask about it of anyone, whatever the length of the questionnaire. Conversely, if the Enumeration Clause permits Congress and the Secretary to ask some respondents about citizenship, it follows that the Clause permits them to ask all respondents. It makes no sense to say that Congress's power (and, by extension, the Secretary's) is dependent on the length of the questionnaire or on whether the entire population or only a portion of the population receives a particular questionnaire. Put simply, if the Enumeration Clause allows the Secretary to ask anyone about citizenship status — and historical practice makes clear that it does — then the Clause permits the Secretary to ask everyone about it.

For the foregoing reasons, the Court holds that Plaintiffs do not — and cannot — state a plausible claim that addition of the citizenship question on the 2020 census constitutes a violation of the Enumeration Clause. That does not mean — as Defendants have audaciously argued (*see* Oral Arg. Tr. 48) — that there are no constitutional limits on Congress's and the Secretary's discretion to add questions to the census questionnaire. First, there is "a strong constitutional interest in accuracy," *Evans*, 536 U.S. at 478, and a decision to add questions to the census without the historical pedigree of the citizenship question could conceivably undermine that interest to a degree that would be constitutionally offensive. The Court need not define the outer limits of Congress's powers under the Enumeration Clause to decide this case, as it suffices to say that the Secretary's decision *here* is "consonant with, though not dictated by, the text and history of the Constitution." *Franklin*, 505 U.S. at 806; *see also Evans*, 536 U.S. at 479

("[W]e need not decide here the precise methodological limits foreseen by the Census Clause."). But there may well be questions or practices that would be so extreme and unprecedented that they would not be permissible even under the Enumeration Clause.

Second, to say that the Secretary has authority *under the Enumeration Clause* to ask about citizenship on the census is not to say that the particular exercise of that authority here was constitutional or lawful. The Secretary cannot exercise his authority in a manner that would violate individual constitutional rights, such as the right to equal protection of the laws. *Compare, e.g.*, *Richardson v. Ramirez*, 418 U.S. 24, 54-55 (1974) (holding that states may disenfranchise felons under Section 2 of the Fourteenth Amendment), *with Hunter v. Underwood,* 471 U.S. 222, 232-33 (1985) (striking down Alabama's felon disenfranchisement law as a violation of the Equal Protection Clause). Nor, under the APA, may he exercise his authority in a manner that would be "arbitrary" and "capricious." 5 U.S.C. § 706(2)(A); *see, e.g.*, *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 42 (2d Cir. 2003). Plaintiffs here make both kinds of claims, and the Court's holding that the Secretary's decision was consonant with the Enumeration Clause does not resolve *those* claims.

E. The Equal Protection Claim

Plaintiffs' final claim — pressed only by NGO Plaintiffs — is that Defendants violated the Fifth Amendment by "act[ing] with discriminatory intent toward Latinos, Asian-Americans, Arab-Americans, and immigrant communities of color generally in adding the citizenship question to the Decennial Census." (NGO Compl. ¶ 195). To state a claim under the Fifth Amendment in the circumstances presented here, NGO Plaintiffs have to plausibly allege that Defendants' decision "was motivated by discriminatory animus and its application results in a

discriminatory effect." *Hayden v. Cty. of Nassau* ("*Hayden I*"), 180 F.3d 42, 48 (2d Cir. 1999).[21] Their allegations of discriminatory effect — that inclusion of the citizenship question for all respondents will bear, in the form of diminished political representation and reduced federal funding, more heavily on "Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color" because the non-response rate is likely to be higher in such communities — are sufficient. (NGO Compl. ¶¶ 196-97). Defendants contend that those claims are "speculative," (Defs.' NGO Br. 18), but — assuming the truth of the allegations, as the Court must — Defendants' contention is no more persuasive here than it was in the standing context.

Thus, whether Plaintiffs state an equal protection claim turns on whether they plausibly allege a "racially discriminatory intent or purpose." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* ("*Arlington Heights*"), 429 U.S. 252, 265 (1977); *accord Red Earth LLC v. United States*, 657 F.3d 138, 146 (2d Cir. 2011). Discriminatory intent or purpose "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279 (citation and footnote omitted). At the same time, "a plaintiff need not prove that the 'challenged action rested solely on racially discriminatory purposes.'" *Hayden v. Paterson* ("*Hayden II*"), 594 F.3d 150, 163 (2d Cir. 2010) (quoting *Arlington Heights*, 429 U.S. at 265); *see also, e.g.*, *United States v. City of Yonkers*, 96 F.3d 600, 611 (2d Cir. 1996) (stating that a plaintiff "need not show . . . that a government decisionmaker was motivated solely, primarily, or even predominantly by

[21] Although the Equal Protection Clause of the Fourteenth Amendment applies only to the states, the Due Process Clause of the Fifth Amendment prohibits racial discrimination by the federal government as well. *See, e.g.*, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.").

concerns that were racial"). Indeed, "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." *Arlington Heights*, 429 U.S. at 265. Thus, it is enough to show that an "invidious discriminatory purpose was *a* motivating factor" in the challenged decision. *Id.* at 266 (emphasis added). Further, "[b]ecause discriminatory intent is rarely susceptible to direct proof, litigants may make 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Hayden II*, 594 F.3d at 163 (quoting *Arlington Heights*, 429 U.S. at 266).

In *Arlington Heights*, the Supreme Court identified a set of non-exhaustive factors for courts to consider in undertaking this "sensitive inquiry" into discriminatory intent. First, whether the impact of the action "'bears more heavily on one race than another' may provide an important starting point." *Arlington Heights*, 429 U.S. at 266 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). Unless a "clear pattern, unexplainable on grounds other than race, emerges," however, "impact alone is not determinative, and the Court must look to other evidence." *Id.* (footnote omitted). That "other evidence" includes: (1) "[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes"; (2) "[t]he specific sequence of events leading up the challenged decision"; (3) "[d]epartures from the normal procedural sequence"; (4) "[s]ubstantive departures . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached"; and (5) "[t]he legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 267-68. "In some extraordinary instances," evidence of discriminatory animus may also come from the testimony of decisionmakers. *Id.* at 268.

Considering those factors here, the Court concludes that NGO Plaintiffs' allegations are sufficient to survive Defendants' motion to dismiss. First, the Complaint pleads facts that show "[d]epartures from the normal procedural sequence." *Arlington Heights*, 429 U.S. at 267. These departures include overruling career staff who strongly objected to including the citizenship question, failing to extensively test reintroduction of the question, and ignoring the recommendation of the Census Bureau's advisory committee. (NGO Compl. ¶¶ 7, 191). The Administrative Record — of which the Court may take judicial notice, *see Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993) — lends support to these allegations. It shows, for example, that Secretary Ross overruled Census Bureau career staff, who had concluded that reinstating the citizenship question would be "very costly" and "harm[] the quality of the census count." (*See* Admin. Record 1277). It also confirms that Defendants made the decision to add the question without the lengthy consideration and testing that usually precede even minor changes to the census questionnaire; in fact, it was added without any testing at all. (*See* Ross Mem. 2, 7). Notably, Defendants challenge only one of these alleged aberrations — the failure to test the question, which they attribute to the fact that it had previously been included on the ACS. (Defs.' NGO Br. 19). Whatever its merits, however, that challenge is premature, as all inferences must be drawn in Plaintiffs' favor at this stage of the litigation. *See, e.g.*, *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994). And, in any event, Defendants do not address, let alone dispute, the other procedural irregularities.

Second, various considerations — including the "specific sequence of events leading up to the challenged decision," *Arlington Heights*, 429 U.S. at 267 — suggest that Secretary Ross's sole proffered rationale for the decision, that the citizenship question is necessary for litigation of Voting Rights Act claims, may have been pretextual. For one thing, there is no indication in the

record that the Department of Justice and civil rights groups have ever, in the fifty-three years since the Voting Rights Act was enacted, suggested that citizenship data collected as part of the decennial census would be helpful, let alone necessary, to litigate such claims. (*See* Docket No. 187-1, at 14; *see also* NGO Compl. ¶¶ 183, 186). For another, while Secretary Ross initially (and repeatedly) suggested that the Department of Justice's request triggered his consideration of the issue, it now appears that the sequence of events was exactly opposite. In his memorandum, Secretary Ross stated that he "*set out* to take a hard look" at adding the citizenship question "[*f*]*ollowing receipt*" of a request from the Department of Justice on December 12, 2017. (*See* Ross Mem. 1 (emphases added)).[22] Yet in a June 21, 2018 supplement to the Administrative Record, Secretary Ross admitted that *he* "began considering" whether to add the citizenship question "[s]oon after" his appointment as Secretary in February 2017 — almost ten months before the "request" from DOJ — and that, "[a]s part of that deliberative process," *he and his staff* asked the Department of Justice if it "would support, *and if so would request*, inclusion of a citizenship question." (Docket No. 189-1 (emphasis added)). Along similar lines, in a May 2, 2017 e-mail to Secretary Ross, the director of the Commerce Department's office of policy and strategic planning stated that "[w]e need to work with Justice *to get them to request* that citizenship be added back as a census question." (Docket No. 212, at 3710 (emphasis added); *see also id.* at 3699 (e-mail from Secretary Ross, earlier the same day, stating that he was

[22] In sworn testimony shortly after his March 26, 2018 memorandum — of which the Court can also take judicial notice, *see, e.g.*, *Ault v. J.M. Smucker Co.*, No. 13-CV-3409 (PAC), 2014 WL 1998235, at *2 (S.D.N.Y. May 15, 2014) — Secretary Ross was even more explicit, stating that it was the Department of Justice that had "*initiated* the request for inclusion of the citizenship question." *Hearing on Recent Trade Actions, Including Section 232 Determinations on Steel & Aluminum: Hearing Before the H. Ways & Means Comm.*, 115th Cong. 24 (Mar. 22, 2018) (testimony of Secretary Ross) (emphasis added), *available at* 2018 WLNR 8951469.

"mystified why nothing have [sic] been done in response to my months old request that we include the citizenship question")).[23]

To prove a violation of the Fifth Amendment, of course, NGO Plaintiffs need to prove that Defendants acted with a discriminatory purpose, and evidence that Secretary Ross's rationale was pretextual does not necessarily mean that it was a pretext for discrimination.[24] Nevertheless, "[p]roof that the defendant's explanation is unworthy of credence is . . . one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 147 (2000) (discussing Title VII of the Civil Rights Act of 1964); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 517 (1993) (stating, in reference to a Title VII claim, that "proving the [defendant's] reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination"). Thus, "[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the [defendant] is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" *Reeves*, 530 U.S. at 147. At a minimum, there is certainly

[23] Docket No. 212 is Defendants' notice of the filing of supplemental materials. Given the volume of those materials, Defendants did not file them directly on the docket, but made them available at http://www.osec.doc.gov/opog/FOIA/Documents/CensusProd001.zip.

[24] While evidence of pretext alone does not suffice to prove a violation of the Fifth Amendment, it may well suffice to prove a violation of the APA — as Defendants themselves conceded at the initial conference in 18-CV-2921. (*See* Docket No. 150, at 15).

much "about the sequence of events leading up to the decision" at issue in these cases "that would spark suspicion." *Arlington Heights*, 429 U.S. at 269.[25]

Finally, NGO Plaintiffs identify "contemporary statements" by alleged decisionmakers that lend further support to their claim that Defendants' decision was motivated at least in part by intentional discrimination against immigrant communities of color. *Arlington Heights*, 429 U.S. at 268. Most notably, NGO Plaintiffs identify several statements made by President Trump himself in the months before and after Secretary Ross announced his decision that, while not pertaining directly to that decision, could be construed to reveal a general animus toward immigrants of color. Those statements include (1) his alleged complaint on January 11, 2018, about "these people from shithole countries" coming to the United States, (NGO Compl. ¶ 109); (2) his assertion in February 2018 that certain immigrants "turn out to be horrendous. . . . They're not giving us their best people, folks," (*id.*); and (3) his comment on May 16, 2018, that "[w]e have people coming into the country, or trying to come in. . . . You wouldn't believe how bad these people are. These aren't people, these are animals . . . ," (*id.*).

It is true, as Defendants note, that none of those statements relate specifically to the decision to reinstate the citizenship question on the 2020 census. (Defs.' NGO Br. 18). But the law is clear that the mere "use of racial slurs, epithets, or other racially charged language . . . *can* be evidence that official action was motivated by unlawful discriminatory purposes." *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 277 (E.D.N.Y. 2018) (emphasis added) (citing cases). It is also true, as Defendants intimate, that the decisionmaker here was Secretary Ross — not President Trump himself. (Defs.' NGO Br. 18). But NGO Plaintiffs plausibly claim that

[25] Citing much of the foregoing evidence of pretext, the Court previously ruled, in an oral opinion, that Plaintiffs were entitled to discovery on their claims under the APA. (*See* Oral Arg. Tr. at 76-89).

President Trump was personally involved in the decision, citing his own reelection campaign's assertion that he "officially mandated" it. (NGO Compl. ¶ 178). Treating those allegations as true, and drawing all reasonable inferences in Plaintiffs' favor, the Court is therefore compelled to conclude that the statements help to nudge NGO Plaintiffs' claim of intentional discrimination across the line from conceivable to plausible. *See Batalla Vidal*, 291 F. Supp. 3d at 279 (relying on "racially charged" statements by the President where he was alleged to have directed the decision at issue in concluding that the plaintiffs' allegations of discriminatory intent were sufficient to survive a motion to dismiss); *cf. Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 49 (2d Cir. 1997) ("[A] decision made in the context of strong, discriminatory opposition becomes tainted with discriminatory intent even if the decisionmakers personally have no strong views on the matter.").

Finally, Defendants' invocation of the Supreme Court's recent decision in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), falls somewhere between facile and frivolous. Defendants claim that the decision, which rejected a challenge to President Trump's so-called Travel Ban, "reaffirmed that facially neutral policies are subject to only limited, deferential review and may not lightly be held unconstitutional." (Defs.' NGO Br. 17). In support of that contention, they quote the Court's opinion for the proposition that "deferential review may apply 'across different contexts and constitutional claims.'" (*Id.* at 18 (quoting *Hawaii*, 138 S. Ct. at 2419)). Conspicuously, however, Defendants omit the first part of the quoted sentence, which reveals that the deferential review referenced by the Court in *Hawaii* is that established by *Kleindienst v. Mandel*, 408 U.S. 753 (1972), for challenges to the exclusion of foreign nationals from the country. *See* 138 S. Ct. at 2419. And they fail to acknowledge that every case cited by the Court in which deferential review was applied involved either immigration or the admission of

noncitizens. *See id.* at 2419-20; *see also id.* at 2420 n.5 ("[A]s the numerous precedents cited in this section make clear, such a circumscribed inquiry applies to any constitutional claim concerning the entry of foreign nationals."). There is nothing in the Court's opinion to indicate that its deferential review applies outside of the "national security and foreign affairs context," *id.* at 2420 n.5, let alone that the Court meant to unsettle decades of equal protection jurisprudence regarding the types of evidence a court may look to in determining a government actor's intent. In fact, even with its "circumscribed judicial inquiry," the *Hawaii* Court itself considered "extrinsic evidence" — namely, President Trump's own statements. *See id.* at 2420. If anything, therefore, *Hawaii* cuts against Defendants' arguments rather than in their favor.

In sum, accepting NGO Plaintiffs' allegations as true and drawing all reasonable inferences in their favor — as is required at this stage of the litigation — the Court is compelled to conclude that they state a plausible claim that Defendants' decision to reintroduce the citizenship question on the 2020 census "was motivated by discriminatory animus and its application results in a discriminatory effect." *Hayden I*, 180 F.3d at 48.[26] It follows that Defendants' motion to dismiss NGO Plaintiffs' Fifth Amendment equal protection claim must be and is denied.

CONCLUSION

For the reasons stated above, Defendants' motions to dismiss are GRANTED in part and DENIED in part. *First*, the Court rejects Defendants' attempts to insulate Secretary Ross's decision to reinstate a question about citizenship on the 2020 census from judicial review.

[26] In light of that conclusion, the Court need not consider NGO Plaintiffs' alternative argument that the inclusion of the citizenship question "was motivated by a 'bare . . . desire to harm a politically unpopular group,' and thus a violation of the equal protection clause even applying rational basis review." (NGO Pls.' Br. 25 (quoting *Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973))).

Granted, courts must give proper deference to the Secretary, but that does not mean that they lack authority to entertain claims like those pressed here. To the contrary, courts have a critical role to play in reviewing the conduct of the political branches to ensure that the census is conducted in a manner consistent with the Constitution and applicable law. *Second*, the Court concludes that Plaintiffs' claims under the Enumeration Clause — which turn on whether Secretary Ross had the *power* to add a question about citizenship to the census and not on whether he *exercised* that power for impermissible reasons — must be dismissed. *Third*, assuming the truth of their allegations and drawing all reasonable inferences in their favor, the Court finds that NGO Plaintiffs plausibly allege that Secretary Ross's decision to reinstate the citizenship question was motivated at least in part by discriminatory animus and will result in a discriminatory effect. Accordingly, their equal protection claim under the Due Process Clause (and Plaintiffs' APA claims, which Defendants did not substantively challenge) may proceed.

None of that is to say that Plaintiffs will ultimately prevail in their challenge to Secretary Ross's decision to reinstate the citizenship question on the 2020 census. As noted, the Enumeration Clause and the Census Act grant him broad authority over the census, and Plaintiffs may not ultimately be able to prove that he exercised that authority in an unlawful manner. Put another way, the question at this stage of the proceedings is not whether the evidence supports Plaintiffs' claims, but rather whether Plaintiffs may proceed with discovery and, ultimately, to summary judgment or trial on their claims. The Court concludes that they may as to their claims under the APA and the Due Process Clause and, to that extent, Defendants' motions are denied.

Per the Court's Order entered on July 5, 2018 (Docket No. 199), the deadline for the completion of fact and expert discovery in these cases is October 12, 2018, and the parties shall appear for a pretrial conference on September 14, 2018. The parties are reminded that, no later

than the Thursday prior to the pretrial conference, they are to file on ECF a joint letter addressing certain issues. (*See id.* at 2-3). In that letter, the parties should also give their views with respect to whether the case should resolved by way of summary judgment or trial and whether the two cases should be consolidated for either of those purposes.

The Clerk of Court is directed to terminate 18-CV-2921, Docket No. 154; and 18-CV-5025, Docket No. 38.

SO ORDERED.

Date: July 26, 2018
New York, New York

JESSE M. FURMAN
United States District Judge

UNITED STATES DEPARTMENT OF COMMERCE
The Secretary of Commerce
Washington, D.C. 20230

To: Karen Dunn Kelley, Under Secretary for Economic Affairs

From: Secretary Wilbur Ross

Date: March 26, 2018

Re: Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire

Dear Under Secretary Kelley:

As you know, on December 12, 2017, the Department of Justice ("DOJ") requested that the Census Bureau reinstate a citizenship question on the decennial census to provide census block level citizenship voting age population ("CVAP") data that are not currently available from government survey data ("DOJ request"). DOJ and the courts use CVAP data for determining violations of Section 2 of the Voting Rights Act ("VRA"), and having these data at the census block level will permit more effective enforcement of the Act. Section 2 protects minority population voting rights.

Following receipt of the DOJ request, I set out to take a hard look at the request and ensure that I considered all facts and data relevant to the question so that I could make an informed decision on how to respond. To that end, the Department of Commerce ("Department") immediately initiated a comprehensive review process led by the Census Bureau.

The Department and Census Bureau's review of the DOJ request – as with all significant Census assessments – prioritized the goal of obtaining *complete and accurate data*. The decennial census is mandated in the Constitution and its data are relied on for a myriad of important government decisions, including apportionment of Congressional seats among states, enforcement of voting rights laws, and allocation of federal funds. These are foundational elements of our democracy, and it is therefore incumbent upon the Department and the Census Bureau to make every effort to provide a complete and accurate decennial census.

At my direction, the Census Bureau and the Department's Office of the Secretary began a thorough assessment that included legal, program, and policy considerations. As part of the process, I also met with Census Bureau leadership on multiple occasions to discuss their process for reviewing the DOJ request, their data analysis, my questions about accuracy and response rates, and their recommendations. At present, the Census Bureau leadership are all career civil servants. In addition, my staff and I reviewed over 50 incoming letters from stakeholders, interest groups, Members of Congress, and state and local officials regarding reinstatement of a citizenship question on the 2020 decennial census, and I personally had specific conversations on

the citizenship question with over 24 diverse, well informed and interested parties representing a broad range of views. My staff and I have also monitored press coverage of this issue.

Congress has delegated to me the authority to determine which questions should be asked on the decennial census, and I may exercise my discretion to reinstate the citizenship question on the 2020 decennial census, especially based on DOJ's request for improved CVAP data to enforce the VRA. By law, the list of decennial census questions is to be submitted two years prior to the decennial census – in this case, no later than March 31, 2018.

The Department's review demonstrated that collection of citizenship data by the Census has been a long-standing historical practice. Prior decennial census surveys of the entire United States population consistently asked citizenship questions up until 1950, and Census Bureau surveys of sample populations continue to ask citizenship questions to this day. In 2000, the decennial census "long form" survey, which was distributed to one in six people in the U.S., included a question on citizenship. Following the 2000 decennial census, the "long form" sample was replaced by the American Community Survey ("ACS"), which has included a citizenship question since 2005. Therefore, the citizenship question has been well tested.

DOJ seeks to obtain CVAP data for census blocks, block groups, counties, towns, and other locations where potential Section 2 violations are alleged or suspected, and DOJ states that the current data collected under the ACS are insufficient in scope, detail, and certainty to meet its purpose under the VRA. The Census Bureau has advised me that the census-block-level citizenship data requested by DOJ are not available using the annual ACS, which as noted earlier does ask a citizenship question and is the present method used to provide DOJ and the courts with data used to enforce Section 2 of the VRA. The ACS is sent on an annual basis to a sample of approximately 2.6 percent of the population.

To provide the data requested by DOJ, the Census Bureau initially analyzed three alternatives: Option A was to continue the status quo and use ACS responses; Option B was placing the ACS citizenship question on the decennial census, which goes to every American household; and Option C was not placing a question on the decennial census and instead providing DOJ with a citizenship analysis for the entire population using federal administrative record data that Census has agreements with other agencies to access for statistical purposes.

Option A contemplates rejection of the DOJ request and represents the status quo baseline. Under Option A, the 2020 decennial census would not include the question on citizenship that DOJ requested and therefore would not provide DOJ with improved CVAP data. Additionally, the block-group level CVAP data currently obtained through the ACS has associated margins of error because the ACS is extrapolated based on sample surveys of the population. Providing more precise block-level data would require sophisticated statistical modeling, and if Option A is selected, the Census Bureau advised that it would need to deploy a team of experts to develop model-based methods that attempt to better facilitate DOJ's request for more specific data. But the Census Bureau did not assert and could not confirm that such data modeling is possible for census-block-level data with a sufficient degree of accuracy. Regardless, DOJ's request is based at least in part on the fact that existing ACS citizenship data-sets lack specificity and

completeness. Any future modeling from these incomplete data would only compound that problem.

Option A would provide no improved citizenship count, as the existing ACS sampling would still fail to obtain *actual*, complete number counts, especially for certain lower population areas or voting districts, and there is no guarantee that data could be improved using small-area modeling methods. Therefore, I have concluded that Option A is not a suitable option.

The Census Bureau and many stakeholders expressed concern that **Option B**, which would add a citizenship question to the decennial census, would negatively impact the response rate for non-citizens. A significantly lower response rate by non-citizens could reduce the accuracy of the decennial census and increase costs for non-response follow up ("NRFU") operations. However, neither the Census Bureau nor the concerned stakeholders could document that the response rate would in fact decline materially. In discussing the question with the national survey agency Nielsen, it stated that it had added questions from the ACS on sensitive topics such as place of birth and immigration status to certain short survey forms without any appreciable decrease in response rates. Further, the former director of the Census Bureau during the last decennial census told me that, while he wished there were data to answer the question, none existed to his knowledge. Nielsen's Senior Vice President for Data Science and the former Deputy Director and Chief Operating Officer of the Census Bureau under President George W. Bush also confirmed that, to the best of their knowledge, no empirical data existed on the impact of a citizenship question on responses.

When analyzing Option B, the Census Bureau attempted to assess the impact that reinstatement of a citizenship question on the decennial census would have on response rates by drawing comparisons to ACS responses. However, such comparative analysis was challenging, as response rates generally vary between decennial censuses and other census sample surveys. For example, ACS self-response rates were 3.1 percentage points less than self-response rates for the 2010 decennial census. The Bureau attributed this difference to the greater outreach and follow-up associated with the Constitutionally-mandated decennial census. Further, the decennial census has differed significantly in nature from the sample surveys. For example, the 2000 decennial census survey contained only eight questions. Conversely, the 2000 "long form" sample survey contained over 50 questions, and the Census Bureau estimated it took an average of over 30 minutes to complete. ACS surveys include over 45 questions on numerous topics, including the number of hours worked, income information, and housing characteristics.

The Census Bureau determined that, for 2013-2016 ACS surveys, nonresponses to the citizenship question for non-Hispanic whites ranged from 6.0 to 6.3 percent, for non-Hispanic blacks ranged from 12.0 to 12.6 percent, and for Hispanics ranged from 11.6 to 12.3 percent. However, these rates were comparable to nonresponse rates for other questions on the 2013 and 2016 ACS. Census Bureau estimates showed similar nonresponse rate ranges occurred for questions on the ACS asking the number times the respondent was married, 4.7 to 6.9 percent; educational attainment, 5.6 to 8.5 percent; monthly gas costs, 9.6 to 9.9 percent; weeks worked in the past 12 months, 6.9 to 10.6 percent; wages/salary income, 8.1 to 13.4 percent; and yearly property insurance, 23.9 to 25.6 percent.

The Census Bureau also compared the self-response rate differences between citizen and non-citizen households' response rates for the 2000 decennial census short form (which did not include a citizenship question) and the 2000 decennial census long form survey (the long form survey, distributed to only one in six households, included a citizenship question in 2000). Census found the decline in self-response rates for non-citizens to be 3.3 percent greater than for citizen households. However, Census was not able to isolate what percentage of decline was caused by the inclusion of a citizenship question rather than some other aspect of the long form survey (it contained over six times as many questions covering a range of topics). Indeed, the Census Bureau analysis showed that for the 2000 decennial census there was a significant drop in self response rates overall between the short and long form; the mail response rate was 66.4 percent for the short form and only 53.9 percent for the long form survey. So while there is widespread belief among many parties that adding a citizenship question could reduce response rates, the Census Bureau's analysis did not provide definitive, empirical support for that belief.

Option C, the use of administrative records rather than placing a citizenship question on the decennial census, was a potentially appealing solution to the DOJ request. The use of administrative records is increasingly part of the fabric and design of modern censuses, and the Census Bureau has been using administrative record data to improve the accuracy and reduce the cost of censuses since the early 20th century. A Census Bureau analysis matching administrative records with the 2010 decennial census and ACS responses over several more recent years showed that using administrative records could be more accurate than self-responses in the case of non-citizens. That Census Bureau analysis showed that between 28 and 34 percent of the citizenship self-responses for persons that administrative records show are non-citizens were inaccurate. In other words, when non-citizens respond to long form or ACS questions on citizenship, they inaccurately mark "citizen" about 30 percent of the time. However, the Census Bureau is still evolving its use of administrative records, and the Bureau does not yet have a complete administrative records data set for the entire population. Thus, using administrative records alone to provide DOJ with CVAP data would provide an incomplete picture. In the 2010 decennial census, the Census Bureau was able to match 88.6 percent of the population with what the Bureau considers credible administrative record data. While impressive, this means that more than 10 percent of the American population – some 25 million voting age people – would need to have their citizenship imputed by the Census Bureau. Given the scale of this number, it was imperative that another option be developed to provide a greater level of accuracy than either self-response alone or use of administrative records alone would presently provide.

I therefore asked the Census Bureau to develop a fourth alternative, **Option D**, which would combine Options B and C. Under Option D, the ACS citizenship question would be asked on the decennial census, and the Census Bureau would use the two years remaining until the 2020 decennial census to further enhance its administrative record data sets, protocols, and statistical models to provide more complete and accurate data. This approach would maximize the Census Bureau's ability to match the decennial census responses with administrative records. Accordingly, at my direction the Census Bureau is working to obtain as many additional Federal and state administrative records as possible to provide more comprehensive information for the population.

It is my judgment that Option D will provide DOJ with the most complete and accurate CVAP data in response to its request. Asking the citizenship question of 100 percent of the population gives each respondent the opportunity to provide an answer. This may eliminate the need for the Census Bureau to have to impute an answer for millions of people. For the approximately 90 percent of the population who are citizens, this question is no additional imposition. And for the approximately 70 percent of non-citizens who already answer this question accurately on the ACS, the question is no additional imposition since census responses by law may only be used anonymously and for statistical purposes. Finally, placing the question on the decennial census and directing the Census Bureau to determine the best means to compare the decennial census responses with administrative records will permit the Census Bureau to determine the inaccurate response rate for citizens and non-citizens alike using the entire population. This will enable the Census Bureau to establish, to the best of its ability, the accurate ratio of citizen to non-citizen responses to impute for that small percentage of cases where it is necessary to do so.

Consideration of Impacts I have carefully considered the argument that the reinstatement of the citizenship question on the decennial census would depress response rate. Because a lower response rate would lead to increased non-response follow-up costs and less accurate responses, this factor was an important consideration in the decision-making process. I find that the need for accurate citizenship data and the limited burden that the reinstatement of the citizenship question would impose outweigh fears about a potentially lower response rate.

Importantly, the Department's review found that limited empirical evidence exists about whether adding a citizenship question would decrease response rates materially. Concerns about decreased response rates generally fell into the following two categories – distrust of government and increased burden. First, stakeholders, particularly those who represented immigrant constituencies, noted that members of their respective communities generally distrusted the government and especially distrusted efforts by government agencies to obtain information about them. Stakeholders from California referenced the difficulty that government agencies faced obtaining any information from immigrants as part of the relief efforts after the California wildfires. These government agencies were not seeking to ascertain the citizenship status of these wildfire victims. Other stakeholders referenced the political climate generally and fears that Census responses could be used for law enforcement purposes. But no one provided evidence that reinstating a citizenship question on the decennial census would materially decrease response rates among those who generally distrusted government and government information collection efforts, disliked the current administration, or feared law enforcement. Rather, stakeholders merely identified residents who made the decision not to participate regardless of whether the Census includes a citizenship question. The reinstatement of a citizenship question will not decrease the response rate of residents who already decided not to respond. And no one provided evidence that there are residents who would respond accurately to a decennial census that did not contain a citizenship question but would not respond if it did (although many believed that such residents had to exist). While it is possible this belief is true, there is no information available to determine the number of people who would in fact not respond due to a citizenship question being added, and no one has identified any mechanism for making such a determination.

A second concern that stakeholders advanced is that recipients are generally less likely to respond to a survey that contained more questions than one that contained fewer. The former Deputy Director and Chief Operating Officer of the Census Bureau during the George W. Bush administration described the decennial census as particularly fragile and stated that any effort to add questions risked lowering the response rate, especially a question about citizenship in the current political environment. However, there is limited empirical evidence to support this view. A former Census Bureau Director during the Obama Administration who oversaw the last decennial census noted as much. He stated that, even though he believed that the reinstatement of a citizenship question would decrease response rate, there is limited evidence to support this conclusion. This same former director noted that, in the years preceding the decennial census, certain interest groups consistently attack the census and discourage participation. While the reinstatement of a citizenship question may be a data point on which these interest groups seize in 2019, past experience demonstrates that it is likely efforts to undermine the decennial census will occur again regardless of whether the decennial census includes a citizenship question. There is no evidence that residents who are persuaded by these disruptive efforts are more or less likely to make their respective decisions about participation based specifically on the reinstatement of a citizenship question. And there are actions that the Census Bureau and stakeholder groups are taking to mitigate the impact of these attacks on the decennial census.

Additional empirical evidence about the impact of sensitive questions on survey response rates came from the SVP of Data Science at Nielsen. When Nielsen added questions on place of birth and time of arrival in the United States (both of which were taken from the ACS) to a short survey, the response rate was not materially different than it had been before these two questions were added. Similarly, the former Deputy Director and COO of the Census during the George W. Bush Administration shared an example of a citizenship-like question that he believed would negatively impact response rates but did not. He cited to the Department of Homeland Security's 2004 request to the Census Bureau to provide aggregate data on the number of Arab Americans by zip code in certain areas of the country. The Census Bureau complied, and Census employees, including the then-Deputy Director, believed that the resulting political firestorm would depress response rates for further Census Bureau surveys in the impacted communities. But the response rate did not change materially.

Two other themes emerged from stakeholder calls that merit discussion. First, several stakeholders who opposed reinstatement of the citizenship question did not appreciate that the question had been asked in some form or another for nearly 200 years. Second, other stakeholders who opposed reinstatement did so based on the assumption that the data on citizenship that the Census Bureau collects through the ACS are accurate, thereby obviating the need to ask the question on the decennial census. But as discussed above, the Census Bureau estimates that between 28 and 34 percent of citizenship self-responses on the ACS for persons that administrative records show are non-citizens were inaccurate. Because these stakeholder concerns were based on incorrect premises, they are not sufficient to change my decision.

Finally, I have considered whether reinstating the citizenship question on the 2020 Census will lead to any significant monetary costs, programmatic or otherwise. The Census Bureau staff have advised that the costs of preparing and adding the question would be minimal due in large part to the fact that the citizenship question is already included on the ACS, and thus the citizenship question has already undergone the cognitive research and questionnaire testing required for new questions. Additionally, changes to the Internet Self-Response instrument, revising the Census Questionnaire Assistance, and redesigning of the printed questionnaire can be easily implemented for questions that are finalized prior to the submission of the list of questions to Congress.

The Census Bureau also considered whether non-response follow-up increases resulting from inclusion of the citizenship question would lead to increased costs. As noted above, this estimate was difficult to assess given the Census Bureau and Department's inability to determine what impact there will be on decennial census survey responses. The Bureau provided a rough estimate that postulated that up to 630,000 additional households may require NRFU operations if a citizenship question is added to the 2020 decennial census. However, even assuming that estimate is correct, this additional ½ percent increase in NRFU operations falls well within the margin of error that the Department, with the support of the Census Bureau, provided to Congress in the revised Lifecycle Cost Estimate ("LCE") this past fall. That LCE assumed that NRFU operations might increase by 3 percent due to numerous factors, including a greater increase in citizen mistrust of government, difficulties in accessing the Internet to respond, and other factors.

Inclusion of a citizenship question on this country's decennial census is not new – the decision to collect citizenship information from Americans through the decennial census was first made centuries ago. The decision to include a citizenship question on a national census is also not uncommon. The United Nations recommends that its member countries ask census questions identifying both an individual's country of birth and the country of citizenship. *Principals and Recommendations for Population and Housing Censuses (Revision 3)*, UNITED NATIONS 121 (2017). Additionally, for countries in which the population may include a large portion of naturalized citizens, the United Nations notes that, "it may be important to collect information on the method of acquisition of citizenship." *Id.* at 123. And it is important to note that other major democracies inquire about citizenship on their census, including Australia, Canada, France, Germany, Indonesia, Ireland, Mexico, Spain, and the United Kingdom, to name a few.

The Department of Commerce is not able to determine definitively how inclusion of a citizenship question on the decennial census will impact responsiveness. However, even if there is some impact on responses, the value of more complete and accurate data derived from surveying the entire population outweighs such concerns. Completing and returning decennial census questionnaires is required by Federal law, those responses are protected by law, and inclusion of a citizenship question on the 2020 decennial census will provide more complete information for those who respond. The citizenship data provided to DOJ will be more accurate with the question than without it, which is of greater importance than any adverse effect that may result from people violating their legal duty to respond.

To conclude, after a thorough review of the legal, program, and policy considerations, as well as numerous discussions with the Census Bureau leadership and interested stakeholders, I have determined that reinstatement of a citizenship question on the 2020 decennial census is necessary to provide complete and accurate data in response to the DOJ request. To minimize any impact on decennial census response rates, I am directing the Census Bureau to place the citizenship question last on the decennial census form.

Please make my decision known to Census Bureau personnel and Members of Congress prior to March 31, 2018. I look forward to continuing to work with the Census Bureau as we strive for a complete and accurate 2020 decennial census.

CC: Ron Jarmin, performing the nonexclusive functions and duties of the Director of the Census Bureau

Enrique Lamas, performing the nonexclusive functions and duties of the Deputy Director of the Census Bureau

UNITED STATES DEPARTMENT OF COMMERCE
The Secretary of Commerce
Washington, D.C. 20230

Supplemental Memorandum by Secretary of Commerce Wilbur Ross Regarding the Administrative Record in Census Litigation

This memorandum is intended to provide further background and context regarding my March 26, 2018, memorandum concerning the reinstatement of a citizenship question to the decennial census. Soon after my appointment as Secretary of Commerce, I began considering various fundamental issues regarding the upcoming 2020 Census, including funding and content. Part of these considerations included whether to reinstate a citizenship question, which other senior Administration officials had previously raised. My staff and I thought reinstating a citizenship question could be warranted, and we had various discussions with other governmental officials about reinstating a citizenship question to the Census. As part of that deliberative process, my staff and I consulted with Federal governmental components and 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.

Ultimately, on December 12, 2017, DOJ sent a letter formally requesting that the Census Bureau reinstate on the 2020 Census questionnaire a question regarding citizenship. My March 26, 2018, memorandum described the thorough assessment process that the Department of Commerce conducted following receipt of the DOJ letter, the evidence and arguments I considered, and the factors I weighed in making my decision to include the citizenship question on the 2020 Census.

Wilbur Ross
June 21, 2018

U.S. Department of Justice

Justice Management Division

Office of General Counsel

Washington, D.C. 20530

DEC 12 2017

VIA CERTIFIED RETURN RECEIPT
7014 2120 0000 8064 4964

Dr. Ron Jarmin
Performing the Non-Exclusive Functions and Duties of the Director
U.S. Census Bureau
United States Department of Commerce
Washington, D.C. 20233-0001

Re: Request To Reinstate Citizenship Question On 2020 Census Questionnaire

Dear Dr. Jarmin:

The Department of Justice is committed to robust and evenhanded enforcement of the Nation's civil rights laws and to free and fair elections for all Americans. In furtherance of that commitment, I write on behalf of the Department to formally request that the Census Bureau reinstate on the 2020 Census questionnaire a question regarding citizenship, formerly included in the so-called "long form" census. This data is critical to the Department's enforcement of Section 2 of the Voting Rights Act and its important protections against racial discrimination in voting. To fully enforce those requirements, the Department needs a reliable calculation of the citizen voting-age population in localities where voting rights violations are alleged or suspected. As demonstrated below, the decennial census questionnaire is the most appropriate vehicle for collecting that data, and reinstating a question on citizenship will best enable the Department to protect all American citizens' voting rights under Section 2.

The Supreme Court has held that Section 2 of the Voting Rights Act prohibits "vote dilution" by state and local jurisdictions engaged in redistricting, which can occur when a racial group is improperly deprived of a single-member district in which it could form a majority. See *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). Multiple federal courts of appeals have held that, where citizenship rates are at issue in a vote-dilution case, citizen voting-age population is the proper metric for determining whether a racial group could constitute a majority in a single-member district. See, e.g., *Reyes v. City of Farmers Branch*, 586 F.3d 1019, 1023–24 (5th Cir. 2009); *Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998); *Negrn v. City of Miami Beach*, 113 F.3d 1563, 1567-69 (11th Cir. 1997); *Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989), *overruled in part on other grounds by Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1141 (9th Cir. 1990); see also *LULAC v. Perry*, 548 U.S. 399, 423–442 (2006) (analyzing vote-dilution claim by reference to citizen voting-age population).

The purpose of Section 2's vote-dilution prohibition "is to facilitate participation ... in our political process" by preventing unlawful dilution of the vote on the basis of race. *Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997). Importantly, "[t]he plain language of section 2 of the Voting Rights Act makes clear that its protections apply to United States citizens." *Id.* Indeed, courts have reasoned that "[t]he right to vote is one of the badges of citizenship" and that "[t]he dignity and very concept of citizenship are diluted if noncitizens are allowed to vote." *Barnett*, 141 F.3d at 704. Thus, it would be the wrong result for a legislature or a court to draw a single-member district in which a numerical racial minority group in a jurisdiction was a majority of the total voting-age population in that district but "continued to be defeated at the polls" because it was not a majority of the citizen voting-age population. *Campos*, 113 F.3d at 548.

These cases make clear that, in order to assess and enforce compliance with Section 2's protection against discrimination in voting, the Department needs to be able to obtain citizen voting-age population data for census blocks, block groups, counties, towns, and other locations where potential Section 2 violations are alleged or suspected. From 1970 to 2000, the Census Bureau included a citizenship question on the so-called "long form" questionnaire that it sent to approximately one in every six households during each decennial census. See, e.g., U.S. Census Bureau, *Summary File 3: 2000 Census of Population & Housing*—Appendix B at B-7 (July 2007), *available at* https://www.census.gov/prod/cen2000/doc/sf3.pdf (last visited Nov. 22, 2017); U.S. Census Bureau, Index of Questions, *available at* https://www.census.gov/history/www/through_the_decades/index_of_questions/ (last visited Nov. 22, 2017). For years, the Department used the data collected in response to that question in assessing compliance with Section 2 and in litigation to enforce Section 2's protections against racial discrimination in voting.

In the 2010 Census, however, no census questionnaire included a question regarding citizenship. Rather, following the 2000 Census, the Census Bureau discontinued the "long form" questionnaire and replaced it with the American Community Survey (ACS). The ACS is a sampling survey that is sent to only around one in every thirty-eight households each year and asks a variety of questions regarding demographic information, including citizenship. See U.S. Census Bureau, *American Community Survey Information Guide at* 6, *available at* https://www.census.gov/content/dam/Census/programs-surveys/acs/about/ACS Information Guide.pdf (last visited Nov. 22, 2017). The ACS is currently the Census Bureau's only survey that collects information regarding citizenship and estimates citizen voting-age population.

The 2010 redistricting cycle was the first cycle in which the ACS estimates provided the Census Bureau's only citizen voting-age population data. The Department and state and local jurisdictions therefore have used those ACS estimates for this redistricting cycle. The ACS, however, does not yield the ideal data for such purposes for several reasons:

- Jurisdictions conducting redistricting, and the Department in enforcing Section 2, already use the total population data from the census to determine compliance with the Constitution's one-person, one-vote requirement, see *Evenwel v. Abbott*, 136 S. Ct. 1120 (Apr. 4, 2016). As a result, using the ACS citizenship estimates means relying on two different data sets, the scope and level of detail of which vary quite significantly.

- Because the ACS estimates are rolling and aggregated into one-year, three-year, and five-year estimates, they do not align in time with the decennial census data. Citizenship data from the decennial census, by contrast, would align in time with the total and voting-age population data from the census that jurisdictions already use in redistricting.

- The ACS estimates are reported at a ninety percent confidence level, and the margin of error increases as the sample size—and, thus, the geographic area—decreases. See U.S. Census Bureau, *Glossary: Confidence interval (American Community Survey), available at* https://www.census.gov/glossary/#term_ConfidenceintervalAmericanCommunity Survey (last visited November 22, 2017). By contrast, decennial census data is a full count of the population.

- Census data is reported to the census block level, while the smallest unit reported in the ACS estimates is the census block group. See *American Community Survey Data* 3, 5, 10. Accordingly, redistricting jurisdictions and the Department are required to perform further estimates and to interject further uncertainty in order to approximate citizen voting-age population at the level of a census block, which is the fundamental building block of a redistricting plan. Having all of the relevant population and citizenship data available in one data set at the census block level would greatly assist the redistricting process.

For all of these reasons, the Department believes that decennial census questionnaire data regarding citizenship, if available, would be more appropriate for use in redistricting and in Section 2 litigation than the ACS citizenship estimates.

Accordingly, the Department formally requests that the Census Bureau reinstate into the 2020 Census a question regarding citizenship. We also request that the Census Bureau release this new data regarding citizenship at the same time as it releases the other redistricting data, by April 1 following the 2020 Census. At the same time, the Department requests that the Bureau also maintain the citizenship question on the ACS, since such question is necessary, *inter alia*, to yield information for the periodic determinations made by the Bureau under Section 203 of the Voting Rights Act, 52 U.S.C. § 10503.

Please let me know if you have any questions about this letter or wish to discuss this request. I can be reached at (202) 514-3452, or at Arthur.Gary@usdoj.gov.

Sincerely yours,

Arthur E. Gary

Arthur E. Gary
General Counsel
Justice Management Division

From: Comstock, Earl (Federal) [redacted]
Sent: 5/2/2017 2:19:11 PM
To: Wilbur Ross [redacted]
CC: Herbst, Ellen (Federal) [redacted]
Subject: Re: Census

I agree Mr Secretary.

On the citizenship question we will get that in place. The broad topics were what were sent to Congress earlier this year as required. It is next March -- in 2018 -- when the final 2020 decennial Census questions are submitted to Congress. We need to work with Justice to get them to request that citizenship be added back as a census question, and we have the court cases to illustrate that DoJ has a legitimate need for the question to be included. I will arrange a meeting with DoJ staff this week to discuss.

Earl

Sent from my iPhone

> On May 2, 2017, at 10:04 AM, Wilbur Ross <wlr@doc.gov> wrote:
>
[redacted]
Worst of all they emphasize that they have settled with congress on the questions to be asked. I am mystified why nothing have been done in response to my months old request that we include the citizenship question. Why not? [redacted]
> Sent from my iPhone

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al.,

Plaintiff,

-v-

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Defendants.

18-CV-2921 (JMF)

NEW YORK IMMIGRATION COALITION, et al.,

Plaintiff,

-v-

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Defendants.

18-CV-5025 (JMF)

OPINION AND ORDER

JESSE M. FURMAN, United States District Judge:

In these cases, familiarity with which is assumed, Plaintiffs bring claims under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*, and the Due Process Clause of the Fifth Amendment challenging the decision of Secretary of Commerce Wilbur L. Ross, Jr. to reinstate a question concerning citizenship status on the 2020 census questionnaire. *See generally New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766 (S.D.N.Y. 2018). In an oral decision on July 3, 2018, the Court granted Plaintiffs' application for discovery beyond the administrative record, finding — among other things — that Plaintiffs had "made a strong preliminary or *prima facie* showing that they will find material beyond the Administrative

Record indicative of bad faith." (Docket No. 205 ("July 3 Oral Arg. Tr."), at 85).[1] In the two succeeding months, the parties have conducted substantial discovery (*see* Docket No. 305, at 1-2 (summarizing the discovery to date)), and have briefed (or are in the midst of briefing) a slew of discovery disputes, (*see, e.g.*, Docket Nos. 236, 237, 293, 299). One of those disputes concerned Plaintiffs' request to depose Acting Assistant Attorney General for Civil Rights John Gore ("AAG Gore"), who allegedly "ghostwrote" a letter from the Department of Justice ("DOJ") to Secretary Ross requesting the citizenship question that lies at the heart of the parties' disputes. (Docket No. 236, at 1; *see also* Docket No. 255). In an Order entered on August 17, 2018, the Court granted Plaintiffs' request. (Docket No. 261 ("AAG Gore Order")). The deposition of Gore is apparently scheduled for September 12, 2018. (Docket No. 304 ("Pls.' Opp'n"), at 3).

On the eve of Labor Day weekend — Friday, August 31, 2018, at approximately 6 p.m. — Defendants filed a letter motion to stay discovery pending resolution of a "forthcoming petition for a writ of mandamus in the U.S. Court of Appeals for the Second Circuit." (Docket No. 292 ("Defs.' Ltr."), at 1). Defendants seek a stay of *all* discovery, or, at a minimum, "further discovery of the Department of Justice . . . particularly the deposition of Acting Assistant Attorney General . . . John Gore." (*Id.*). In their motion, Defendants also sought an "administrative stay while the Court considers this stay request." (*Id.*). On September 4, 2018, the Court summarily denied the latter request and set an expedited briefing schedule (later modified), with Plaintiffs' opposition due on September 6, 2018, and any reply due today at noon. (Docket Nos. 297, 306). Thereafter, on September 5, 2018, Defendants filed a Petition for a Writ of Mandamus and an Emergency Motion for Immediate Administrative Stay Pending Resolution of the Government's Petition for Writ of Mandamus with the Second Circuit. To the

[1] Unless otherwise noted, docket references are to 18-CV-2921.

Court's knowledge, the Second Circuit has not yet acted on that application.

In determining whether to grant a stay pending mandamus, district courts must consider the following four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *U.S. S.E.C. v. Citigroup Glob. Mkts. Inc.*, 673 F.3d 158, 162 (2d Cir. 2012) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The "'most critical' factors" are whether "the stay movant has demonstrated (1) a strong showing of the likelihood of success and (2) that it will suffer irreparable harm." *In re Revel AC, Inc.*, 802 F.3d 558, 568 (3d Cir. 2015) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)); *cf. Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) ("A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." (internal quotation marks omitted)). Critically, to satisfy the likelihood-of-success requirement here, Defendants must not only demonstrate that this Court erred in its decisions, but also that the Second Circuit is likely to grant mandamus. *See, e.g.*, *Emp'rs Ins. of Wausau v. News Corp.*, No. 06-CV-1602 (SAS), 2008 WL 4560687, at *1 (S.D.N.Y. Oct. 6, 2008) (denying motion to stay pending mandamus where "plaintiffs have made no showing that their mandamus petition has a likely chance of success"). That is a very high burden. Indeed, to succeed in their mandamus petition, Defendants must overcome the "expressed reluctance" of the Second Circuit "to overturn discovery rulings" by demonstrating that the issue here "is of extraordinary significance or there is extreme need for reversal of the district court's mandate before the case goes to judgment." *In re the City of New York*, 607 F.3d 923, 939 (2d Cir. 2010). If Defendants meet *those* requirements, they must *also* show that their "right to issuance of the writ is clear and

indisputable," *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381 (2004) (internal quotation marks omitted); *see also In re the City of New York*, 607 F.3d at 943 ("Because a writ of mandamus is a 'drastic and extraordinary remedy reserved for really extraordinary causes,' we issue the writ only in 'exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion.'" (quoting *Cheney*, 542 U.S. at 380)).

The Court turns, first, to Defendants' request for a stay of discovery altogether and, then, to their request for a stay of the AAG Gore deposition scheduled for September 12th.

STAY OF DISCOVERY ALTOGETHER

In light of the standards above, Defendants' motion to stay discovery altogether is frivolous. First, a court "must consider a plaintiff's delay in seeking relief when analyzing whether the plaintiff will suffer irreparable harm in the absence of relief." *Ingber v. N.Y.C. Dep't of Educ.*, No. 14-CV-3942 (JMF), 2014 WL 2575780, at *2 (S.D.N.Y. June 9, 2014) (citing *Tom Doherty Assocs. v. Saban Entm't, Inc.*, 60 F.3d 27, 39 (2d Cir. 1995)). That is because "inexcusable delay in filing" a motion to stay "severely undermines the . . . argument that absent a stay irreparable harm would result." *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir. 1993); *see, e.g., S.E.C. v. WorldCom, Inc.*, 452 F. Supp. 2d 531, 531-32 (S.D.N.Y. 2006) (denying a stay on the ground that the defendant's delay in requesting it was "dilatory in the extreme but also patently prejudicial"); *cf., e.g., Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) (holding that "significant delay in applying for injunctive relief . . . alone may justify denial" of preliminary relief). Here, the Court authorized extra-record discovery on July 3, 2018, and set a tight discovery schedule in light of the parties' agreement that Plaintiffs' claims in these cases should be resolved quickly to allow Defendants to prepare for the 2020 census. (July 3 Oral Arg. Tr. 87-89, 91). Nevertheless, Defendants waited *nearly two full*

months to seek a stay of the Court's ruling (and even then filed their motion at 6 p.m. on the eve of a three-day weekend) — during which time the parties conducted substantial discovery. That delay, in itself, belies Defendants' conclusory assertions of irreparable harm.

That is enough to defeat Defendants' claim of irreparable harm, but their claim — that, "[w]ithout a stay, Defendants will be required to expend significant time and resources to collect, review, and produce additional discovery materials," (Defs.' Ltr. 3) — does not withstand scrutiny for two independent reasons. First, "[t]he prospect of burdensome or expensive discovery alone is not sufficient to demonstrate 'irreparable injury.'" *M.D. v. Perry*, No. C-11-84 (JGJ), 2011 WL 7047039, at *2 (S.D. Tex. July 21, 2011); *see, e.g.*, *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); *see also, e.g.*, *Linden v. X2 Biosystems, Inc.*, No. C17-966 (RSM), 2018 WL 1603387, at *3 (W.D. Wash. Apr. 3, 2018); *In re Cobalt Int'l Energy, Inc. Sec. Litig.*, No. H-14-3428, 2017 WL 3620590, at *4 (S.D. Tex. Aug. 23, 2017); *In re: BP P.L.C. Sec. Litig.*, No. 4:10-CV-4214, 2016 WL 164109, at *2 (S.D. Tex. Jan. 14, 2016); *DL v. District of Columbia*, 6 F. Supp. 3d 133, 135 (D.D.C. 2014). Second, and in any event, Secretary Ross's decision to add the citizenship question is the subject of parallel litigation in the Northern District of California and the District of Maryland. (*See* Docket Nos. 221, 224, 287). The judges presiding over those cases have also — and independently — allowed extra-record discovery, and to date Defendants have not sought a stay of either of those rulings. Thus, granting a stay here would not even provide Defendants with the relief they seek. *Cf., e.g.*, *V.S. v. Muhammad*, No. 07-CV-1281 (DLI) (JO), 2009 WL 936711, at *1 (E.D.N.Y. Apr. 3, 2009) (finding a claim of irreparable harm suspect because the party claiming harm "will be subject to discovery, including giving deposition testimony and providing documents"

regardless of the relief sought).

The Court could deny Defendants' motion for a stay of discovery altogether on that basis alone, but the other factors to be considered compel the same conclusion. First, Defendants do not come close to demonstrating a likelihood of success on the merits. They contend that the Court failed to apply the correct legal standard and erred in inferring bad faith "primarily from" the timing of Secretary Ross's decision relative to the DOJ letter (*see* Defs.' Ltr. 2), but Defendants are wrong on both counts. First, in its July 3rd oral decision, the Court indisputably articulated and applied the correct legal standard, to wit that "a court may allow discovery beyond the record where 'there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decision-makers.'" (July 3 Oral Arg. Tr. 82 (quoting *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997))). In fact, it is Defendants who get the legal standard wrong, insisting that the Court could not authorize extra-record discovery without "a strong demonstration that Secretary Ross did not actually believe his stated rationale for reinstating a citizenship question." (Defs.' Ltr. 2). Notably, however, the only authority Defendants cite for that proposition is *National Security Archive v. CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014) — a non-binding decision regarding the Freedom of Information Act and the deliberative-process privilege that has literally nothing to do with the issue here.[2]

Second and in any event, Defendants badly mischaracterize the basis for the Court's finding of potential bad faith. The Court did not rely "primarily" on the relationship in time between Secretary Ross's decision and the DOJ letter. Instead, the Court relied on several considerations that, taken together, provided a "strong showing . . . of bad faith." (July 3 Oral

[2] Defendants implicitly concede the inaptness of the D.C. Circuit's decision by citing it using the "*cf.*" signal, but even that understates the case's irrelevance to the matter at hand.

Arg. Tr. 82 (quoting *Nat'l Audubon Soc'y*, 132 F.3d at 14)). Those considerations included: (1) Secretary Ross's June 21, 2018 supplemental memorandum (Docket No. 189-1), in which he suggested that he had "already decided to add the citizenship question before he reached out to the Justice Department"; (2) allegations that Secretary Ross "overruled senior Census Bureau career staff, who had concluded . . . that reinstating the citizenship question would be very costly and harm the quality of the census count"; (3) claims that the Census Bureau "deviated significantly from standard operating procedures in adding the citizenship question"; and (4) Plaintiffs' *prima facie* showing that Secretary Ross's stated justification was pre-textual. (July 3 Oral Arg. Tr. 82-83 (internal quotation marks and brackets omitted)). Taken together, those considerations provided the Court with a solid basis to conclude that Plaintiffs had made a sufficient showing of bad faith to warrant extra-record discovery. *See, e.g.*, *Tummino v. von Eschenbach*, 427 F. Supp. 2d 212, 231, 233 (E.D.N.Y. 2006) (authorizing extra-record discovery where there was evidence that the agency decisionmakers had made a decision and, only then, took steps "to find acceptable rationales for the decision"; where "senior level personnel . . . overruled the professional staff"; and where the decisionmaking process was "unusual" in various respects). If anything, the basis for that conclusion appears even stronger today. (*See* Pls.' Opp'n 2 n.1).

Finally, given the importance of the census and the need for a timely resolution of Plaintiffs' claims, staying discovery altogether will substantially injure both Plaintiffs and the public interest. As noted, Defendants themselves agree that there is a strong interest in resolving Plaintiffs' claims quickly given the need to prepare for the 2020 census. (*See* Docket No. 103, at 4-5 (noting that "the Census Bureau has indicated in its public planning documents that it intends to start printing the physical 2020 Census questionnaire by May 2019" and that Ron Jarmin,

Acting Director of the Census Bureau and a Defendant here, "testified under oath before Congress . . . that the Census Bureau would like to 'have everything settled for the questionnaire this fall'" and "wants to resolve this issue 'very quickly'")). Staying discovery altogether would plainly make it difficult, if not impossible, to meet that goal. More broadly, there is a strong interest in ensuring that the census proceeds in an orderly, transparent, and fair manner — and, relatedly, that it is conducted in a manner that "bolsters public confidence in the integrity of the process and helps strengthen this mainstay of our democracy." *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992) (Stevens, J., concurring in part and concurring in the judgment); *see id.* ("The open nature of the census enterprise and the public dissemination of the information collected are closely connected with our commitment to a democratic form of government."). Those interests weigh heavily against any delay and in favor of discovery to ensure an adequate record for the Court to review Defendants' decision to add the citizenship question.

STAY OF THE AAG GORE ORDER

Although Defendants' motion for a stay of the AAG Gore Order arguably presents a closer question, it too falls short. First, for the reasons discussed above, Plaintiffs and the public have a strong interest in ensuring that this case proceeds without unnecessary delay and that there is an adequate record for the Court to evaluate the lawfulness of Defendants' decision to add the citizenship question to the census questionnaire. Second, once again, Defendants inexplicably delayed in seeking relief. The Court entered the Order compelling the deposition of AAG Gore on August 17, 2018, yet Defendants waited two full weeks, until August 31, 2018, to file their motion for a stay. Even then, they filed their motion at 6 p.m. on the eve of a three-day weekend, with only six business days — two of which are religious holidays during which the Court is unavailable — before the AAG Gore deposition. To the extent that Defendants claim

allowing the deposition to proceed would result in irreparable harm, therefore, "the irreparability is a product of [their] own delay. This is a delaying tactic that is inequitable to the [Plaintiffs] and to the courts as well." *Hirschfeld*, 984 F.2d at 39 (internal quotation marks omitted). On top of all that, Defendants' claim that a deposition of AAG Gore would be uniquely and irreparably burdensome is belied by the fact that, as Defendants themselves point out, "Plaintiffs have [already] deposed six high-ranking Commerce and Census Bureau officials." (Defs.' Ltr. 3). More broadly, the burdens of discovery, including depositions of government officials, are not inherently irreparable — particularly where, as here, the Court has taken various steps to limit the scope of discovery and to protect any relevant privileges. *See, e.g.*, *Citizens for Responsibility & Ethics in Washington v. Cheney*, 580 F. Supp. 2d 168, 180-81 (D.D.C. 2008).

Finally, and in any event, Defendants fail to show a likelihood of success on the merits of their mandamus petition. Quoting *Lederman v. New York City Department of Parks and Recreation*, 731 F.3d 199 (2d Cir. 2013), for the proposition that "judicial orders compelling testimony of high-ranking officials are highly disfavored and are justified only under 'exceptional circumstances,'" Defendants contend that the Court erred in concluding that there was a need to compel AAG Gore's testimony. (Defs.' Ltr. 3). Significantly, however, in opposing Plaintiffs' motion to compel AAG Gore's testimony, Defendants did not make that argument, let alone cite *Lederman*; instead, they relied exclusively on the standard set forth in Rule 45 of the Federal Rules of Civil Procedure. (*See* Docket No. 255). That may well constitute a formal waiver, but it *certainly* weighs against the likelihood of mandamus. *See, e.g.*, *In re Catawba Indian Tribe of S.C.*, 973 F.2d 1133, 1135 (4th Cir. 1992) ("[F]ailure to raise [an] issue . . . in the face of the [petitioner's] admitted knowledge of the importance of the question to its case, can only weigh against its present petition for the extraordinary writ of mandamus.").

And in any event, the Court's decision was consistent with, if not compelled by, *Lederman*. Notably, the *Lederman* Court provided two *alternative* examples of showings that would satisfy that standard: "that the official has unique first-hand knowledge related to the litigated claims *or* that the necessary information cannot be obtained through other, less burdensome or intrusive means." *Id.* (emphasis added). Consistent with those examples, the Court found that a deposition of AAG was appropriate. "Given the combination of AAG Gore's apparent role in drafting the Department of Justice's December 12, 2017 letter requesting that a citizenship question be added to the decennial census and the Court's prior rulings," the Court explained, "his testimony is plainly 'relevant,' within the broad definition of that term for purposes of discovery." (Gore Order 1). And "given Plaintiffs' claim that AAG Gore 'ghostwrote DOJ's December 12, 2017 letter requesting addition of the citizenship question,'" — a claim that Defendants have conspicuously not disputed — he "possesses relevant information that cannot be obtained from another source." (*Id.* at 1 (citing *Marisol A. v. Giuliani*, No. 95-CV-10533 (RJW), 1998 WL 132810, at *2 (S.D.N.Y. Mar. 23, 1998)).

In challenging the Court's decision, Defendants suggest that the Court was required to consider whether there were "less burdensome means" to obtain the information in AAG Gore's possession. (Defs.' Ltr. 3). As *Lederman* makes clear, however, where a court finds that the relevant government official "has unique first-hand knowledge related to the litigated claims," it need not make a separate finding "that the necessary information cannot be obtained through other, less burdensome or intrusive means." 731 F.3d at 202. In any event, the Court did make the latter finding here, as it expressly concluded that "AAG Gore possesses relevant information *that cannot be obtained from another source*." (Gore Order 2 (emphasis added)). More broadly, although Defendants are correct that "[t]he decision Plaintiffs challenge" in these cases "was

made by the Secretary of Commerce, not the Department of Justice," it does not follow — as Defendants contend — that the information possessed by AAG Gore is "irrelevant to assessing the Commerce Secretary's reasons for adopting a citizenship question." (Defs.' Ltr. 3). Among other things, AAG Gore's testimony is plainly relevant to whether Secretary Ross "made a decision and, only thereafter took steps 'to find acceptable rationales for the decision.'" (July 3 Oral Arg. Tr. 82 (quoting *Tummino*, 427 F. Supp. 2d at 233)). It is also relevant to whether Secretary Ross's stated rationale — that reinstating the citizenship question was necessary to enforce the Voting Rights Act — was pre-textual. After all, Defendants themselves concede that "any requests for citizenship data with a Voting Rights Act enforcement rationale would naturally come from the head of the Civil Rights Division," (Docket No. 236, Ex. 5, at 50), and Secretary Ross has disclosed that it was he who "inquired whether the Department of Justice . . . would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act," (Docket No. 189). Put simply, a deposition of the person who apparently wrote the memorandum that Secretary Ross himself requested and then later relied on to justify his decision to add the citizenship question is highly relevant "to assessing the Commerce Secretary's reasons." (Defs.' Ltr. 3).

CONCLUSION

For the foregoing reasons, Defendants' motion for a stay of discovery is DENIED in its entirety. The Clerk of Court is directed to terminate 18-CV-2921, Docket No. 292 and 18-CV-5025, Docket No. 116.

SO ORDERED.

Dated: September 7, 2018
New York, New York

JESSE M. FURMAN
United States District Judge